

Respecting Facts & Written Agreements:

Recently local attorney Bob Kerrigan wrote a letter to the Pensacola City Council regarding the state of affairs regarding the Community Maritime Park. Later Kerrigan posted his treatise to a blog and the letter was widely circulated via email. Mr. Kerrigan's six page letter is as difficult to follow as it is full of inaccurate statements and innuendo—most of which are slanted against, or directed toward, Quint Studer and Northwest Florida Professional Baseball, LLC d/b/a the "Pensacola Blue Wahoos." Ironically, at the conclusion of his tome, Mr. Kerrigan calls for "civil" discussions regarding a list of five suggestions/observations, to wit:

1. Renegotiate the entire Blue Wahoos shell entity lease and require the owners and the Blue Wahoos to collateralize and guarantee the lease.
2. Suspend everything not committed until a master plan can be developed.
3. Hire an independent, competent master developer who has no conflicts with any tenant or developer on the site who will be responsible for all leasing to third-parties.
4. Prohibit a future transfer of the lease absent a prepayment of the remaining lease obligation and a participation in the payoff of the bonded debt.
5. People who want to do business with the government should respect the role of elected officials and their responsibility to the taxpayers.

Several of these suggestions make sense; sadly, Mr. Kerrigan is directing the suggestions to the wrong audience. Instead of the CMPA, the former City Council, the former mayor, and Quint Studer, Mr. Kerrigan would stand a better chance creating a lasting impact and great results if he would deliver his suggestions to Mayor Hayward. Under the new city charter these suggestions are best handled by the Mayor.

While we admire the passion with which Mr. Kerrigan states his position, in the interest of full disclosure and fairness some of the factual inaccuracies in his letter must be addressed.

First and foremost, Mr. Kerrigan spreads considerable ink explaining his analyses of the financing and bonded indebtedness utilized to construct the Community Maritime Park. He describes the \$58 Million Dollar bond obligation as the "new baseball stadium bonds" leading the reader to believe that this was the cost of the Multi-Use Facility and that the stadium was intended to service the bond debt. However, Mr. Kerrigan may not be aware that the stadium revenue was never intended to service the bond debt and that, in fact, the stadium cost was not \$58 million; rather, the entire construction budget for the stadium was approximately \$12,900,000.00. In addition to this amount, Quint & Rishy Studer donated over \$2,000,000.00, to the CMPA, for additions and enhancements to the facility. The remainder of the bonded indebtedness was used for environmental remediation of the site, construction of park and festival infrastructure, seawalls, dredging, storm water retention areas, roads, sidewalks, DeVilliers Plaza, Professional Fees and construction of the Skip & Martha Hunter Amphitheater. The Final Approved Sworn Construction Budget for the entire project can be accessed through the CMPA. A pdf of the budget is attached hereto for easy reference.

The total expenditures converted the "Trillium" property from a vacant, environmentally contaminated, parcel of waterfront property, into what we now know as the Community Maritime Park. The park is made up of nine separate shovel ready private development parcels and a public waterfront park. The development of these nine private parcels was intended to be a catalyst for additional development in the CRA District, creating additional tax revenue to service the bonded indebtedness.

Using misinformation about the cost of the stadium as a backdrop, Mr. Kerrigan next criticizes the existence of the CMPA board suggesting that it has "no concern" with repaying the bonded indebtedness. Kerrigan may not be aware of the CMPA's fiduciary duty to make the park financially viable or the hard work it has undertaken to develop the project. Further Kerrigan may not realize that the financial circumstances inherited by the CMPA with the exodus of UWF from the project have created tremendous problems for the CMPA. Despite these factors, Kerrigan attempts to put all of the blame on the Blue Wahoos remarking that "[t]he reported losses that the CMPA is experiencing is because they are collecting so little lease revenue that the can't pay the basic expenses to operate the baseball park facility, can't repay the \$500,000.00 they borrowed from the CRA for the amphitheater, and have little chance of breaking even for years to come."

Sadly, Kerrigan stops short of explaining why the current lease revenue is insufficient to pay the ongoing maintenance of the Community Maritime Park. For instance, Mr. Kerrigan may not understand that the CMPA was never intended to pay for the construction and ongoing maintenance of the amphitheater; rather, this was an expense the CMPA involuntarily inherited from UWF. Part of the consideration for leasing Parcel 8 to UWF for \$1.00 a year was the University's agreement to construct and maintain the amphitheater. This is also the reason that the CMPA did not originally budget anything to construct the amphitheater. Had UWF maintained its commitments to the park, these expenses would never have been thrust upon the CMPA.

Further, Mr. Kerrigan may not realize that the CMPA is paying to maintain the "Private Improvement Parcels" at the park which are being held solely for the benefit of the City of Pensacola—not the CMPA. The City has strapped approximately \$100,000.00 in annual upkeep and utilities costs onto the operating budget of a struggling CMPA. Perhaps a better rhetorical question to ask is: why doesn't the City of Pensacola pay to maintain its own property? Further, why are the streets, sidewalks, and public areas of the Community Maritime Park not dedicated to the City of Pensacola as every other public park in the City of Pensacola?

While the Blue Wahoos are responsible for a large portion of maintaining the stadium under the Use Agreement, it is unclear what justification exists for requiring the Blue Wahoos to make up for the shortcomings of other entities and compel them to contribute toward the maintenance of the amphitheater, the City's Private Improvement Parcels, or other public elements of the Community Maritime Park.

Where do the Blue Wahoos fit in?

Much of Kerrigan's ire is directed at Quint Studer and the Blue Wahoos' rights to utilize the Community Maritime Stadium to play Double-A Baseball Games under the July 20, 2012 Use Agreement.

Mr. Kerrigan asserts that the Use Agreement is actually not with the Blue Wahoos but rather "[t]he lease is with a **shell entity**." This bold statement is false. Why Mr. Kerrigan asserts such a statement is puzzling. The actual party to the Use Agreement with the CMPA is Northwest Florida Professional Baseball, LLC. (hereafter "NFPB" or the "Blue Wahoos"). Falsely calling NFPB a "shell entity" leads Mr. Kerrigan to the conclusion that there is no security, or collateral, protecting the CMPA from a default in the Use Agreement by NFPB. As such, he makes the statement that "[h]ad the [Use Agreement] been with the Double-A franchise team, a default by the team would have the collateral of the team value to pay the default."

Mr. Kerrigan is incorrect about the ownership status of the Double-A team, i.e., the Blue Wahoos. The legal owner of record for the franchise is "Northwest Florida Professional Baseball, LLC." The sole members of this LLC are Quint and Rishy Studer. This should not come as a shock or surprise to anyone who has read the Use Agreement as this fact was negotiated and disclosed as part of the Use Agreement. Recitals E & H of the Use Agreement state:

NFPB owns a class "AA" minor league baseball team known as the "Carolina Mudcats," an affiliated franchise of the Cincinnati Reds Organization, referred to herein as the "Club". . . .

Upon execution and approval of this Use Agreement and upon receipt of all necessary approvals of the Cincinnati Reds, Major League Baseball, and Minor League Baseball, the Carolina Mudcats will be re-named the "Pensacola Blue Wahoos" and will be re-located to Pensacola in 2012.

A copy of the *actual* Use Agreement may be viewed at: <http://www.cityofpensacola.com/maritimepark>. After reading the Use Agreement, if Mr. Kerrigan still has reason to believe that NFPB is not the owner of the Blue Wahoos, he should produce evidence or verifiable proof supporting his statement. Otherwise, his assertion amounts to little more than a ill-informed supposition that should be retracted. Additionally it is disappointing for someone to insinuate the Blue Wahoos and/or the Studers would abandon their commitments to the Maritime Park by defaulting under the Use Agreement. Recent history demonstrates that they are the only promoters of the park who have met, or exceeded, every promise made in connection with the development.

No where is this more evident than in the Studers' decision to upgrade from an independent minor league team to an affiliated Double-A franchise. To purchase the Cincinnati Reds Double-A franchise, NFPB spent in excess of \$15,000,000.00-- more than the entire construction budget for the stadium. Furthermore NFPB is virtually debt free. Mr. Kerrigan and the entire community can rest assured that the full value of the team serves to secure the performance of NFPB under the Use Agreement. Why Mr. Kerrigan so vociferously protests otherwise is not clear.

"What does the lease (that benefits the Blue Wahoos) with the shell entity provide?"

According to Mr. Kerrigan the Use Agreement between the CMPA and the Blue Wahoos was a terrible deal for the CMPA. Kerrigan selects a few individual provisions of the Use Agreement to illustrate his point. Undergirding his argument that the agreement is bad for the

CMPA is his statement that in negotiating the Use Agreement, "the City did so under the former weak mayor form of government." Once again, Mr. Kerrigan is misinformed on this issue and his statement is false.

In fact, Mayor Hayward, took the lead in negotiating the present Use Agreement to replace a Use Agreement negotiated under the "weak mayor" system. After negotiating the new agreement, Hayward took responsibility for sheparding the agreement through approvals from the CMPA and the City Council. Instead of focusing on the concessions Hayward won from the team under the new lease, Kerrigan cherry picks a few points to inflame the passions of City Council members and those reading his blog.

Much credit should be given Hayward for his efforts in negotiating the Use Agreement. As a result of his negotiating a new Use Agreement, the arrangement became much more lucrative for the CMPA than was agreed under the former weak mayor form of government. A side-by-side comparison of the two Use Agreements (Pelicans & Blue Wahoos) underscores the mayor's successful negotiations:

Issue	2009 Use Agreement CMPA & PPB LLC	2011 Proposed Use Agreement CMPA & NWPB LLC
Team	Pensacola Pelicans	Blue Wahoos
League	American Association (Est. 2006)	Southern League (Est. 1964)
Classification	Independent	AA
Facility Seating	4,000	5,225
Sales & Retail	Yes	Yes
Video Scoreboard	Yes	Yes
Sound System	Yes	Yes
Internet TV/Radio	Yes	TBD
Occupancy	March 31, 2012	February 15, 2012
Term	10 years; 2-5 year options	10 years; 2-5 year options
Team Use	Exclusive use between 4/1 to 11/1 Games, Practice, Admin., Retail, Ticket Office *Plus 10 additional use days	Exclusive for scheduled pre-season, exhibition, regular season, and play-off games; All additional dates non-exclusive
Homegames	40+/-	70+/-

Community/CMPA Use	All non-scheduled days for other games, exhibitions, concerts, festivals, and events sponsored and arranged by CMPA	Same
Advertising and Signage	Exclusive to Team Billboards, Signage, Scoreboard, publications Temporary to CMPA for its events	Exclusive to Team Billboards, Signage, Scoreboard, publications Temporary to CMPA for its events
Use Fee	\$175,000; monthly i.a.o. \$14,583.33 starting April 1, 2012	\$175,000; payable in six monthly installments April - September i.a.o. \$29,166.66 starting April 1, 2012
Naming Rights	Exclusive to Team [20]	All Net Naming Rights Revenue Split evenly between the Team and the CMPA
Team Financial Commitment	Team & Studer pledge profits with a minimum guarantee i.a.o. \$250,000 per year for 5 years (Total of \$1,250,000); first payment January 30, 2013; Money must be used pursuant to Master Lease 11.02	Team & Studer Guarantee \$125,000 per year for 10 years through Attendance Surcharge (below)(Total of \$1,250,000); first payment January 30, 2013; Money must be used pursuant to Master Lease 11.02
Attendance Surcharge	None	No Attendance Charge on first 20k Next \$100k-\$0.50 per attendee; Next \$100k-\$1.00 per attendee; All over \$220k-\$2.00 per attendee. Guaranteed \$125k for each of first 10 years; excludes season ticket holders in year one
Ticket Surcharge	None	\$0.50 per ticket sold; excludes Military, children under 12
Parking	Revenue Split 50-50	CMPA 100% Parking Revenue
Additional Uses	Each party to pay its own promotions, sales, security, parking & clean-up	same
Clean Up	Team cleans up field, stands, concessions, grounds, toilets, and parking before and after teams events; Community Events responsibility of CMPA or Licencesee	same
Maintenance	Team Maintains the Playing Surface day to day during the season CMPA maintains & repairs everything else including playing field unless team is negligent or at fault for damage	Team Maintains the Playing Surface as well as the Multi-Use Facility
Utilities	CMPA	same
FF&E	CMPA	CMPA: Fixtures Team: Equipment & Furniture
Grounds Equipment	Team will provide; CMPA to reimburse for its use [10]	CMPA to Provide; team to maintain and replace
Security	Party conducting event responsible	same

Assignment	Assignable only with Consent	same
Indemnity	Reciprocal	same
Insurance	Team: General Liability for its events CMPA: General Liability for its events CMPA: casualty	same
Alteration, Additions & Improvements	Team has right to make	same
Ad Valorem Taxes	CMPA	same

In hindsight it is easy to select individual provisions of any written contract and believe that one party or the other came out better; however that is not an effective or useful way to look at a 40 page negotiated contract. Under Florida law a contract is a written document that sets forth parties' respective rights, responsibilities and obligations. In any negotiation there is give and take between the parties required to reach consensus. While not exhaustive, the above comparison of the two Use Agreements demonstrates that the CMPA, led by the Mayor, made thoughtful, intelligent, and meaningful changes to the original Use Agreement which improved the CMPA's position. Regardless of Mr. Kerrigan's opinion of any individual provision of the contract, it cannot be reasonably argued that the agreement was one-sided, or that the Blue Wahoos failed to make concessions to the Mayor and CMPA.

Furthermore, Mr. Kerrigan's letter fails to examine the Use Agreement in the context of how it compares with other similarly situated teams and municipalities in the Southern League. The Use Agreement between the Blue Wahoos and the CMPA is the most lucrative guaranteed agreement in all of the Southern League. I challenge Mr. Kerrigan to find a situation in the Southern League that is better for the respective municipality than the Blue Wahoos Use Agreement—on almost any point that he highlights in his tome---- to include parking revenue, concessions, naming rights, utilities, maintenance, capital improvement, etc.

Yet another puzzling aspect of Kerrigan's blog is his criticism of the team for conducting non-baseball events at the stadium on days when no other events are scheduled. Perhaps he is unaware that the goal of the Multi-Use Facility has always been to create activity and traffic at Maritime Park—this was one of the Mayor's and CMPA's primary goals for the Multi-Use Facility. During the course of the first year the Blue Wahoos conducted different events at the stadium to facilitate this goal. These events served to show the flexibility of the Multi-Use Facility and generated revenue for the CMPA.¹ The events included football games, festivals, challenge courses, corporate retreats, church services, weddings, and numerous catered events—much more than just baseball games. The events proved that the Pensacola Bayfront Stadium was truly a Multi-Use Facility.

¹ It is noteworthy that the Blue Wahoos agreed to pay the CMPA 20% of the revenue from its non-baseball events. In 2012 this resulted in over \$60,000.00 in additional revenue for the CMPA.

"Renegotiate the entire Blue Wahoos shell entity lease . . ."

The contractual elements referenced above were negotiated by the Mayor Hayward and the Blue Wahoos in the 40 page Use Agreement. As with any contract, one could identify elements that are more favorable to one side or the other; striking a balance of interests is necessary in forming a written contract between two parties. What makes little sense is Kerrigan's suggestion that the City Council renegotiate only those selected portions of the contract that he feels favor the Blue Wahoos, when he is such a strong proponent of our strong mayor, Ashton Hayward. In amending or forming agreements there must be a "mutuality of obligation" or "mutuality of consideration;" i.e., for an agreement to be formed or amended there must be give-and-take on both sides. What consideration is being offered to the Blue Wahoos to re-negotiate a written agreement that was negotiated in good faith?

Strangely enough, the upshot of Kerrigan's suggestion about re-negotiating the Use Agreement is not being directed to Mayor Hayward (who negotiated the Use Agreement) or the CMPA (who signed the Use Agreement), rather the suggestion was directed to the City Council. Why he chose to deliver his opus to the City Council is perplexing. However, this strange delivery is reminiscent of the recent confusion regarding who is responsible for leasing property at Maritime Park. Where do investors or developers go to discuss leasing Private Improvement Parcels? Who has the authority? If an attorney of the intellect and stature of Mr. Kerrigan does not know where to go to negotiate—how does anyone else know?

In any event, the answer to the challenges that face the Maritime Park is not repudiating a written contract negotiated in good faith with its only tenant. What such an action says to future tenants at the Maritime Park is: "At some point in the future if the City/CMPA does not like a written contract it will pressure you into renegotiating to make the contract better for the City." With all due respect this does not appear to be a good strategy for attracting future development. Perhaps a better strategy for attracting future development would be to paraphrase one of Mr. Kerrigan's suggestions, "*Parties who enter into written contracts should respect the sanctity of a negotiated agreement and the rights, responsibilities, and obligations agreed upon therein.*"

"What does this have to do with the YMCA?"

As the media has reported, when the YMCA wanted to discuss the possibility of leasing property at Maritime Park the first person they went to was Mayor Hayward. Mayor Hayward immediately brought the CMPA Chairman into the conversation and the YMCA was provided with a process with which to follow. That process directed the YMCA to negotiate with the City Attorney, Jim Messer. The YMCA followed this advice and a proposed lease was drafted. Subsequently, at the direction of the Mayor, the YMCA presented the document to the City Council which approved the Lease in concept. The procedure and process was confirmed by Mr. Messer at a City Council meeting.

While Mr. Kerrigan is correct that Quint and Rishy Studer offered to donate \$5,000,000.00 to the new Maritime YMCA if it was located at Maritime Park, the gift was not conditioned solely on placement of the YMCA on Parcel 8. Rather, the Studer gift was contingent on two factors, first, locating the Maritime Y at the Maritime Park, and second, that the project would be on a fast track.

Specifically, the Studers did not want the process of developing this community asset to get bogged down in petty fights over procedure, referendums, mean spirited "blog wars" or a political quagmire.

Despite following the guidance of Mayor Hayward and Chairman Merrill and negotiating a lease with the City Attorney, the YMCA's bid for a lease at Maritime Park turned into a political and media circus. Before ending the bid, YMCA supporters spent close to 20 hours in public meetings listening to 29 elected and appointed officials of the CMPA and City Council argue over the process of negotiating—without ever actually negotiating. Unfortunately, what killed the Maritime Y was not location; rather it was a dysfunctional political environment.

Perhaps, as Mr. Kerrigan suggests, some of this confusion at the Maritime Park is due to the lack of a Master Developer. However, no Master Developer was needed when Mayor Hayward negotiated the Use Agreement with NFPB. No Master Developer was needed when the CMPA and City Council negotiated a Ground Sublease with Maritime Place, LLC, for construction of a \$12,000,000.00 office building at Maritime Park. Neither the YMCA nor the Blue Wahoos can force the CMPA, City Council, or Mayor to hire a Master Developer for the Maritime Park. Perhaps the present dust-up over the Maritime Y will hasten the hiring process for a new Master Developer. One might even be hired before the law suit against the former Master Developer is resolved.

"the highway may be the only reasonable approach"

Mr. Kerrigan is correct that the CMPA, the City Council, and Mayor Hayward have the right to tell any investor, developer or philanthropist to "hit the highway." In fact, Pensacola has a pretty solid history of turning away investors and opportunities. AppRiver and Avalex "hit" Highway 98 and took their high tech jobs and construction dollars from the CRA District to Gulf Breeze. Furthermore, our government has the right to hit the pause button and "[s]uspend everything not committed until a master plan can be developed." Suspension and delay is also nothing new in Pensacola: Hixardt, Hawkshaw Eastside, PennAir, the Fish Hatchery, are all examples of developments that were suspended or delayed following government involvement.

Perhaps the most reasonable way to repay the bonds is to halt all development and maintain green space at the Maritime Park—just like the abundant green space at the Technology Park. While "watching grass grow" is a past time in some communities, unfortunately for Pensacola "watching grass grow" seems to be an economic development tool.² No one is suggesting that our elected officials do not have the right to make decisions to stop or stall developments—it is just questionable why they would choose stagnation over progress.

It is also true that the YMCA has the right to propose a \$10,000,000.00 to \$15,000,000.00 development at Maritime Park. Further, Quint and Rishy Studer have the right to "suspend" a \$5,000,000.00 donation of their money if our elected and appointed leaders choose stagnation over a viable new project at Maritime Park. Particularly if the project stalled would bring fair market lease fees, construction jobs, wellness facilities, and children's programs.

² Presently Maritime Place, LLC is designing and permitting a \$12,000,000.00 on Parcel 2 of the Maritime Park. If the City and CMPA feel it is better for the community to "suspend and study" this development, Maritime Place, LLC will cancel its Ground Lease and walk away from the project.

With all due respect, many communities have taken a different approach to these types of opportunities. While Pensacola suspends and studies the situation, investors in Jacksonville, Florida are moving forward with plans for a \$21,000,000.00 "Riverside YMCA" to be build on the St. John's River in its downtown. (<http://jacksonville.com/news/health-and-fitness/2012-10-19/story/ymca-announces-21-million-riverside-y-replace-current>). Similarly, the Dallas, Texas community had the right to accept a \$5,000,000.00 gift from T. Boone Pickens to renovate its Downtown YMCA, (<http://www.tboonepickensfoundation.org/pdf/102108.pdf>). Perhaps these communities and others like them should discourage these types of projects in their Downtowns.

"These discussions can and should be civil."

Mr. Kerrigan will find no disagreement from the Blue Wahoos or the Studers on his statement on civility. At every stage of this process the Blue Wahoos and the Studers have conducted themselves in an honorable fashion and exemplified the highest level of public integrity. Ironically the call for civility is made at the conclusion of a blog post riddled with inaccurate and inflammatory comments directed at the Blue Wahoos and the Studers. While Mr. Kerrigan is entitled to his own opinion, he is not entitled to his own facts. Regrettably his opus blog post is the antithesis of civil discourse. Nevertheless, as Mr. Kerrigan points out, jumping into the public arena is not a venture for people with "thin skin." If the Studers and Blue Wahoos did not have thick skin they would have "hit the highway" long ago. As such, the Blue Wahoos and the Studers are more than willing to sit down with Mayor Hayward, the CMPA, and/or the City Council (to include Mr. Kerrigan if he would like to participate) to work on solutions for the Maritime Park.

At the most recent CMPA meeting we implored that body to set up such a meeting between the CMPA, City Council, and the Mayor to discuss and negotiate a ground lease for the Maritime Y. No preconditions or site requirements were placed on these discussions by the Studers or the YMCA—everything was on the table. Unfortunately the CMPA refused to joint negotiations, and in direct contravention to the City Council, set unreasonable and unworkable pre-conditions to any negotiations. Thereafter the City Council declined to call all the stakeholders together for public negotiations on the CMPA/YMCA issues. The City Council did elect to move forward with more study and ordered a new legal opinion regarding process. Ironically, the legal opinion on process will come from the same City Attorney who directed the YMCA on process previously and negotiated the controversial Lease. Déjà vu all over again!

Once again we appreciate Mr. Kerrigan's passion and desire to improve the plight of the CMPA and the City of Pensacola. If any good comes out of Mr. Kerrigan's Blog, perhaps it will be initiating the civil dialogue between the City Council, CMPA and Mayor that we have been asking take place. Surely this will be more constructive than dragging the public conversation over these issues into the blogosphere.