

**MINUTES OF
SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY-EAST
LEGAL COMMITTEE MEETING
HELD ON SEPTEMBER 4, 2014**

PRESENT: Lambert J. "Joe" Hassinger, Jr., Chair
Stephen Estopinal, Committee Member
Paul Tilly, Commissioner

The Legal Committee of the Southeast Louisiana Flood Protection Authority-East (SLFPA-E or Authority) met on September 4, 2014, in Meeting Room 201, Orleans Levee District Franklin Administrative Complex, 6920 Franklin Avenue, New Orleans, Louisiana. Mr. Hassinger called the meeting to order at 8:30 a.m.

Opening Comments: None.

Adoption of Agenda: The agenda was adopted by the Committee as presented.

Approval of Minutes: The Committee approved the minutes of the Legal Committee meeting held on July 10, 2014.

Public Comments:

Roy Arrigo, a resident along the 17th Street Canal, stated that the Board unanimously adopted a resolution in 2011 after the toe plus 15-ft. increase was passed by the legislature that directed its counsel to request an opinion from the Attorney General regarding the constitutionality of the increase. However, no such request was made and counsel acted to prevent such a record from being created. He commented that the Commissioners were vetted and approved to sit on the Board and make decisions based on their skill set and that counsel is to provide advice and not make decisions. He stated that the Board's counsel acted to block any ruling on the constitutionality from being heard, unilaterally made a decision to file a writ and withheld this action from the Board. He commented concerning the advice given to the Board by its attorney and that the advice about the toe plus 15-ft. not replacing the toe plus 6-ft., but adding to it, was wrong, as was the advice about how Judge Reese's recent ruling would turn out. He requested that the Board direct its counsel to withdraw the writ.

Craig Berthold, a resident along the 17th Street Canal, commented that his property was extremely effected and concerning his loss of property rights. He asked a number of questions that he hoped would be included in the Committee's discussions, including the year that the St. Julien servitude was established and that the landowners were notified that the levee district wished to acquire the servitude, the method by which landowners were notified and documentation of their consent. He commented that the property owners researched Ordinance Nos. 3129 and 3130 and that the strip of land referred to in the ordinances is located outside of the landowners' property line.

Carol Byram, a resident along the 17th Street Canal, commented that there has been a deficit of representation for Orleans Parish on the Board until Mr. Hassinger's

appointment and that the property owners had no one to approach for help. She added that individuals were afraid of retaliation when the property owners sought technical help from the U.S. Army Corps of Engineers (USACE) and commented concerning the outside vegetation experts brought in by the property owners. One of the experts received a rude reception by the former President and a meeting was declined with the second expert. She added that both experts were severely retaliated against by the USACE. She asked that the Committee members consider the history of this issue and compare the words and decisions in the rulings of Federal Judge Barbier and the 4th Circuit Court of Appeal.

Brett Downs explained that he purchased his home, which is adjacent to the 17th Street Canal breach site, just over a year ago. He unknowingly inherited the conditions placed upon the property with the cooperation of the SLFPA-E and Orleans Levee District due to the seller's failure to disclose the conditions. There is a cloud hanging over the subject of free and unobstructed use of the property. He stated that the toe plus 15-ft. rule compounds the situation since it clearly states that there is a possibility in the future that he may be evicted from additional land area in his back yard, which is currently occupied by a pool. Based on the current legal precedent there is no limit to where the eviction may one day end and no likelihood of compensation that he has observed. He stated that the current conditions impact 45-ft. of his land. While the former landowner chose not to disclose this condition, Mr. Downs stated that he is left in a legal limbo in which failing to disclose this condition to a future buyer could land him in court and acting to disclose it will likely burden the sale of the property of its full value in the future. He stated that the survey shows no unobstructed use of the property and that the title company has implied that it is not compelled to make him whole for the loss of use and risk of future loss potential due to the current grey area that has been placed upon the land. He stated that he met with Robert Turner, SLFPA-E Regional Director, and with the Board's counsel; however, he has not been offered a full and satisfactory resolution. He commented about the unconstitutionality of the legislation. He asked the Board to fix this situation by any and all means necessary.

Mr. Hassinger asked Mr. Downs whether the survey showed the toe of the levee. Mr. Downs responded that the survey shows the toe of the levee as determined by the surveyor. Mr. Estopinal pointed out that typically a survey does not show the servitude created by toe plus 15-ft. legislation since it is not recorded against the property. However, the title company should have provided advice concerning the general law. He agreed that the problem of nebulous servitudes must be solved and advised that he has been pushing to establish servitudes that are permanently fixed and can be recorded. He noted that he could not do anything about the actions of the legislature. Mr. Berthold pointed out that the general law concerning the toe plus 15-ft. zone did not exist when the 4th District Court of Appeal reversed Judge Reese's ruling.

Ms. Byram commented that the Board used laws unethically in 2006 and 2007 to take the property and that toe plus 15-ft. legislation was not handled truthfully in the legislature.

New Business:

A. Approval of the legal invoices listed on the spreadsheet dated September 4, 2014.

Mr. Estopinal advised that he reviewed the spreadsheet and did not find anything out of order. He offered a motion, which was adopted by the Committee, to approve the legal invoices listed on the spreadsheet.

B. Discussion of the policies and procedures currently in place regarding the authority given to the Board's general counsel with respect to ongoing litigation, and consideration of whether to adjust those policies and procedures.

Mr. Hassinger explained that a question concerning the authority to take legal action without Board approval was raised at the last Board meeting, specifically with respect to the 17th Street Canal case and the filing of a writ. He requested that Robert Lacour, SLFPA-E General Counsel, explain the current procedures in place and whether there are any specific procedures in place concerning the 17th Street Canal case.

Mr. Lacour responded that the procedures are the same. He explained that he has asked the Gordon, Arata firm to come to the Board many times with litigation relative to the Bohemia Spillway since these cases involve big dollars. A problem arises if an adverse decision is rendered and there is a period of approximately seven days in which to request a new trial and the Board or Legal Committee is not scheduled to meet in the interim. Someone must make a decision. He added that even when there is a 30-day window for a decision, the attorney cannot wait until the end of the window since he must prepare the motion, writ or brief. He explained that he speaks to the counsel handling the case, since they are the most knowledgeable, when dollars are not involved and a decision is reached. If it is a difficult decision or one that could incur liability for the Board, he stated that he usually consults with the President. He explained that at one time he was bringing settlements for small amounts of money to the Board and that the Board advised him that he should make the decision on any case \$5,000 or under. He reiterated that someone needs this authority, whether it be the President or Legal Committee Chair, since questions arise between meetings.

Mr. Hassinger asked was there was deadline for filing the writ on the 17th Street Canal case. Thomas Anzelmo, SLFPA-E Counsel, advised that with any determination by the Court, if a ruling is made and a writ is going to be recommended or taken, it must be taken within 30 days of the date upon which the decision is made or 30 days from the date upon which the entity is aware that a decision has been made. Mr. Tilly asked whether the Board can cancel an action taken by counsel. Mr. Anzelmo responded that the Board is the client and directs its counsel as to what it wants him to do.

Mr. Estopinal asked that Mr. Anzelmo explain the writ in question. Mr. Anzelmo explained that an action was originally brought by the 17th Street Canal Coalition class action allegedly brought on behalf of all of the residents along the 17th Street Canal impacted by a tree and fence removal project requested by the USACE. The 4th Circuit Court of Appeal decided that the St. Julien doctrine is alive and well in Louisiana and that the St. Julien servitude does not have to be recorded. The St. Julien servitude is exercised by public bodies that have the power of expropriation. In this case the

servitude is from toe to toe on the levee. The Court mandates that three conditions must exist and it found that all three existed in this particular case: there must be a public body with powers of expropriation (the levee district had this power); the public body must construct a facility in the public interest (the levee was constructed in the public interest), and the landowners' consent or acquiescence. The SLFPA-E submitted evidence to the Court of Appeal in the form of a Motion for Summary Judgment, which included the title and servitude of every property of the landowners that showed the levee itself. He quoted from the Court of Appeal's findings, "The Orleans Levee District contends that it has a servitude of the 17th Street Canal levee under the St. Julien doctrine as well as a right to clear obstructions from the levee and six feet from the toe under R.S. 38:225A(1)(a). We agree." Judge Reese had granted a Motion for Summary Judgment in favor of the plaintiffs and denied the SLFPA-E's Motion for Summary Judgment. The Court of Appeal reversed this action and sent the case back to Judge Reese to enter a judgment. The SLFPA-E petitioned Judge Reese to enter the judgment granting the SLFPA-E's summary judgment and dismissing the case. The case languished because it ultimately went to Federal Court and when it came back the SLFPA-E re-presented its judgment. At the same time a second law suit was filed involving deep soil mixing and the two cases were consolidated. An Amended and Supplemental Petition was filed in the deep soil mixing case. Judge Reese ultimately rendered the decision to dismiss the plaintiff's petition relative to the levee district's use of the St. Julien doctrine and a law of general application (R.S. 38:225) which created the 6-ft. no build zone. The 6-ft. zone is not a servitude; it is similar to a setback. The law states that no landowner anywhere in the State can build within 6-feet of the toe of a levee. The Court then stated in its opinion that it would grant the SLFPA-E's Motion for Summary Judgment; however, it would allow the property owners to pursue new things that were raised in the Second Supplemental and Amended Petition. Since the amendment that was filed realleged everything that had been dismissed in the first case, a writ was taken by the SLFPA-E asking the Court of Appeal basically to untie the knot. The SLFPA-E asks in the writ that the Court of Appeal untie the knot (unconsolidated the two cases) and provide the clarification needed; that is, dismiss the first case (tree and fence removal project) and then proceed with the second case (deep soil mixing). The allegations made concerning the unconstitutionality of the 15-ft. setback due to the legislature's amendment of R.S. 38:225 are included in the second case. He noted that the State needs to come in and defend the constitutionality of R.S. 38:225 as amended. Mr. Estopinal asked whether the SLFPA-E is going to defend the constitutionality of R.S. 38:225 as amended. Mr. Anzelmo responded that the SLFPA-E has not done anything relative to the constitutionality of R.S. 38:225 as amended.

Mr. Anzelmo read from the plaintiff's opposition to the writ, "As this Court is well aware, it found that the defendants do have a servitude over the 17th Street Canal levee pursuant to the St. Julien doctrine, as well as a right to clear obstructions from that levee and 6-ft. from the toe of the levee under R.S. 28:225." The concurring opinion of Judge Love attached to the Court of Appeal's decision states, "While I respectfully agree with the majority, I write separately to add that the acts of sale and/or surveys for the properties in question acknowledge the existence of the toe of the levee. Therefore, the plaintiffs were aware or should have been aware of the levee servitude. Once the servitude was established, La. R.S. 38:225 applied to prevent landowners from placing obstructions within six feet of the levee. The Orleans Levee District and SLFPA-E were within their authority to permit the U.S. Army Corps of Engineers to remove any

obstacles within six feet of the levee toe.” The Court of Appeal judgment was rendered by a panel of five judges with only Judge McKay dissenting. He pointed out that the case went to the Louisiana Supreme Court and writs were denied. He stated that he would not provide recommendations relative to actions that the Board should take unless he had sound and specific basis and grounds from the Court of Appeal.

Mr. Tilly asked about the question posed by residents regarding additional land. Mr. Anzelmo responded that R.S. 38:225 is a State law of general application. The prohibition about building within 6-ft. has been withheld. The legislature then extended the setback from 6-ft. to 15-ft. Mr. Estopinal asked whether the SLFPA-E has the authority to release the 15-ft. setback. Mr. Anzelmo responded that he did not think that the SLFPA-E has that authority because it is not a SLFPA-E regulation—it is a state law of general application. Mr. Lacour added that the SLFPA-E cannot release the setback and that the law states that no one shall put anything within 15-ft. of the levee that endangers the levee or its maintenance. When an individual requests a permit to do something within this space, the request is analyzed and if it does not endanger the levee or impede maintenance, it is allowed. The USACE agreed that it would not enforce the 15-ft. setback on the 17th Street Canal unless it caused a real problem for the levee. The Orleans Levee District permit states that the levee district only looks at the 6-ft. setback along the outfall canals in order to honor the agreement; the 15-ft. setback is looked at in other locations. Mr. Anzelmo noted that R.S. 38:225 provides that no one shall place or cause to be placed upon or within six feet of any part of the levee any object, material or matter of any kind or character which obstructs or interferes with the safety of the levees or is an obstacle to the inspection, construction, maintenance or repair of any levee.

Mr. Downs indicated that his pool was within the toe plus 15-ft. zone and that he did not know whether or not a levee district permit was obtained. Mr. Estopinal suggested that Mr. Downs file a request for an after the fact permit from the Orleans Levee District if a permit cannot be located.

The Committee briefly discussed rights within the no build zone. Mr. Lacour reiterated that the 6-ft. and 15-ft. zones are setbacks—not servitudes. Therefore, the levee district would not have the right to build, for example a levee embankment, within the 6-ft. or 15-ft. zone. However, the statute provides the ability to use the 6-ft. and 15-ft. zones for maintenance purposes and the right to remove obstructions that endanger the levee.

Ms. Byram commented that R.S. 38:225 does not apply to the 17th Street Canal because it was changed in 2006 and is not retroactive and that all of the properties were purchased before that date. She added that it applies to navigable waterways.

Mr. Arrigo pointed out that in 2012 there was a bill in the legislature to reverse the toe plus 15-ft. revision back to toe plus 6-ft. He noted that in the fall of 2010 the SLFPA-E granted the USACE the right-of-entry to construct a new levee and levee embankment enhancements. The USACE excavated the landowners’ property up to 6-ft. deep and hauled away the material. He also asked the difference between landowners who had the toe plus 15-ft. buffer zone purchased from them and the rest of the landowners.

Mr. Lacour pointed out that R.S. 38:225 expressly states “levees fronting on any waterway”. He advised that letters were sent to the municipalities within the SLFPA-E’s jurisdiction advising that permits must be obtained from the levee district for any construction near a levee.

Mr. Hassinger suggested that if an issue is in litigation and a decision is required prior to the next Board meeting that the SLFPA-E’s attorney inform the President or the Chair of the Legal Committee (as backup) regarding the issue. Mr. Estopinal recommended that a policy be established that both the President and the Chair of the Legal Committee be so informed.

D. Report on creation of position of SLFPA-E Executive Counsel.

Wilma Heaton, SLFPA-E Director of Governmental Affairs, explained that she was requested to pursue options for the Board concerning the creation of the position of in-house Executive Counsel. She reported that the Louisiana Civil Service Commission approved the creation of an unclassified position for Executive Counsel. The creation of the position would not prevent the Board from retaining outside counsel for special issues. She recommended that the position be advertised in its official journal and on the SLFPA-E website. The Louisiana Department of Civil Service also approved a classified position for a Paralegal to provide support to the Executive Counsel. The position of Paralegal would not be posted unless an Executive Counsel is hired. Mr. Hassinger advised that he attended the Civil Service Commission’s meeting on September 3rd in the event that comment was needed. Mr. Estopinal recommended that a scope of responsibilities be developed and that the position be advertised.

Ms. Heaton advised that one of the items on the City of New Orleans’ agenda for its meeting to be held this day is a resolution of support for the SLFPA-E’s request for funding from the Interim Emergency Board (IEB). A meeting will be held tomorrow morning with members of the Orleans delegation to ask their assistance with this issue. She explained that the IEB is an advisory board that meets when the legislature is not in session. Should IEB recommend approval, a positive vote of two-thirds of the State legislature would be required via mail ballots.

C. Discussion of when and how SLFPA-E/Orleans Levee District acquired its servitude along the 17th Street Canal.

Mr. Anzelmo quoted from page 6 of the opinion of the 4th Circuit Court of Appeal which states, “To the extent the creation of this servitude resulted in a taking, it occurred decades ago when the 17th Street Canal levee was constructed. Under the St. Julien doctrine, the right to compensation is personal to the owners of the property at the time the levee was constructed. None of the Landowners owned the property in question at that time.” He added that Ordinances 3129 and 3130 were supplied to the Court relative to the creation of the levee and the acquiescence or consent of the landowner. Ordinance 3130 recognized an urgent need for the construction of a levee along the east bank of the 17th Street Canal from Pumping Station No. 6 to the shore of Lake Pontchartrain in order to protect a large section of the City of New Orleans against overflow by storm waters from Lake Pontchartrain. The ordinance then stated that the Orleans Levee Board had advised the City that it has the funds and the will to construct

the necessary levees, provided the necessary rights-of-way were provided at no cost. The ordinance recites that two landowners (Jefferson and Lake Pontchartrain Railway and New Orleans Land Company) had been willing to donate the land. The ordinance ordained that the City would accept the donations for the exclusive purpose of constructing a public levee and public highway. The ordinances came about in 1916 and the construction of the levee commenced thereafter. The ordinances were attached as Exhibit No. 4 to the SLFPA-E's Motion for Summary Judgment.

Mr. Hassinger advised that no Executive Session would be required.

There was no further business; therefore, the meeting was adjourned at 9:40 a.m.