

MINUTES OF
SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY-EAST
LEGAL COMMITTEE MEETING
HELD ON FEBRUARY 14, 2008

PRESENT: Abril Sutherland, Chairman
Timothy Doody, President
Stradford Goins, Committee Member
George Losonsky, Committee Member
Thomas L. Jackson, Committee Member

The Legal Committee met on February 14, 2008, in the Second Floor Hall of the Lake Vista Community Center, 6500 Spanish Fort Blvd., New Orleans, LA. Chairwoman Sutherland called the meeting to order at 10:17 a.m.

The Committee voted unanimously in favor of adopting the agenda.

Executive Session:

- A. Haspel & Davis Milling & Planting Co. Ltd., et al v. Orleans Levee District, USDC EDLA 06-3829; 5th Cir. C.A. No. 07-30086.
- B. In re: Katrina Canal Levee Breaches Consolidated Cases, USDC EDLA 05-4182.
- C. Taylor v. Tensas Basin Levee Board, 24,844 7th Judicial District.

A motion was offered, seconded and the Committee voted unanimously in favor of convening in Executive Session to discuss the items listed on the agenda. The Committee convened in Executive Session at 10:18 a.m.

The Committee reconvened in regular session at 11:16 a.m. and the meeting was called back to order.

New Business:

D. Discussion of Nolan Lambert Permit.

Stevan Spencer, Orleans Levee District (O.L.D.) Executive Director explained Nolan Lambert wishes to rebuild his home on Bellaire Drive (on the 17th Street Canal). The U.S. Army Corps of Engineers (USACE) and LA Department of Transportation and Development (DOTD) issued letters of no objection. The O.L.D. permit was issued several months ago; however, Mr. Lambert had concerns about several parts of the permit. This permit was discussed by the Committee at its last meeting and Mr. Spencer and SLFPAE Interim General Counsel Robert Lacour were tasked with meeting with the Lamberts for further discussions. Major revisions were made to the O.L.D. permit and DOTD revised its letter; however, the Lamberts still have concerns about the revised O.L.D. permit.

Mr. Lacour reported Mr. Lambert did not want to give up his right to contest the validity of the right-of-way and would be allowed to sign the permit under protest with a reservation of rights; however, he still had issues with the hold harmless language. The hold harmless was broken into three components: (A) materially incomplete, inaccurate or false information in the permit application, (B) failure to comply with all the terms of the permit, and (C) the exercise of the permit, which is when heavy equipment would be on the property. An accommodation was offered relative to (C) the exercise of the permit to allow for Mr. Lambert, his contractor and any subcontractor using heavy equipment to each provide \$300,000 of insurance and name the levee district as an additional insured; however, no insurance carrier would cover (A) falsification or (b) failure to carry out the permit terms, leaving Mr. Lambert to personally hold harmless those two components.

Mr. John Lambert, representing his son Noland Lambert who was unable to attend the meeting, explained his son's flooded home has been demolished and he received approval to rebuild from all authorities except the City of New Orleans, which would not provide approval without concurrence from the O.L.D. The Lamberts feel strongly about not exposing themselves to any liability because they fear holding the levee district harmless may expose them to liability in the event of a levee failure. He requested that the language be changed to read, "to the extent that the law allows the O.L.D. to require the permittee to agree to a hold harmless indemnify agreement"; however, should the law allow this as a mandatory requirement, then the permittee would agree to the language contained in the paragraph holding the levee district harmless. Additionally, he questioned whether failure to comply with all the terms of the permit meant all terms as a whole or any of the terms, and requested that the paragraph regarding this issue be removed from the permit. He pointed out that the Lamberts could not build within the levee right-of-way, which is defined in the permit. Since the home is being built on the unencumbered property, he felt the levee district should only need to approve the plans and specifications.

A discussion ensued concerning the issue of the levee district's legal authority to require the hold harmless provisions, the proposed concession to allow the permittee to provide \$300,000 insurance coverage, potential risks due to heavy equipment that will be used by contractors and recommendations regarding possible permit language revisions. It was pointed out that under the concession the permittee would be required to control the aspects of the permit that he can control (e.g., information contained in the permit application and the contractor following the plans and specifications), and those aspects of the permit that he may not be able to control in the exercise of the permit would be limited to the insurance provided.

The Committee concurred with revising the hold harmless language relative to failure to comply with all terms of the permit to specify, "any material terms of the permit"; stating paragraphs A and B of the hold harmless apply "to the extent the O.L.D. has the legal authority to require"; and paragraph C of the hold harmless would be covered by \$300,000 of insurance.

Mr. Lacour advised he would revise the permit and e-mail a draft to Nolan Lambert.

A. Approval of Legal Invoices (Authority – East, OLD, EJLD and LBBLD).

A spreadsheet containing a summary of invoices to be approved was distributed. The Committee voted unanimously in favor of approving the invoices listed in the total amount of \$14,587.39.

B. Discussion of FY 09 Budget for legal expenses.

SLFPAE Regional Director Robert Turner explained this item was placed on the agenda to provide the Committee an opportunity to provide input into the budget process.

Mr. Lacour explained his time is apportioned, as appropriate, between the Authority and the three levee districts. The Committee concurred a budget for legal services of \$2,000 per month or \$24,000/year would be sufficient for the Authority.

C. Discussion of United Southern Securities Government Borrow Pit.

Mr. Todd Klock, USACE representative, explained in December, 2005, the Mayor of New Orleans commandeered a borrow pit located in the general vicinity of the Chef Menteur Highway near I-510 for use in Task Force Guardian levee breach repairs. The substantial portion of borrow materials have been used out of this pit. An offer was made to the property owners of the fair market or appraised value of approximately \$724,000. United Southern Securities, a defunct corporation at the time of the offer, requested additional time to determine whether the owners wished to reconstitute the corporation and accept the offer. A meeting was held on January 23rd and the owners insinuated that the USACE's offer would be accepted if the property would be acquired in fee, in lieu of the USACE taking a temporary easement. The cooperation agreement with the levee district provides that the USACE would acquire the property; however, after acquisition the property would be placed in the name of the levee district.

Comments were offered regarding the issue of borrow pits and the liability exposure from these pits. Mr. Jackson felt the USACE should provide a comprehensive plan regarding borrow needs, impact and possible mitigation.

A suggestion was offered that the borrow pit be donated to the adjacent wildlife refuge. Mr. Turner offered to contact the Bayou Sauvage Wildlife Refuge or the appropriate federal or State Agency regarding a donation.

E. Discussion of Legislative Plan.

Ms. Wilma Heaton explained the Legislature this year can be broken into three phases, the current Special Session on ethics reforms, the Special Fiscal Session and the Regular Session. She reported some 59 bills have been filed on "disclosure" issues in the current Special Session, provided copies of three bills dealing with public meetings

laws and violation penalties, all which are being tracked and monitored, and advised a comprehensive report would be provided at session end on matters affecting the Board.

The Special Fiscal Session is anticipated to start at the beginning of March and would deal with the billion dollar surplus. The Authority's groundwork was laid prior to the November Flood Summit. Discussions were held with Senator President Senator Chassion and House Speaker Jim Tucker and commitments were received to work with the Authority on administrative and operational needs; however, the Authority would need to make its case. A policy directive is needed from the Board. Assistance could come through House and Senate Appropriations and Finance Committees, respectively.

Committee members brought up the issues of the local share participation, appropriation for judgments and additional funding for the Authority.

Ms. Heaton pointed out the Committee may wish to consider unfunded mandates, such as the drainage study. Mr. Turner added, the biggest unfunded mandate deals with the magnitude of current inspection requirements. Ms. Heaton suggested creative alternatives may be possible, such as DOTD providing inspectors, and she would reach out to the Association of Levee Board to see what they propose.

Ms. Heaton reiterated the groundwork has been laid out for the Special Session and expert witnesses are lined up to help make the Authority's case financially.

Ms. Sutherland requested that Ms. Heaton work with Sara Mouledoux, who would draft language needed for legislation regarding an appropriation for judgments, and with Vicky Bowers with Oats and Hudson on the local share participation and on operations and staffing.

Ms. Heaton advised the Board should first determine its priorities at its February meeting, and provided print outs of suggestions from Mr. Botnick, the Attorney General's Office and Mr. Lacour. She reminded the Committee some rehab of HB 413 (Act 475) of 2007 may be desired by the Board and that borrow pit acquisitions and liabilities are also possible issues for the regular session.

Mr. Lacour suggested seeking legislation to provide immunity for land owners retaining title of property used for borrow materials by the USACE and immunity for levee districts should the districts take title of the borrow pit property. Ms. Sutherland stated this was something that could be worked on with Vicky Bowers.

Ms. Heaton advised term limits created a large number of new legislators this year. She explained the challenge ahead to educate these new legislators about the Authority and its needs, and provided copies of a spreadsheet indicating each legislator in the House and Senate along with their committee assignments. She further advised she has reached out to Citizens for One Greater New Orleans (Ruthie Frierson) and Women of the Storm (Ann Milling), who showed interest in seeing the Authority's legislative package when adopted and expressed a willingness to help.

The Committee discussed educating legislators. Mr. Lacour was requested to provide a clarification regarding statutes on lobbying. Ms. Heaton discussed joining with the CPRA and also the Association of Levee Boards on common interests and needs. Mr. Turner commented another attempt may be made to modify statutes regarding encroachments on levee rights-of-way. Ms. Heaton pointed out an issue brought to her attention by Mr. Lacour was that municipalities should not be allowed to issue building permits prior to notifying levee districts of piling driving or excavation within so many feet of a levee or hurricane protection system.

Ms. Heaton asked whether the Authority wished to bring to the Legislature the issue of PCA's that must be executed with the USACE. Mr. Jackson pointed out the SLFPA-East and SLFPA-West are treated differently by the State. Ms. Sutherland stated the legislation for the East Authority should mirror that for the West Authority.

Ms. Sutherland added Ms. Heaton knows what resources she has to work with and that they want the proposed legislation that would be advertised and recommendation as to what matters would be local and what matters would be State-wide.

Ms. Heaton asked for further logistical direction and recommended the Board prioritize its biggest challenges and present those challenges to the Governor's office so that it could perhaps get something from a policy perspective in the Governor's legislative package for the regular session. She reminded the Committee the intent to file local bills must be advertised twice thirty days prior to the regular session; therefore, in order to pre-file local bills the Board must address those matters at its next meeting. Appropriations can be requested at the Special Fiscal Session through the Appropriations and Finance Committees. She also discussed the option of a House and Senate Concurrent Resolution to request a study of the local cost share.

Ms. Sutherland concurred with Mr. Jackson that the State should be made the local sponsor for the Lake Pontchartrain and Vicinity Hurricane Protection Project, as it is the local sponsor for the West Bank and Vicinity Project.

Current legislation relative to the CPRA and its local sponsorship responsibility, which it subsequently delegated to DOTD, was discussed. Mr. Tuner pointed out clarification is needed relative to local sponsorship with respect to responsibility for funding local matching funds.

There was no further items of discussion, therefore, the meeting was adjourned at 1:00 p.m.