

**NON-FLOOD PROTECTION ASSET MANAGEMENT AUTHORITY
LEGAL COMMITTEE MEETING MINUTES
DECEMBER 6, 2012 – 3:30 P.M.**

The Legal Committee meeting of the Non-Flood Protection Asset Management Authority was held on Thursday, December 6, 2012 at 3:30 p.m., in the Lake Vista Community Center, 2nd Floor, 6500 Spanish Fort Blvd., New Orleans, Louisiana after due legal notice of the meeting was sent to each Board member, the news media, and a copy of the call was posted.

Commissioner Ernst called the meeting to order at 3:47 p.m. and led in the Pledge of Allegiance. The roll was called and a quorum was present.

PRESENT

Chairman Greg Ernst
Commissioner Wilma Heaton
Commissioner Michael Stack
Commissioner Joe Hassinger

ABSENT

Commissioner Nyka Scott

STAFF

Louis Capo - Executive Director
Sharon Martiny - Non-Flood
Chuck Dixon – Marina Manager

ALSO PRESENT

Albert Pappalardo – Real Estate Consultant
Gerard Metzger – Legal Counsel
Ray Landeche - Lakeshore

APPROVAL OF AGENDA

Commissioner Hassinger offered a motion to adopt the agenda, seconded by Commissioner Heaton and unanimously adopted.

APPROVAL OF PRIOR MINUTES

Commissioner Hassinger offered a motion to approve the minutes of the Legal Committee meeting of June 7, 2012, seconded by Commissioner Stack and unanimously adopted.

OLD BUSINESS

1) Discussion of request by Mr. Ted Alcus regarding Boathouse W-17

Mr. Ted Alcus, resident of Boathouse W-17, stated that he has been a boathouse tenant for 50 years and requested a reduction in rent. Mr. Alcus pays \$11,700 per year and requested to reduce that by 50% as Mr. Alcus cannot afford that amount and his children are not interested in the boathouse. The boathouse and the boat could be packaged together and put up for sale when the boat engine is repaired if there was a market for recreational residences. A real estate agent has been looking at the boathouse for the past year and informed that there is no market for the boathouse at any price. At 50% the Authority would receive approximately \$5,600 or zero because I will vacate the boathouse. Mr. Alcus informed the Committee that his boathouse has been maintained and can be lived in today. The consideration for the boat and boathouse is \$100,000 but has not yet been packaged together. The boathouse currently has over \$300,000 invested in it. There has not been a price for the boathouse as the 2004 5-year appraisal has a price of \$228,000. Mr. Alcus informed the Committee that he also resides in a house at 165 Harding Drive.

Commissioner Heaton stated her empathy for Mr. Alcus and noted that the Board could not reduce the rent for Mr. Alcus and not the other boathouse tenants. Mr.

Alcus suggested that all tenants that had been in their boathouse for 50 years or more could get a reduction and the constitutional issues would have been addressed. I do not see a way that the Board can set this precedent.

Gerard Metzger, Legal Counsel, noted that there is an AG Opinion from 2000 when the rental rate was established by Mr. Pappalardo which was litigated for 12 years to get in place. The Authority has to receive consideration for the lease of every property commensurate with the value of the leased property consisting of the water bottoms and the improvements. That was when the extension came into place. The formula concocted by Mr. Pappalardo brought in the value of the improvements. Also, under Title 38 the Authority has to be fair and equitable. The Authority would end up with lawsuits being filed by tenants over disparate treatment on the grounds that they are also not in the financial position to pay rent which are not grounds to grant this reduction in rent.

Chairman Ernst requested that Mr. Pappalardo address Mr. Alcus' statement regarding no market for the boathouse property. Mr. Pappalardo informed that since Katrina the market for recreational property has been lagging. The Authority had three transfers this year of properties within the Marina so there is a market for recreational residences. One boathouse transfer went for \$100,000 and it was basically a shed. The Joan Rogers transfer was \$300,000 and Ruston Johnson went for approximately \$80,000 on the sale of the improvements. There was also the unique situation of N-28 which is owned by the Authority. The consideration was much less, but it was purchased by Sam Marks.

Mr. Pappalardo stated that the market has been impacted by Katrina and the 2008-2009 recession. Money is not being spent on recreational properties as it was at one time, but that is the risk of owning real estate. The rents go up and down along with the values. If you unload the property when the value is up you make a profit. If you unload the property when values are down no profit is made.

Mr. Metzger informed Mr. Alcus has a 30 year lease, five years with options to renew. Commissioner Ernst confirmed that the only question before the Legal Committee is whether the Board has the legal authority to reduce the rent so it is my recommendation the Committee only vote on that issue. Commissioner Hassinger noted that no motion is needed as the Board has the Attorney General's Opinion, which is a balanced reliable legal basis. Chairman Ernst stated that the Committee does not have to act on this issue. The Authority can defer to the judgment of the Attorney General's Opinion and recommendation of counsel that there is a legal impediment for such action.

Mr. Alcus requested that the property be re-appraised based on the economy. Mr. Metzger noted that this is more of a practical issue. The Authority would have to re-appraise every boathouse in the Orleans Marina. Further, in the *Hugel* litigation the attorney looked at every boathouse file to see how each tenant was treated looking for exceptions to the general rental terms the Authority has established to find a basis on which to argue there was an equal protection violation.

Mr. Capo informed that Mr. Alcus' lease has an option period of July 1, 2013 and Mr. Alcus could walk away and elect not to renew at that option period. If the lease is renewed at that point there would be a CPI adjustment and rent will go up. Mr. Metzger advised that the Option must be exercised within 90 days of the new lease term. If Mr. Alcus does not want to renew, the option is not exercised.

Mr. Alcus then requested a waiver of the \$17,000 transfer fee if the boathouse was transferred. Mr. Metzger advised this would create a difficult issue as the 8% transfer fee is based on the value of the sale. That is uniform in every lease in the Marina including Boathouse N-28 which was recently amended. Also, Mrs.

Rogers transferred her boathouse for \$300,000 and the Authority received \$24,000 as the transfer fee.

Mr. Pappalardo explained the transfer fee was put in place because when you are looking at a 30 year period, the CPI adjustments seldom keep track with the market. The market goes up and down, but over time CPI only tracks the value of the dollar. If rents are increased by CPI only, the Authority is only keeping pace with the value of the dollar. The transfer fee is a way for the Authority to catch back. When the new lease term was formulated the Authority placed the transfer fee in as an additional basis to keep pace with the value of the boathouse. The transfer fee is tied to the value of the boathouse of if the boathouse goes down to \$100,000 the transfer fee is only \$8,000.

Mr. Pappalardo stated that the boathouse would revert back to the Authority if Mr. Alcus did not exercise the option to renew. The lease would terminate and the improvements revert back to the Authority. At that point, the Authority could either lease the improvements or sell the improvements. The transfer fee is due from the transaction and does not have to come from the seller it can come from the purchaser.

2) Discussion and recommendation regarding ad valorem tax issue concerning Boathouse N-28

Mr. Metzger informed that several letters were written to Tax Assessor Errol Williams regarding the issue of whether ad valorem taxes were properly assessed on boathouse N-28 which the Authority owns. Correspondence received from Mr. Williams on November 28, 2012 stated the following,

“It is clear that we do not agree on the issue of the taxability of public improvements on public land not used for public purposes. An appeal to the Louisiana Tax Commission is of course for your prerogative, however, since this is a legal question I suggest that you take your appeal directly to the District Court where these types of matters would be finally decided. In the interest of judicial economy, I also suggest that you consider including all other properties owned by the Orleans Levee District and leased to private individuals for businesses.”

Mr. Metzger advised the Tax Assessor may begin taxing the Lake Vista Community Center and the Hangars at the Airport along with all other properties the Authority owns. The Authority can go to court, but does the Authority want a lawsuit filed.

Mr. Metzger informed that ordinarily when a tax bill is issued it has to be paid timely, under protest, and then the Authority would go to the Tax Commission then the District Court. Since this is not an argument over the amount of the assessment, but an argument over whether the tax is legal to begin with, the Authority can go straight to District Court and file a Petition for Declaratory Judgment. Going to the Tax Commission is not necessary. The Assessor is inviting the Authority to go directly to District Court. The Assessor is stating that the Authority is not leasing the property for a public purpose. Mr. Metzger advised that if this issue is not addressed, the Authority could be fighting for boathouse N-28 as the Assessor could go to a tax sale.

Chairman Ernst confirmed that Mr. Metzger is recommending the Committee approve the Declaratory Judgment action in CDC and go straight to a Summary Judgment. Mr. Metzger stated that Orleans was the only venue to file the Petition because the Authority is suing the Sheriff to cancel the assessment and the assessor because he cannot make the assessment. The Authority is also domiciled in the Parish of Orleans. Jurisprudence stated if you are not dealing with an issue over the amount of the assessment, but over the tax itself, it is a legal issue and can be brought to the District Court. The lawsuit may be litigated in Baton Rouge, but the venue would be Orleans.

Mr. Metzger informed the Committee that this issue has never arisen as taxes have never been assessed on Levee District property. Chairman Ernst requested Mr. Metzger research the issue before an action is filed and report back to the Committee.

Mr. Metzger advised that the Assessor is stating the Authority is leasing the property to a private individual and that consequently this is not for a public purpose. That would apply to every lease the Authority has whether it is a ground lease or not. Mr. Pappalardo advised there is no difference between Lake Vista Community Center and Boathouse N-28. If the Assessor wins on the boathouse issue, taxes could then be assessed on Lake Vista Community Center because the Authority is leasing the space to private individuals.

Commissioner Stack suggested requesting an Attorney General Opinion on this matter because the Authority may have no choice but to file a lawsuit. Mr. Metzger informed that the Tax Assessor does not have to abide by an Attorney General Opinion. Mr. Pappalardo pointed out that this issue is a legal issue and the Assessor has to have something from the court stating that the Authority can lease the boathouse because it owns the property.

Chairman Ernst suggested Mr. Metzger attempt to meet with the Assessor and have basic research to show the Assessor why the Authority is correct and let the Legal Committee know the outcome at the next Legal Committee meeting.

ANNOUNCE NEXT MEETING

Chairman Ernst informed that the next Legal Committee meeting is scheduled for Thursday, January 10, 2013 at 3:30 p.m.

ADJOURN

Commissioner Hassinger offered a motion to adjourn, seconded by Commissioner Heaton and unanimously adopted.

The meeting adjourned at 4:20 p.m.