

REAL PROPERTY COMMITTEE
5:30 p.m., Monday, November 17, 2014

The regular meeting of the Real Property Committee was held at 5:30 p.m., Monday, November 17, 2014 in the City Hall Conference Room, 1207 Palm Boulevard, Isle of Palms, South Carolina. Attending the meeting were Councilmembers Bergwerf and Buckhannon, Chair Loftus, City Administrator Tucker, Assistant City Administrator Dziuban and City Clerk Copeland.

1. Chair Loftus called the meeting to order and acknowledged that the press and public were duly notified of the meeting in accordance with the Freedom of Information Act.

2. Approval of Previous Meetings' Minutes

MOTION: Councilmember Bergwerf moved to approve the minutes of the regular meeting of October 14, 2014 and October 29, 2014 as submitted; Councilmember Buckhannon seconded and the motion PASSED UNANIMOUSLY.

3. **Citizens' Comments – None**

4. Comments from Marina Tenants

Carla Pope and Jay Clarke of Morgan Creek Grill approached the Committee and noted that they have been a tenant of the City since 2002 and have had a "great" relationship with the City. Mr. Clarke said that the only way the restaurant has under-performed has been paying the rent late periodically, but he has always paid including the late fees. In his opinion, Morgan Creek Grill has been a good tenant to the City. Referencing the Real Property Committee meeting of October 29th, Mr. Clarke stated that he was "unaware of the magnitude" of the response or that there was a problem with the City's noise ordinance, and he acknowledged receiving "a few warnings in the past." He explained that, immediately after the meeting, he had remedied that situation by discontinuing all outside amplified music; he promised the Committee that the restaurant will continue to be in compliance with the noise ordinance. He added that he wanted to get the lease renewed, and he thought it was "only fair to get the lease renewed as quick as possible and to continue to operate as usual. Mr. Clarke informed the Committee that he had sent a letter to the City with the same comments. (A copy is attached to the historical record of the meeting.)

Chair Loftus stated that he had heard that a number of residents have been unhappy with the parking changes for golf cart parking. He recalled that the marina had been purchased to provide water access for the island's residents; he was concerned that changes to the golf cart parking had occurred.

Mr. Clarke explained that the restaurant had accommodated the golf carts for as long as possible as the golf cart parking area grew and grew. It eventually became a problem in two (2) ways:

- A legal issue arose when people were bringing their own alcohol onto the leased premises under the restaurant's insurance policy; Mr. Clarke indicated that he had had several informal conversations with the City about the problem. He noted that he has a

letter from his insurance company stating that he had to control the liquor being brought onto his leased property.

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- As the yard has become more popular for people, there are more children coming to the marina with their families. He agreed that it is a great island atmosphere, and it became very dangerous with the golf carts backing out.

The golf cart parking has been relocated and expanded in the area adjacent to the ramp. He assured the Committee that he and Marina Manager Berrigan were in agreement to accommodate the golf carts. Mr. Clarke added that anyone who came to the City with an issue regarding the golf cart parking should be referred to him and he would explain the situation. Once the parking lot is reconfigured, the golf cart parking may be relocated again.

Administrator Tucker asked how many people had driven golf carts to the marina for the oyster roast the previous Saturday; Ms. Pope replied that the entire seventy-five foot (75 ft.) area was filled with carts.

5. Old Business

A. Discussion of Marina Outpost and Marina Joint Ventures Leases

Brian Berrigan, marina manager and owner of Marina Outpost, and Gray Taylor, his attorney, were present to discuss the details of the lease amendments and, subsequent, renewal. Mr. Taylor reminded the Committee that, at a previous Real Property Committee meeting, they reviewed a set of lease amendments which they proposed for the marina and the store. Since that time, Mr. Berrigan and Administrator Tucker have been in communication and have resolved some issues and narrowed-down some other issues. The Administrator noted that the members of the Committee were in receipt of what the Administrator had reviewed at the last meeting and Mr. Berrigan's comments in response. (Copies of the documents are attached to the historical record of the meeting.) Mr. Taylor asked to review the issues and to provide the Committee with the reasoning/rationale behind them.

The first issue was extending both leases to a thirty year (30 yr.) term, meaning they both will expire on January 31, 2045. He acknowledged that thirty (30) years was a long time in the future, but the City was working with an operator who has been on the scene for fifteen (15 years) and who has taken what the residents of IOP purchased and made it better. A key reason that the tenant was seeking the longer term was to take the next step to make it better and a place the residents and visitors enjoy and use.

Mr. Taylor recalled that an unresolved item at the previous meeting was whether the toggles for additional rent would or would not stay in the lease; Mr. Berrigan proposed that the toggle for Marina Joint Ventures (MJV) would be gross profits in excess of one million dollars (\$1,000,000) and for the Marina Outpost the toggle would be gross profits in excess of seven hundred fifty thousand dollars (\$750,000). Once the toggles were reached, MJV would pay additional rent of fifteen percent (15%) of gross profits and the Marina Outpost would pay additional rent of two percent (2%) of gross profits. Mr. Taylor advised that the two (2) businesses would provide both

the additional rent and financial statements no later than sixty (60) days after the lease year expired.

Both leases contain language for capital improvements, but the tenant was asking that the language be modified to have a dollar threshold; he reminded the Committee that the marina tenant has plans for significant improvements. The proposed improvements would far exceed that threshold and would need the City's approval; however, for smaller and less significant improvements, the tenant would like to do them without City approval. Mr. Taylor stated that the requirement to get City approval for every improvement was administratively ineffective and burdensome for both the City and the tenant.

Administrator Tucker noted that the bulk of work to be done at the marina had to be done in the winter and that, if the Marina and the City became too caught up in the approval process, the season could be lost. On a best case scenario, the Administrator commented that Council approval would take four to five (4-5) weeks; if a problem was identified, the process could span two to three (2-3) months. In addition, price quotes obtained would likely not be extended for that long.

The paddle board rental operations have become much more significant and heavily utilized by both residents and visitors; the current language in the MJV lease gives the operator the right to contact businesses as long as the City is not in a direct relationship with one of the operators. Mr. Taylor stated that the tenant would like that to be removed from the MJV lease to give the tenant the certainty of knowing that he could continue that amenity, as well as to give the operator certainty that the City will not come in to compete with them.

On the subject of liens, Mr. Taylor stated that the tenant could not mortgage the property since he does not own the property, but, theoretically, the tenant could enter into a leasehold mortgage or security agreement for items the tenant does own that are on the property. He indicated that the tenant would like the ability to do that up to one hundred thousand dollars (\$100,000); any amount over one hundred thousand dollars (\$100,000) would require consent from the City. Any such mortgage would be tied to a large-scale capital improvement at the marina.

Administrator Tucker hypothesized if Mr. Berrigan did get a loan with a lien against the improvement; if something unfortunate were to happen and the tenant defaults on the loan, the Administrator pointed out that there could be a possible demand put on the City. The Administrator commented that she was concerned about the City's bonds.

Mr. Taylor reiterated that only the assets owned by the lessee would be the collateral for the loan, such as the tenant buying a new point-of-sale system; therefore, the new system would be subject to the financing agreement.

The next section of the amendment for discussion was that the tenant would be responsible for the payment of property taxes; today there are no property taxes because the City owns the property. If the City were to sell the property and it became subject to property taxes, the tenant would suffer a serious financial shift. In the amendment, the tenant would like the language to be changed to the tenant being responsible for property taxes as long as the City owns one hundred percent (100%) of the marina; the tenant was willing to take the risk that there could be a change in state law.

Administrator Tucker suggested that Mr. Taylor further investigate whether or not the City of Charleston marina is taxed. The Administrator's understanding from Charleston County officials

is that, if Charleston County were to assess the marina operation and determine that it is essentially for profit and not a public entity, they could assess property taxes on the marina. The

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Administrator noted that she did not know whether a longer term lease would prompt a new assessment; if that were to happen when the City is still the owner of the marina, the tenant would be responsible for paying the property taxes.

In the Marina Outpost lease, discussions have taken place regarding the reallocation of responsibility for some of the assets under maintenance; Mr. Taylor stated that the list that has been agreed upon at this time. It indicates that the tenant would be responsible for all repairs and maintenance of the store, the fuel dispensers, the fuel island canopy, but the City would be responsible for the underground storage tank, the fuel lines and the pumps.

Mr. Taylor stated that the tenant was not seeking any changes in the allocation of responsibility and maintenance for the Marina Joint Ventures lease.

The issue that remains undecided is, with the capital improvements projected at being in excess of one million dollars (\$1,000,000), the tenant has asked for rent abatement; the rent abatement is directly correlated with the amount of money spent, the verification of the amount spent, and the existence of the improvement. Once the amount of the capital improvement has been established, the tenant would need some form of rent abatement to make the scenario work financially. Mr. Taylor reiterated that this would be an investment that the tenant is willing to make in an asset that is owned by the City and used by the City's residents and visitors every day.

The City's concerns about the timing of a rent abatement period were heard from the last meeting; with that consideration, the tenant proposes that rent abatement would not begin until July 1, 2016. This action would allow for the City to get through the 2015 budget cycle and time to plan/budget for a period of rent abatement and time to consider the difference in revenue coming to the City; in addition, it would give another year toward the marina bond. The tenant continues to request a seven-year (7 yr.) term based on the amount of money spent.

Mr. Taylor explained that the marina has been designed to construct the dry-stack storage in the future; for now it is a representation on the site plan. The tenant is hoping that it will be real, but no plans have been made at this point; Mr. Taylor commented that the cost would exceed the one hundred thousand dollar (\$100,000) threshold and would require City approval.

Councilmember Buckhannon was pleased that the tenant had incorporated the Committee's concerns expressed at the last meeting into the amendment request; he stated that he liked having many items off the City's Capital Plan.

Councilmember Bergwerf voiced concern about establishing a toggle of one hundred thousand dollars (\$100,000) before the City becomes involved; she acknowledged that one hundred thousand dollars (\$100,000) was a substantial sum of money; therefore, a lot could be done.

She also stated that the cost of a one point one million dollar (\$1,100,000) improvement would be one point six million dollars (\$1,600,000) to the City. In addition, the Councilmember reminded Mr. Berrigan and Mr. Taylor that City Council has tasked the Planning Commission to review the responders to the RFP for a Marina Master Plan; she conjectured that the Marina Master Plan could indicate that a dry-stack storage is not in the best interest of the marina.

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Councilmember Bergwerf asked Mr. Berrigan if he would still be interested in a thirty year (30 yr.) lease if he could never have dry-stack storage at the IOP Marina; he responded that he would.

Mr. Taylor added that the tenant was also aware that Council might not approve a dry-stack plan if presented; he noted that the inclusion on the site plan was a direct reflection of the demand from current users of the marina.

Councilmember Bergwerf commented that a major problem with a dry-stack was the limited foot-print at the marina and repeated that there is not sufficient parking for those to go the marina without the existence of dry-stack storage.

Chair Loftus asked whether the CPI would continue to be applied to the marina rents in the years of rent abatement; Mr. Taylor responded that he would expect that to be the case. The Chair asked whether the replacement of certain "big ticket" items like a walk-in freezer would require rent abatement, and Mr. Berrigan replied that it would not.

Mr. Berrigan explained that the one hundred thousand dollar (\$100,000) toggle became a part of the lease amendment when discussing situations like replacing the walk-in; he recalled that the replacement of the walk-in coolers were listed at ninety thousand dollars (\$90,000) on the City's capital plan. If the coolers were to go down, his business could not survive the time for the City's approval process; he stated that this was the primary reason for the one hundred thousand dollar (\$100,000) toggle.

Administrator Tucker wanted more discussion about rent abatement because, despite understanding the need, it is the item of most concern for her. The Administrator noted that it is her responsibility to present a balanced budget to City Council, and clearly, without borrowing money, the City does not have the resources to fund this on its own, and she continued that it has not been the will of the current City Council to consider borrowing money. In essence, by abating the rent, the City is doing the same thing in reverse – the City is funding the improvements through rent abatement. Based on her concerns about a balanced budget and the rent abatement, the Administrator stated that she envisioned the private entity making the improvements and getting the rent abatement retroactively for having done that. This would increase the City's asset base at the marina in return for the loss of revenue. The Administrator voiced concern over funding the gap for the ongoing expenses at the marina, which the City will still have, and the marina debt will not be paid off until 2019. This issue would need to be resolved in order for this plan to be workable for the City.

Mr. Taylor explained that the rent abatement would not begin until July 1, 2016 when the work would all be done; he noted that language could read that the rent abatement would begin July

1 of the year following the completion of the work. Under these terms, the City has the certainty of knowing that the rent abatement is in arrears, the tenant has advanced the money on its own, the tenant has made the capital improvement allowing the City to adjust the value that it places on the marina based on that capital improvement. Mr. Taylor indicated that he would prefer not to tie it to a specific year because they could have some kind of permitting issue that would delay the work.

The Administrator repeated that she was not certain that the City could afford the rent abatement.

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Councilmember Bergwerf stated that she remained uncomfortable about the rent abatement since the City did not know what the cost of money was going to be; she repeated the fact that the parking lot improvements have been estimated to cost one point one million dollars (\$1,100,000) but the tenant is seeking one point six million dollars (\$1,600,000) in rent abatement in return.

Chair Loftus stated that he was committed to the parking lot improvements which would be a considerable upgrade for the property and would provide better control over the parking issues at the marina. The Chair thought that City Council has two (2) options, i.e. for the City to take out a loan to do the project itself or allow private capital to fund the project and accept the cost of money to do so.

The Administrator agreed that the question was whether the City was willing to accept the additional cost for a private investor to fund the work; she thought that the City could possibly do the project at a lower cost. Mr. Taylor acknowledged that, "in the world of commercial lending, this would not be the cheapest money out there," adding that this would not be a traditional loan since the tenants will not be in a position to give the lender a first position mortgage on the property.

Chair Loftus commented that the City's bond rating has been upgraded; therefore, the City would be in a good position to receive a favorable loan rate. He opined that with a low rate, the City could save four to five hundred dollars (\$400,000-500,000) if it were to borrow the money for the parking improvements.

Before the Committee went into Executive Session, Mr. Berrigan made it clear that he did not want the issues of parking improvements and rent abatement to influence the Committee's decision about the lease renewals and amendments; he added that he was comfortable letting the marina improvements and rent abatement be the subject of future negotiations.

MOTION: Councilmember Bergwerf moved to go in to Executive Session at 6:18 p.m. to discuss negotiations incident to contractual arrangements concerning the City's leases with Barrier Isle LLC, Marina Joint Ventures and Marina Outpost and to receive legal advice on potential claims related to the lease for Morgan Creek Grill; Councilmember Buckhannon seconded and the motion PASSED UNANIMOUSLY.

The Committee returned to regular session at 7:00 p.m.

The Chair stated that Phillip Smith has asked to address the Committee and requested that he come forward at this time.

Mr. Smith said that he was present as the result of an email he received related to the redevelopment plan RFP for the marina; he acknowledged that these enhancements would be in the future. He wanted to voice his opinion that a "cushion" should be created between the marina activities and his home, and he has learned that the Committee voted to leave Tidal Wave Watersports in its current location on the marina.

Administrator Tucker interrupted Mr. Smith to explain to the Committee to which meetings and emails Mr. Smith was referring. She reminded the Committee that John Schaffer had taken the

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remaining balance on his contract to meet with stakeholders relative to the marina site; the stakeholders invited to the meeting were the people who live around the marina site and tenants at the marina site. The purpose of the meeting was to allow these stakeholders to talk about all of the options for the waterside of the marina; according to the Administrator, there were two or three (2 or 3) such meetings held at City Hall. Drawings of different configurations were all discussed; there was good dialogue on these meetings. Recently Mr. Schaffer assembled the results of the meetings and sent them to the participants in the meetings. The Administrator concluded that, between one (1) meeting and another, Mr. Smith had not been able to attend, something changed in the plan that did not make him happy.

From the last meeting Mr. Smith attended, Tidal Wave Watersports was to be relocated further from his property. In his mind, the Real Property Committee has more authority over the marina than the participants in the meetings; he had several photographs of his property and the various activities occurring at the Tidal Wave operation. (The photographs are attached to the historical record of the meeting.)

Mr. Smith said that he was under the impression that the lease with Tidal Wave limited the activities they could engage in. He commented that the noise from the jet-ski was terrible and that the operation runs from 8:00 a.m. to 6:00 p.m., seven (7) days a week; from his photos, he illustrated several activities that he believes are not allowed under the terms of the lease. Without amending the lease, Mr. Smith indicated that the two (2) parasail boats are not allowed under the lease, but he did not come to the meeting to report on the Tidal Wave activities. In his opinion, Tidal Wave has grown too big for its location at the marina; they have sixteen (16) jet-skis, two (2) parasail boats, two (2) jet boats; in Mr. Smith's opinion, the business is "busting at the seams with no place to go." Mr. Smith said that the noise from Tidal Wave was much worse than the music coming from Morgan Creek Grill, and he paraphrased the noise ordinance saying that "you cannot have noise that is going to interrupt someone in their house." Whether Mr. Smith is in his house or in his back yard, he stated that the noise from Tidal Wave interrupts his lifestyle.

Mr. Smith asked the Committee to move Tidal Wave Watersports to another location at the marina that is away from this property sooner rather than later.

Councilmember Buckhannon informed Mr. Smith that the members of this Committee were remotely aware that these meetings were to be held, but no minutes were submitted for the Committee to read. The Councilmember recalled that Tidal Wave had wanted modifications to

its lease when it renewed to expand their offerings to the public; the City did not allow for the expansion with the renewal. At that time, the City found that Tidal Wave could have been in default of their lease because they were operating with too many pieces of equipment. Councilmember Buckhannon indicated that the first thing the City needed to do was to determine whether or not they were operating within the parameters of their lease.

Administrator Tucker remarked that she has recently sent Tidal Wave a letter asking that they re-examine their circumstances to ensure that they were in compliance with their lease.

Councilmember Buckhannon stated that he does not know how the balance of the parking lot infrastructure was going to work, but the businesses are allowed “x” number of parking spots for their business. At one time, Tidal Wave was lobbying for a shed to store equipment.

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The Administrator sought to assure Mr. Smith that the information he received was the product of the stakeholders’ work.

Mr. Smith asked whether the marina was to serve as a boat yard, and he was told that it was not. As such, Mr. Smith thought that Tidal Wave was not allowed to be working on their boats and changing oil on-site; he said that Tidal Wave has a trailer where they store their tools. He asked how many things have to happen before the City does what it should to make life more enjoyable for the residents.

Chair Loftus stated that he thought it was highly appropriate for the City Administrator to sit down with the management of Tidal Wave to address the issues Mr. Smith brought forth.

Councilmember Buckhannon asked Mr. Smith whether he had called the police to complain about the noise emanating from Tidal Wave. Mr. Smith replied that he had never called the police to complain about happenings at the marina in fifteen (15) years.

MOTION: Councilmember Buckhannon moved to approve the leases and amendments for Marina Joint Ventures and Marina Outpost, excluding the parking lot improve-ments and rent abatement; Councilmember Bergwerf seconded and the motion PASSED UNANIMOUSLY.

B. Discussion of Morgan Creek Grill Lease – Noise

Jay Clarke and his attorney Johnnie Dodds approached the Committee as requested.

Administrator Tucker clarified that past enforcement for the noise complaints for Morgan Creek Grill has been based on complaints and verifying the complaint “disturbs the repose of people in their homes.” Officers have not been enforcing on the basis of the amplified music provision of the Code. From the advice staff has heard, there is agreement that the marina is a public place; therefore, enforcement related to amplified music is definitely appropriate.

MOTION: Councilmember Buckhannon moved to automatically renew the lease for Morgan Creek Grill, assuming that they remain out of default through November 30th, on December 1, 2014; Councilmember Bergwerf seconded and the motion PASSED UNANIMOUSLY.

Mr. Dodds reported that he has reviewed the Morgan Creek Lease with Mr. Clarke and responded to Attorney Halversen's correspondence. He commented that, legally, he thought the Committee had done the right thing to renew the lease; he added that he hoped the fact that Mr. Clarke has been there for twelve (12) years and that he has built up a level of good faith that when he tells the City that his intention is to comply with the terms of the lease, to include his obligations with respect to the noise ordinance, that is what he will do.

Mr. Clarke stated that he has understood the process that this issue had to go through, and he is glad that he and the City could work through it will this outcome.

6. New Business – None

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7. Miscellaneous Business

Marina Rents Report

Administrator Tucker reported that all tenants were current.

Next Meeting Date: 5:30 p.m., Monday, January 12, 2015

8. Executive Session occurred earlier in the meeting

9. Adjourn

MOTION: Councilmember Buckhannon moved to adjourn the meeting at 7:36 p.m.; Councilmember Bergwerf seconded and the motion PASSED UNANIMOUSLY.

Respectfully submitted:

Marie Copeland
City Clerk