



MEMORANDUM

To: The Honorable Mayor and Members of the Fort Lauderdale City Commission

From: Lynn Solomon, Assistant City Attorney 
Donald J. Lunny, Jr., City Special Counsel 

Date: December 11, 2015

Re: Resolution Approving New Master Lease and Conceptual Plan for Property Known as the Bahia Mar

Copy: Cynthia A. Everett, City Attorney
Lee R. Feldman, City Manager
John Herbst, City Auditor
Jeffrey A. Modarelli, City Clerk

Please find attached a Resolution approving a new Master Lease and Conceptual Plan for property known as the Bahia Mar, where the City Commission will be taking this action as a Landlord. The proposed development will remain subject to all of the City's regulatory review and approvals, regardless of the Landlord's approval of the matters explained below.

Background

Pursuant to Section 8.06 of the City Charter of the City of Fort Lauderdale, the City Commission is authorized to negotiate and approve leases for property known as the Bahia Mar without the necessity of public bid, provided that the initial term of each lease is not longer than fifty (50) years, and provided that any extension thereof will not result in an extension term in excess of fifty (50) years. Therefore, the maximum amount of time authorized for any one lease pursuant to this Charter provision is one hundred (100) years.

The existing lease for the Bahia Mar Property ("Existing Lease") was signed on September 30, 1962. In 1995, the term was extended so that the Existing Lease expires on August 31, 2062, which is approximately 47 years from now. The Existing Lease does not allow the Bahia Mar Property to be used for condominium, multi-family residential uses as principal, independent uses. Under the Condominium Act, a residential condominium cannot be created in a leasehold having a remaining term less than fifty (50) years; therefore, if the City Commission desires to allow for the redevelopment of the Bahia Mar by allowing residential condominium uses to be located on the property, a new lease will be necessary.

At the present time, the City's Lessee has asked to terminate the Existing Lease and enter into new leases so as to obtain future leasehold rights to the property for fifty (50) years, with extension privileges for another fifty (50) years, so that the property known as the Bahia Mar will be leased for one hundred (100) years.

While City Charter Section 8.06 authorizes the City Commission to negotiate the Leases contemplated by such Section, as a practical matter, preliminary negotiations are conducted under the overall supervision of the Office of the City Manager, and then presented to the City Commission for review and consideration, and any additional action the Commission may desire. As in any area where lawyers for one side or the other are "at odds", executive personnel need to resolve the disagreement to allow negotiations to continue. During these negotiations, Mr. Feldman resolved differences with respect to significant City issues.

Legal Considerations

The significant legal considerations for this matter are as follows:

1. The Bahia Mar Property will no longer be subject to one lease. Presently, the Bahia Mar Property is under one lease, such that if the Lessee defaults and the Existing Lease is terminated, the entire Bahia Mar Property returns to the City and the City may sell or re-lease all or any portion of it. The proposed new arrangement contemplates not only a Master Lease, but also, three (3) additional, independent leases for the condominium buildings (Phase 1B, Phase II, and Phase III).¹ This means that the Bahia Mar Property will be subject to four (4) independent leases which are not cross-defaulted. Therefore, if one lease is terminated while the others remain being performed, then only the portion of the Bahia Mar Property associated with the terminated lease will be returned to the City, and the City will have only such affected portion of the Bahia Mar Property to sell or re-lease. In a sense, the leasing of the Bahia Mar Property will be fractionalized. The City requested during its negotiations that the Bahia Mar Property remain subject to one Master Lease, and that the condominiums be constructed on subleased parcels; however, this request was rejected because the Lessee expressed concerns that the market conditions in this area of the City would not be conducive to sub-leasehold condominiums for the type of luxury condominiums being proposed, and because some of the investors in the development entities in the condominium portions of the proposed development may be different than the investors in the portion of the project subject to the Master Lease. If having more than one (1) lease for the Bahia Mar Property is acceptable to the City Commission, it will be important that regulatory requirements for the development entitlements associated with each lease be effectively allocated, and this should be addressed as part of the City's zoning and land development regulatory review.
2. The new lease contemplates residential condominiums as an independent, principal use. Once the residential condominiums are built, the City will then be dealing with its residents vis-à-vis default, breach, remedies, and rent collection, because when the developer turns over the condominium to each responsible condominium association, each association will become the City's Lessee. Generally, municipal corporations are not enthusiastic about enforcing transaction requirements against citizens who have a "block voice" or "block

¹ These will be finalized once the Master Lease is approved (as these leases will contain many of the Master Lease's provisions) and will be presented to the City Commission in January 2016. At one point, thirteen (13) leases were proposed.

vote”, and this may limit the City’s willingness to pursue available legal remedies in the future under the lease structure contemplated for the residential condominiums.

3. The leases do not terminate if the improvements are not built within a specific time period. Once the new Master Lease and contemplated condominium leases are executed, there is some risk the Lessees may not complete all of the proposed improvements, and if this happens, these leases will not terminate. Thus, even if the zoning entitlements expire, each Lessee’s rights under each lease would continue. The City requested during negotiations that if the proposed improvements were not built, the affected lease would terminate and the property would return to the City so that the City could keep it, negotiate a new lease with a different tenant, or sell it. This proposal was refused. The City then proposed that if the buildings were not built, the new lease would expire after fifty (50) years (which is only a few years after the date the current lease expires). This proposal was also rejected. Currently, the proposed Master Lease requires that the Promenade be completed before the Lessee can extend the term for another fifty (50) years, and requires the rent paid to the City to be increased if the development is delayed.

From a legal perspective, the continuing lease (and extension rights) will materially and practically affect the City’s ability to obtain significant value in any subsequent sale of its underlying title to the property, because generally, entitlements to a one hundred (100) year lease is viewed as the “legal equivalent” of fee simple ownership, and thus the land would not have much “residual value.”

4. The Boat Show. The Existing Lease does not contain any provisions about the Boat Show; however, the proposed Master Lease does. The Lessee’s obligation with respect to the Boat Show in the proposed Master Lease are contained in Article 36. Generally, this provision contains a lot of “forward looking” statements concerning the Boat Show, all contingent upon the Lessee renegotiating its obligations with the Boat Show operator - - which has not yet been finalized. If, and when these arrangements are finalized, the Lessee made a concession in negotiations that if the Boat Show leaves the Bahia Mar (as distinguished from leaving Fort Lauderdale) the Lessee will pay the City a \$1,000,000 penalty. The City is aware that the representatives of the Boat Show and representatives of the Lessee have been heavily engaged in negotiations for some time. Additionally, the City Manager facilitated a meeting at City Hall to allow such representatives an opportunity to continue to work on this matter. Unfortunately, the negotiations have not been completed. The following is recommended at this time:
 - a. The Master Lease will not become effective until either: (i) a new twenty (20) year Boat Show arrangement comes into effect between the Lessee and the Boat Show or (ii) the City Commission adopts a Resolution removing this requirement. This will allow the parties to continue to negotiate and if such negotiations are not fruitful, allow the City Commission to consider the efforts of its Lessee and the Boat Show representatives in determining whether the requirement should be deleted.

- b. The Development Agreement (which will be required as part of the City's regulatory review of this matter) will provide that no building permit will be issued for a residential condominium building until either:
 - (1) The Existing Lease is amended to include residential condominiums as a primary and independent use; or
 - (2) The City Commission removes the contingency in the Master Lease that the Boat Show arrangement become finalized before the Master Lease is effective.
5. Non-monetary Default. The City has no right to terminate the Existing Lease for a default which is "non-monetary" (meaning, something other than payment of rent, taxes, and insurance). The City requested in its negotiations the right to terminate the lease for a non-monetary default, and this request was denied. Being unable to terminate a lease for a non-monetary default is legally disadvantageous. The following provisions, however, have been added to the proposed Master Lease to help offset this continued negative consideration:
 - a. Provisions in the proposed Master Lease have been improved to increase the likelihood that the City would be able to obtain a Decree of Specific Performance (a Court Order) to compel the Lessee's correction of a non-monetary default; and
 - b. Provisions concerning the City's right to recover damages for the Lessee's default have been improved; and
 - c. Provisions have been added to the Master Lease to the effect that if the City cures a non-monetary default, the City's reasonable costs and expenses incurred would be "additional rent", due within thirty (30) days of invoice (which, if not paid, would allow the City to terminate for "non-payment of rent"); and
 - d. The Existing Lease's rent acceleration clause has been retained in the proposed Master Lease.
6. Development "Quality". The Existing Lease requires that the Bahia Mar be a "first class hotel marina and resort complex". What may have met this standard long ago when the Bahia Mar was built is different than what might meet the standard today. In order to use a "quality standard" that may be more comprehensive, industry specific, and fluid, the City proposed that the Hotel meet the Forbes Four (4) Star Rating and the American Automobile Association (AAA) Four (4) Diamond Rating. The Lessee's existing business arrangements are such that it was unable to agree to this standard, and the proposed Master Lease requires the hotel to maintain a Forbes Three (3) Star Rating or AAA Three (3) Diamond Rating. However, a number of new provisions have been added to the Master Lease to address "quality" of development concerns:
 - a. The new lease provides the City with much more extensive control over the Bahia Mar property as a Landlord. As the Mayor, Commissioners, and Manager know, the scope

and extent of the municipal regulatory authority over development will likely continue to change during the upcoming one hundred (100) year lease period.² Therefore, it is very important that the City have control over the Property as a Landlord. In this respect:

- (1) The City Commission will review and approve a detailed Conceptual Plan for the Site (as is proposed when the Master Lease is approved). The "Conceptual Plan" is defined in the Master Lease to be very specific. Exhibit "C" to the Master Lease incorporates all of the plans and renderings comprising the Conceptual Plan which, because of its number of pages, is being delivered separately. If material changes to the Conceptual Plan are proposed by the Lessee and they are reviewed by the City Commission before regulatory approvals are finalized, the proposed Conceptual Plan changes will be approved or not approved in the City Commission's reasonable discretion as a Landlord considering:
 - i. Nature of the proposed change;
 - ii. The advice of the Manager;
 - iii. Public comment;
 - iv. The needs of the Lessee; and
 - v. The best interests of the City of Fort Lauderdale.
- (2) Many other "landlord decisions" will require the reasonable review of the City, which has the ability to approve or deny such requests in the exercise of reasonable discretion.
- (3) Regardless of approval by the City as a Landlord, the Lessee will still be required to obtain all required regulatory approvals. By the same token, regardless of City approvals in its regulatory capacity, the City will still need to approve matters as a Landlord.³

² Indeed, in the last fifty (50) years: (i) Florida's Local Government Comprehensive Planning Acts were enacted which limit municipal discretion to approve or deny development (as now such actions – and third party suits concerning same - must be consistent with a Comprehensive Plan (which in turn must be consistent with the Plans of superior governing entities); (ii) Broward County's Charter was changed giving the County certain pre-emptive rights over municipal land use and subdivision (platting) law, and (iii) Florida's jurisprudence concerning site specific rezoning, use approvals, and other regulatory specific "policy application" decisions was changed to make these regulatory decisions "quasi-judicial" and subject to increased judicial scrutiny (and thus less municipal discretion).

³ To avoid multiple approvals by the City Commission, the proposed Master Lease provides that the City Manager may review material changes to the Conceptual Plan which have received the City Commission's prior regulatory approval; however, the Commission retains the prerogative of always approving these matters as Landlord, or making these decisions on a case-by-case basis.

Thus, if all of the City's land development regulatory authority is eroded over the next one hundred (100) years, the City's control over the quality of the development (as reflected in the Conceptual Plan approved when the Master Lease is approved) will remain and will be substantial.

- b. Extensive provisions concerning "appearance" and "maintenance" of the site and buildings have been added to the proposed Master Lease, with the proviso that if such standards are not maintained and the City cures any deficiencies, the reasonable costs incurred by the City will become "additional rent." These provisions can be found in Article 18 (for the land and building aspects of the property) and in Exhibit "I" for the Marina.
7. Rent. The amount, method, and manner of how "rent" is determined paid is primarily a "business consideration" as distinguished from a "legal consideration". However, the following should be noted:
 - a. The proposed Master Lease will contain provisions for fixed base rent, and provisions that may cause such fixed rent to be increased based on the development's performance in terms of generating "gross revenues". While the proposed Master Lease has extensive provisions as to what constitutes "gross revenues", it generally indicates that whenever the Lessee subleases space, the rent it receives will be the "gross revenue" instead of the revenues generated from actual operations. This is not the case with the sublease of the Marina however, where the gross revenues will be based on operations even if the Marina is subleased.
 - b. The Lessee can sublease to affiliates. In order to be able to ensure that rent in these cases is "fair market," the City has the right to go through a determination process to have MA1 - Appraisers evaluate the matter. While this is a practical way to address affiliate subleasing, having provisions of this type cause rent contributions to the Lease performances formula to be uncertain until the process is complete. The process could be cumbersome if a significant number of affiliate subleases come into being.
 8. General Comment on Business Considerations. Given the ability of the Broward County Office of Inspector General to investigate business decisions made by municipalities, the City Manager was advised to seek independent business advice concerning the business aspects of this transaction. Working drafts of certain lease provisions concerning rent were shared with the City's Auditor.
 9. Hazardous Materials. The provisions concerning Hazardous Materials have been improved from a practical perspective. Under the Existing Lease, the City was responsible to remediate any Hazardous Substances violations which could be traced by to have occurred prior to 1995.⁴

⁴ The City is aware of a fuel discharge prior to 1995; however, the Lessee maintains that this issue was resolved.

Under the proposed Master Lease, the Lessee is now responsible to remove all Hazardous Substances that exceed the limits as may be allowed under the Hazardous Substance laws whenever the Master Lease expires or is terminated, and regardless of when the Hazardous Substances release occurred. This would exclude, of course, Hazardous Substances that are released by the City and its employees and agents (the City will have rights to use two (2) boat slips at the Marina and stores some of its beach maintenance vehicles and equipment on the Bahia Mar property) or which migrates to the Bahia Mar property from the City Fire Station (located South of Bahia Mar).

Conclusion

The Resolution proposed approves the proposed Master Lease "Final Draft" and authorizes the document to be finalized by the Office of the City Manager and City Attorney and Special Counsel prior to being executed. Some of the legal forms referenced in the Master Lease are being finalized. While every effort was made to review electronic edits to the document that were occasioned by final business considerations, the Final Draft will likely have a few typos, or misspellings, or provisions that need further and final revisions.

One "hallmark" of a well-negotiated transaction is that neither side gets everything it requests, and certainly, such has been the case in this proposed transaction. Whether the overall development being proposed is desirable or undesirable is a policy decision for the City Commission and whether the terms of the proposed Master Lease are acceptable is also a City Commission decision.

To conclude, we would like to particularly thank Mr. Feldman, Mr. Tate and Mr. Somerstein for their efforts in connection with this matter, and we would like to particularly recognize Mr. Somerstein's assistant Susan, who exerted great efforts in trying to accurately incorporate all comments on the prior drafts of the Master Lease proposed - - often after business hours, and sometimes late at night and on weekends.

The Master Lease and Conceptual Plan are now ready for the City Commission's consideration.