

Law & Major Contracts

BOL Meeting Minutes - Final



Committee Chair: Nancy Barr

800 Michaelan Office Bldg.
148 Martine Avenue, 8th Floor
White Plains, NY 10601
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Wednesday, February 10, 2021

10:00 AM

Committee Room

CALL TO ORDER

Joint with Budget & Appropriations and Parks & Recreation committees

With a quorum present, Chair Barr called the meeting to order at 10:10 a.m.

Pursuant to Governor Andrew Cuomo's Executive Order No. 202.1, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," which temporarily suspends portions of the New York State Open Meetings Law.

A section of the order, "Suspension of law allowing the attendance of meetings telephonically or other similar services," provides for the suspension of "Article 7 of the Public Officers Law, to the extent necessary to permit any public body to meet and take such actions authorized by the law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed."

Others in attendance: LAW: John Nonna, Tami Altschiller, David Chen BOL: Legislators: Catherine Borgia and David Tubiolo; Remote: Catherine Parker, Damon Maher, Ruth Walter, Chris Johnson, Margaret Cunzio and Alfreda Williams GUESTS: Elizabeth Sacksteder

Present: Legislator Barr, Legislator Boykin and Legislator Covill

Absent: Legislator Smith

Remote: Legislator Alvarado, Legislator Gashi and Legislator Shimsky

MINUTES APPROVAL

February 3, 2021 at 10:00 a.m.

On motion of Legislator Alvarado, seconded by Legislator Covill, the minutes were approved. The motion carried unanimously.

I. ITEMS FOR DISCUSSION

[2021-153](#) ACT - Second Restated and Amended Playland Management Agreement with Standard Amusement, LLC

Mr. Nonna explained that the original agreement was signed in 2015 and revised in 2016. When George Latimer became County Executive, his

administrated reviewed all County contracts, including Playland. They issued a report in May 2018 which focused on the business, financial and legal issues with the contract, finding that Standard Amusements was in breach of the agreement. Standard claimed that the County was in breach because it had failed to meet its obligation to complete certain capital projects by a certain date. On May 28, 2019, the County served Standard with a notice of termination. However, Standard filed for bankruptcy the day before.

Ms. Sacksteder explained the proceedings in bankruptcy court. She stated that filing the Chapter 11 case the day before the termination put an automatic stay into effect, and all issues with the 2016 agreement now fall under the jurisdiction of the bankruptcy court. Standard also filed an adversarial proceeding asking the bankruptcy court to rule that Standard had not breached the agreement, or that Standard could cure the breach and keep the contract. However, this would not resolve the claim that the County was in breach.

The County moved to dismiss the bankruptcy proceeding on the grounds that it was a baseless claim used to delay the termination of the agreement, and asserted counterclaims in the adversary proceeding including misallocation of the manager's investment. The motion was denied. Legislator Barr asked why the County didn't appeal that decision, and Ms. Stacksteder explained that it was not immediately appealable in federal court, and noted that it would have been difficult to appeal in any event since the grounds for appeal were limited.

In January 2020, Standard moved for summary judgment. The judge made a preliminary ruling indicating that he would rule in favor of Standard on the breach claim. He urged both parties to try in good faith to resolve their differences. They spent the last year working out a new and better agreement. The key changes were memorialized in a term sheet, which was incorporated into Standard's amended reorganization plan. The judge confirmed the plan and approved the term sheet on December 18, 2020, noting that the difficulties in the original agreement were improved upon in the term sheet. He also noted that this modified agreement needs to be entirely consistent to the term sheet unless both parties agree and there is no material change adverse to the debtor's interest or estate. Under the plan, the agreement will not become effective unless approved by the Board of Legislators and the Board of Acquisition & Contracts. If the Board does not approve the modified agreement, it will revert back to the 2016 agreement, and Standard can move forward with its claim that the County is in breach of its contract and sue the County for millions.

Mr. Nonna reviewed the key changes. For the manager's investment, the new agreement has a provision for \$27,750,000 to be put back into the park for physical improvements, with hard and soft costs spelled out on page 19,

section 3(D). It was agreed that Standard could spend \$5 million for overhead costs (page 18). The capital plan cannot change without County approval. Most of the investment is in rides. If Standard has not spent the \$27,750,000 in 5 years, the County has the right to terminate. They also need to meet a revenue target of \$12 million for four consecutive years or the County has a right to terminate, and they cannot use weather or the economy for not meeting those targets.

Ms. Stacksteder discussed the capital plan, noting that Standard is to add in \$35 million in new money, as follows: \$18 million in attractions (\$10 Million for rides, \$7 million for Kiddieland, \$1.3 million for games); \$8 million Other Guest Experiences (\$1.5 million for landscaping, \$1.5 million for lighting, \$2.0 million for the fountain plaza); \$1.5 million in Operations (including the \$5 million for overhead) plus \$2.25 million for the Tiki Bar. Money spent in the past does not count, and overhead cannot be more than \$5 million. These projects are not designed yet, so cost is not finalized. Projects other than rides are laid out in section 6 and Ride Projects in section 14. She noted that section 6-A from the 2016 agreement, which limited the County's control, was removed, so the County has control over their own projects.

Mr. Nonna noted that under the 2016 agreement, Standard was required to pay a management fee of \$300,000, but it would not become payable until the County spent 70% on their capital projects. Now they have to pay \$300,000 the year they take over the park and \$400,000 the following year. The revenue share was based upon net revenue, which would allow Standard to inflate their expenses to reduce their net revenue. They have now agreed to use gross revenue less sales tax. In the original agreement, Standard did not have to pay a revenue share until it recouped its entire investment. That was eliminated.

The new agreement provides that Standard must keep non-gated areas open to public access. Standard can use the main parking lot in the off season for temporary attractions as long as it does not interfere with the County's needs, and permits are required. He noted that a provision in the original agreement that provides for assignment of the Ice Casino contract to Standard was removed. The operating plan dealing with fees, staffing and fee structure requires approval by the Commissioner of Parks. He noted that there is no reason why the Board cannot have a say in what happens with the Park. The provision with key personnel has been strengthened. Anyone brought in must have prior experience in running a Park, and if they do not have anyone in place Nick Singer can temporarily take over for six months.

Mr. Nonna noted that pages 27- 30 provides that any work not being done by the vendor has to be done by union labor as laid out in the agreement. The County will give Standard a list of current Playland employees by April 1st, and Standard will let the County know by June if they will retain the employees. The County will guarantee the employees their jobs and place

them elsewhere in the County.

Legislator Parker asked how the MOU from 2015 is different from the agreement. Mr. Nonna said he believes that Section 11 (page 42) implements that MOU and protects employees. Ms. Sacksteder said the largest construction project planned by Standard is the Tiki Bar, and they are required to use union workers for that.

Ms. Stacksteder stated that in the new capital plan, a new timeline was implemented. Under the old agreement, the County needed to spend a certain amount of money by a date certain. Now, completion is not based on what the County spends but what it gets done. The deadline can be extended if there is some unavoidable delay. If the delay is beyond a reasonable explanation, Standard has the right to terminate.

She also discussed termination provisions. She noted that Section 22 and Section 23 discuss breach of contract and have not changed. Section 23(b) (i) addresses the payment due if the County breaches the agreement. If this happens before the County reaches 90% completion of the County's capital projects, Standard will get back all of its all money (\$11 million) plus the new manager's investment it already expended plus 12% interest. If it happens after the County has reached 90%, Standard will get back part of the money (\$6 million) plus the new manager's investment it already expended plus 12% interest. This is the most punitive provision to the County, but Standard wanted protection against a new administration.

She discussed the new provisions on Dispute Resolution, Section 43. The parties will select a monitor who will be available to resolve quick disputes, i.e., within 30 days. Legislator Parker asked for a definition of monitor. Ms. Sacksteder said that the parties are in the process of interviewing and expect to identify a monitor before the Board votes on the agreement. Legislator Barr expressed concern that there is no definition of the monitor in the agreement. Legislator Parker said that she feels the oversight role of the Board has been minimized to a onetime event. Ms. Stacksteder said the monitor will be a person who is agreeable to both parties, and if the monitor has to step down, the parties will have to choose a new, mutually agreed upon monitor. There is also a provision for formal arbitration, which provides that the arbitrator must be either a retired federal judges or retired state appellate judge. This is a more formal track and would only apply if either party is looking to terminate.

Legislator Barr noted that we should have conversation at a later date regarding the monitor and whether the Board of Legislators should have a bigger say in who/how the monitor is chosen. Mr. Nonna said that he feels this is an internal conversation and should not be put into the agreement. Ms. Stacksteder noted they are open to questions and or statement from the Legislators.

Legislator Alvarado agreed with Legislator Parker's concerns about the

agreement. He feels that Standard has already filed for bankruptcy and is looking to see what else they can get from the County. Although he is not comfortable with the agreement, he will support the Administration's efforts to remediate a badly done contract.

Legislator Covill asked how much input the County Attorney has in choosing the monitor. Mr. Nonna said he has directed the Parks Department that if any issues arise, they should come to the County Attorney. She also asked about the time commitment, and Ms. Stacksteder said she expects it will be substantial. She noted that the money paid for the monitor will ultimately save the County in legal fees by eliminating further litigation.

Chairman Boykin concurred that the monitor discussion needs more careful probing. He asked what happens if Standards wants to sell or assign the agreement. Mr. Nonna said that we can have a deeper conversation regarding assignment at the next meeting.

Majority Leader Shimsky noted that even if this agreement breaks up in two years, it will redirect the Park in a better direction to being fixed up safely for the people who want to use it.

Legislator Walter asked if there were lawyers on the team regarding keeping land in public trust. Mr. Nonna said they did not need an expert as the law department researched the issue, and he could discuss it further in executive session. She questioned whether the County had to pay for policing at the park. Mr. Nonna said that if he misspoke before, he wanted to clarify that Standard pays for the Police at Playland.

Legislator Barr stated that she will hold over any further questions until next week when the committees meet again. No action was taken.

This ACT was tabled

II. OTHER BUSINESS

III. RECEIVE & FILE

ADJOURNMENT

Moved by Legislator Covill, seconded by Legislator Gashi, the Committee adjourned at 12:37 p.m. by the following vote:

Aye: Legislator Barr, Legislator Alvarado, Legislator Boykin,
Legislator Covill, Legislator Gashi and Legislator Shimsky

Absent: Legislator Smith