

Office of  
City Attorney

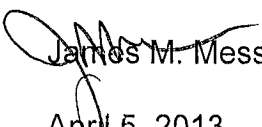
City of  
**Pensacola**



*America's First Settlement  
Established 1559*

MEMORANDUM

To: City Council

From:  James M. Messer, City Attorney

Date: April 5, 2013

Re: The Legal Relationship between the City of Pensacola and  
Community Maritime Park Associates, Inc.

1. BACKGROUND

Following a referendum in 2003, in which the city-proposed concept of a new auditorium to be located on what was then known as the L&N or Trillium property was rejected by the voters, several local businessmen met with City Manager Tom Bonfield to consider what other productive use may be made of the City's property now known as the Community Maritime Park.

The Community Maritime Park Associates, Inc. ("CMPA") was incorporated as an IRS Sec. 501(c)(3), Florida not-for-profit corporation on July 26, 2005. Its first Board of Trustees consisted of Quinton D. Studer, Adm. John H. Fetterman, and UWF President John C. Cavanaugh. The Articles of Incorporation provided that the affairs of the corporation would at all times include representatives of the Studer Group, the Florida Maritime Heritage Foundation, and the University of West Florida, and the articles further stated:

[T]he corporation will operate for the benefit and carry out the public purposes of the City of Pensacola, Florida, and for such exclusively public purposes will undertake the development, improvement and operation of public amenities, public spaces and coordinating private economic development strategies on real property in the City of Pensacola .... In carrying out such purposes, the corporation will coordinate public and private economic development strategies for promoting, encouraging and assisting with employment,

educational opportunities and economic development in the City of Pensacola, all in furtherance of the development and social welfare of the area and its residents.

(Att. 1, CMPA Articles of Incorporation, filed 7/26/05)

On September 15, 2005, the City accepted a proposal submitted by the CMPA in response to a City-issued Notice of Intent to Dispose of Property and Request for Proposals, for the negotiation of a development agreement and a lease for a project named the Community Maritime Park. (Att. 3, p. 1)

## 2. MASTER DEVELOPMENT AGREEMENT AND MASTER LEASE

On March 27, 2006, the City of Pensacola and the CMPA executed a Master Development Agreement and a Master Lease, anticipating development of the Maritime Park and the financing of the project. (Att. 2, Summary of Master Development Agreement; Att. 3, Master Development Agreement; Att. 4, Summary of Master Lease, and Att. 5, Master Lease)<sup>i</sup>

The Master Development Agreement specified that the CMPA was "to act as the master developer to carry out a public purpose" and was to "be the initial Project Coordinator." (Att. 3, pp. 7 and 9) It was contemplated that the CMPA would competitively select contractors to prepare the site for development, (Att. 3, p.12), and that the City would control and have final approval of the project budget and any change in development plans. (Att. 3, pp. 16 and 19)

Significantly, the Master Development Agreement expressly specified that the CMPA was not serving as an agent of the City. The agreement stated:

During the term of this Agreement, CMPA hereunder ***shall not be an agent of the City***, with respect to any and all services to be performed by CMPA (and any of its agents, assigns, or successors) with respect to the Project. [Emphasis added]

(Att. 3, p. 43)

The Master Lease provided that the City was the Lessor and the CMPA was the Lessee of the entire development, including both the public improvements and the private development sites. (Att. 5, p. 4) (defining Leased Property) and p. 8 (expressing the lease). The agreement stated that under the Master Lease, "Lessee shall use the Leased Property to construct, develop, operate and maintain the Public Improvements and the Private Improvements on the Leased Property." (Att. 5, p. 8)

The term of the lease was for 60 years, and any subleases proposing to extend for a longer period of time required approval of the City, with the extended period of time becoming a direct lease with the City. (Att. 5, pp. 8, 13)

The Master Lease provided for the financial obligations of the Studers and his entities, including the construction of an office building, payment of \$175,000 for ten years, \$250,000 for five years, and \$2,250,000 to the Maritime Museum.<sup>ii</sup> (Att. 5, pp. 8-9)

With respect to the CMPA's role as master developer of the Private Improvements and the portions of the public improvements made available for commercial enterprises, the Master Lease specified the process that was to be followed. (Att. 5, pp. 13-14)

The CMPA was to negotiate and execute subleases with developers or sublessees, and bring the agreements to the City for its approval "in its absolute discretion." (Att. 5, p. 14) City approval was to be a condition of any sublease. (Att. 5, p. 14) The proposed sublease was to be accompanied by documentation satisfactory to the City that the lease amount yielded "fair value" to the City, with the Master Lease stating that the burden was upon the CMPA to "justify to the Lessor that the lease payments under the Sub-Lease yield fair value to the Lessor with such valuations, analysis and expert opinions as Lessee shall deem necessary or appropriate for such purpose." (Att. 5, pp.13-14) A process was also provided to resolve differences in lease valuation if there was a disparity between what the CMPA determined was "fair value" and what the City determined was "fair value." (Att. 5, p. 14)

Finally, the Master Lease specified that the Board of Trustees of the CMPA would be comprised of at least 7 individuals, a majority of whom shall be residents of the City, and 3 of whom would be representatives appointed by the City. (Att. 5, p.16) On January 24, 2007, the CMPA amended its Articles of Incorporation to provide for a Board of 12 trustees, a majority of whom shall reside in the City, 4 of whom shall be appointed by the City and 8 of whom shall be appointed by the Trustees. (Att. 7, Amended and Restated Articles of Incorporation, filed January 24, 2007)

Following the execution of the Master Development Agreement and the Master Lease, a number of events occurred which necessitated deviation from the development plan contemplated by those agreements. These events included elimination of the concept of a conference center and a Maritime Museum, addition of the Hunter Amphitheater, the CMPA's selection of Land Capital/Maritime Park Development Partners, Inc. and subsequent termination of the development agreement with that entity, and most significant to the purpose of this report, a change in the method of financing the Maritime Park project.

### 3. A SIGNIFICANT CHANGE IN FINANCING

The initial plan to finance the Maritime Park public improvements (consisting of a multi-use stadium facility and conference center) and site development for the Private Improvements was the sale of municipal revenue bonds, pledging the CRA's TIF revenues as the source of repayment, in an amount which would net \$40 million for the project. (Att. 3)

In 2009, however, as a result of the federal government's economic stimulus effort, another financing device became available - Build America Bonds (BABS). Unlike traditional municipal revenue bonds which are free of federal income tax on interest paid to the bondholders, the income to bondholders of BABS is not free of federal income tax. However, the stimulus characteristic of BABS is that the federal government itself "buys down" some of the interest paid on the bonds, and reimburses the municipal issuer a percentage of the interest paid to the bondholders. According to advice received from the City's financing team, the use of BABS was deemed to be advantageous and in December 2009, the City issued \$6,715,000 of the more traditional Redevelopment Revenue Bonds, and \$38,925,000 of BABS. The net proceeds were intended to constitute the \$40 million available for financing the Maritime Park development.

Also in 2009, yet another financing tool was considered and ultimately utilized, in combination with the BABS, that required a substantial transformation in the relationship between the City and the CMPA.

The New Markets Tax Credit (NMTC) program had existed since 2000, but only became a consideration at the City after former Gulf Breeze Mayor Ed Gray had formed a qualifying investment business entity that was authorized by the federal and state governments to receive and sell federal tax credits for the benefit of improving conditions in designated low-income areas. Mr. Gray approached the City with a plan that would (and did) result in \$12 million in additional moneys for the Maritime Park, which does not have to be repaid provided all federally required conditions continue to be met for the life of the NMTC local program.

The NMTC/BABS financing arrangement that was utilized for the Maritime Park was an extremely complex transaction, with the City relying entirely upon the information and advice of its special counsel, the firm of Edwards Angell Palmer & Dodge (currently, Edwards Wildman Palmer LLP) through its partners, Rick Miller of West Palm Beach and Steve Paul of Boston. A summary overview of how NMTCs function was provided to the City in August 2009. (Att. 8)

As noted in the law firm's overview, NMTC financing is of greatest benefit when the amount of tax credits available for sale to investors has been leveraged through loans of funds derived from other sources. (Att. 8, pp. 2-3) In the City of Pensacola's

circumstance, the leveraging would require combining the \$40 million derived from the sale of revenue and BABS bonds with the additional funds received from the purchasers of NMTC tax credits.

The City's plan to sell BABS bonds required that the transaction be accomplished by a governmental agency. The use of NMTC-derived funds required that the transaction be accomplished by an IRS Section 501(c)(3) qualified entity that would adhere to all of the extensive IRS regulations pertaining to the NMTC program. Since this hybrid financing plan had not been utilized before, to the City's and law firm's knowledge, the City requested a formal opinion of the law firm regarding the legality of the transaction and the requirements that must be met. The formal opinion was rendered on September 17, 2009, (Att. 9), and it stated that the transaction could proceed and would be lawful if certain changes were made and certain IRS regulations were met.

The City's special counsel opined that the CMPA must transform itself into an "instrumentality" or "alter ego" of the City itself - by amending its charter and by-laws to provide that at least a majority of the members of the Board of Trustees "must be appointed by the City and may be removed by the City without cause." (Att. 9, p. 3) The firm's opinion states:

It is our view that were the structure of CMPA such that it was controlled by the City, it would, in effect, be an instrumentality of the City and its bonds issued for the Project would be classified as governmental bonds. Further, it is our view that the status of the CMPA as an instrumentality of the City will not preclude the qualification of the CMPA as a 501(c)(3) corporation under the Code or the capacity to use NMTCs in conjunction with tax-exempt bonds or BABS under this structure.

In order to constitute an instrumentality of the City, a majority of the members of the Board of CMPA, by virtue of the terms of the charter and by-laws, must be appointed by the City and may be removed by the City without cause. Moreover, at the end of the day were the 501(c)(3) to dissolve, the assets of CMPA must be distributed to the City. Accordingly, the charter and by-laws of CMPA would require amendment and the membership in the Board adjusted in order to accomplish BAB financing in conjunction with NMTCs, as only 1/3 of the CMPA board members are now appointed by the City.

(Att. 9, p. 3)

#### 4. THE OMNIBUS AMENDMENT

In order to preserve the City's ability to take advantage of the NMTC additional funds, Mr. Gray's investment corporation was required to "reserve" a federal allocation of tax credits before the end of 2009. The City Council was presented with the special counsel's opinions, as well as a presentation by counsel and Mr. Gray, and Council voted to fund the \$10,000 reservation fee. (Att. 10, COW Memorandum of November 2, 2009)

In May 2010, the City took a number of steps to finalize and secure the NMTC funding. On May 13, 2010, the City Council adopted Resolution No. 14-10, which amended the 2009 Bond Resolution and 2006 City-CRA Interlocal Agreement and conformed them to the NMTC requirements. (Att. 11, Resolution No. 14-10 and Council Memorandum, May 13, 2010)

Also on May 13, 2010, the City Council approved an Omnibus Amendment to the Master Development Agreement and the Master Lease, drafted by special counsel for the purpose of securing the legality of the NMTC transaction as outlined in their September 2009 opinion. (Att. 9) (Att. 12, Omnibus Amendment (Community Maritime Park) and COW Memorandum, May 13, 2010) The Committee Memorandum explained that the leveraging of revenue bonds with NMTCs increased the funds available for the Maritime Park from \$40 million to \$52 million, with no increased debt burden to the City. (Att. 12, p. 4) In order to accomplish this result, the following changes were required with respect to the CMPA:

1. CMPA shall have no interest in the Private Improvements located on the Property and shall not be responsible for any costs of development, construction, operation or maintenance, including taxes and insurance, with respect to the Private Improvements.
2. CMPA shall act as agent of the City in making parcels available to the developer of the Private Improvements on terms subject to approval by the City.
3. All amounts paid by sublessees for use of the land on which the Private Improvements are situated shall be paid to the City.

(Att. 12, p. 4) The Omnibus Amendment stated, in part:

CMPA shall have no interest in the Private Improvements located on the Leased Property and, except as contemplated in the Site Improvement Project, shall not be responsible for any costs of development, construction, operation or maintenance, including taxes and insurance, with respect to the Private Improvements. It shall, instead, act as agent of the City in making such portions available to developers of the Private Improvements on terms subject to approval by the City. All amounts paid

by such developers or sublessees for use of the Private Improvements or the land on which they are situated shall be paid to the City. Except as provided in paragraph 8 below, nothing herein shall be deemed to prohibit CMPA from utilizing the proceeds of the QLICI Loans for the development of sites or building pads for the Private Improvements, or any mixed-use projects on the Leased Property.

(Att. 12, p. 7) Based on the Council's taking all of the actions recommended by the City's special counsel, the firm rendered its extensive formal opinion on May 27, 2010, allowing the closing of the NMTC transaction to take place. (Att. 13, letter dated May 27, 2010)

On April 20, 2010, the CMPA filed an amended Articles of Incorporation, providing the City with the power of appointment and removal of its Board of Trustees. (Att. 14, Second Amended and Restated Articles of Incorporation, April 20, 2010)

In early 2011, the City Council expressed an interest in learning whether the Council could remove all of the existing CMPA Trustees and appoint only Councilmembers to serve as CMPA Trustees, without jeopardizing the NMTC financing that was then in place. Special counsel rendered an opinion that the City Council could take that action without adversely affecting the NMTC financing. (Att. 15, Edwards Angell letter dated February 28, 2011)

This significant change in financing in conjunction with the Omnibus Amendment has resulted in the current governance problem.

## 5. THE CURRENT ROLE OF THE CMPA

As noted above, the role of the CMPA has evolved since the inception of the organization. Privately incorporated by three individuals, it then assumed a contractual role as anticipated developer, project coordinator and Lessee through an expanded board of trustees to include several appointed by the City Council. The Master Development Agreement expressly precluded the CMPA from serving or acting as the City's "agent" in any regard.

Since the commingling of public agency BABS funds and 501(c)(3) agency NMTCs required the CMPA to be both "fish and fowl," it was required to become the "instrumentality" and "alter ego" of the City, and transform itself into an "agent" of the City for the Private Improvements. It currently has 14 Trustees, all subject to appointment and removal by the City Council and it has had several City Council members serving on its Board.

Recently, the City's special counsel were requested to render an opinion regarding the role of the CMPA as a signatory to a proposed lease with the YMCA. Counsel responded that the CMPA can have no interest in the YMCA development, if it

takes place, and that it would execute a sublease in its capacity as agent for the City, subject to (1) the City-CMPA agreements as amended by the Omnibus Amendment, and (2) approval by the City in its absolute discretion. (Att. 16, Edwards Wildman letter dated March 11, 2013) In addition, counsel opined that since the Master Development Agreement, the Master Lease and the Omnibus Amendment control the property for federal tax purposes and were disclosed as controlling to investors, those agreements must prevail over any inconsistency with a ground sublease with the YMCA. (Att. 16, p. 1)

## 6. THE CITY'S OPTIONS FOR FUTURE PRIVATE DEVELOPMENT AT THE MARITIME PARK

The following options have been vetted by special counsel and would appear to be the only viable options:

1. A pathway for a successful sublease of the Private Improvements would parallel the process set out in the Master Lease, with modifications to reflect the changed nature of the CMPA established by the Omnibus Amendment. It could commence with a potential sublessee approaching either the Mayor, City Council or the CMPA. If the tenant/concept appeared agreeable, the potential sublessee would be directed to the CMPA. The CMPA has the authority to negotiate a lease on terms and conditions acceptable to the City Council. The Council has sole final approval authority of the proposed sublease. The CMPA has no right to deviate from whatever basic concepts are transmitted to it for negotiation. Although the CMPA has authority to negotiate the terms and conditions of the sublease, it has no legal right to disregard or change the orders of the Council. The CMPA has an obligation to execute any sublease as the agent of the City. In the event that the CMPA refuses to discharge this obligation, the City Council may remove all or any of the trustees of the CMPA and appoint replacements; or
2. Remove all the trustees of the CMPA and replace them with members of the City Council or their designees; or
3. Retain the services of a Master Developer for the Private Improvements to work with the CMPA on the negotiation of the subleases within parameters set by the City, which Master Developer would be subject to the approval of and supervision by the City and subject to existing requirements applicable to the CMPA.

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<sup>i</sup> Also, on March 27, 2006, the City and the CRA executed an Interlocal Agreement providing for the funding of municipal bond financing through use of the CRA's anticipated Tax Increment Financing (TIF) revenues in amounts necessary to generate a net \$40 million to fund the project development. (Att. 6, City-CRA Interlocal Agreement, March 27, 2006)

<sup>ii</sup> The Lease provided that if the Maritime Museum was not developed, the Studer donation would then be applied to the Public Improvement Costs.