

City of Miami

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September 18, 2015

Honorable Members of the City Commission
City of Miami
3500 Pan American Drive
Coconut Grove, FL 33133-5504

Re: Audit of Bayshore Landing, LLC. for the Period August 20, 2004 through September 30, 2011
Audit No. 15-019

Executive Summary

We have completed an audit of records and selected financial transactions of Bayshore Landing, LLC (BL), primarily for the period August 20, 2004 (the date BL assumed its leasehold interests) through September 30, 2011.

In accordance with provisions of the Lease, BL's rental payments to the City should be the greater of "Minimum Annual Guaranteed Rent" (Minimum Rent) or "Percentage Rent", which is based on BL's Gross Receipts/Revenues for the immediately preceding fiscal year. We initially performed an audit of BL's compliance with Lease provisions for the period October 1, 2011 through September 30, 2013. As a result of differences in calculations of Gross Receipts and minimum rental payments, BL owed the City \$126,887 in additional rent. Prior to the conclusion of this audit, BL remitted payments totaling \$34,685, leaving a balance due of \$92,202. (See Audit No. 15-004)

During the course of our audit, BL entered into an agreement to transfer its rights under the Lease to another party; and, BL agreed to deposit \$150,000 in escrow to satisfy potential liabilities that may result from audits of prior and subsequent periods.

Consequently, we performed an audit for the period October 1, 2013 through the closing date of the transaction, and noted that \$35,255 in additional rent was due to the City for FY 2015. However, since BL transferred its leasehold interests on May 20, 2015, BL's prorated portion of this amount due was \$22,461 while \$12,794 was due from the new lessee for the remainder of FY 2015, or through September 30, 2015. (See Audit No. 15-015). Accordingly, due to BL's differences in calculations of Gross Receipts and incorrect rent payments for the period subsequent to September 2011, we deemed it necessary to audit certain transactions for the period commencing August 20, 2004 through September 30, 2011.

From August 20, 2004 through September 2011, BL made percentage rent payments to the City totaling \$6,008,545 which were based on Gross Receipts totaling \$54.6 million. It should be noted that rather than auditing the books and records of BL, we calculated an estimate of additional percentage rent due

for the period based on the results of the prior audits, since BL stated that it did not “keep records older than five years, and any records prior to 2010 simply are not available and no longer exist.”

Overall, we have concluded that **as a result of differences in our calculated estimate of additional percentage rent due totaling \$210,676, and actual calculations of additional minimum rent payments due totaling \$61,259, BL owes the City \$271,935 during our scope period.** However, after adding the amounts owed that were identified in the previous two audits (less: the previously remitted payment of \$34,685) and applying the \$150,000 escrow payment, BL owes the City **\$236,598** (See Schedule 1 on page 3).

Finally, it should be noted that as of the date of this report and after several requests, BL has not provided a written response to this report’s findings; however, in response to our recommendations that BL remit the additional rent owed to the city noted in the previous two audits, “BL disagreed with our finding that additional percentage rent is due to the City.” Consequently, this matter will be referred to the Office of the City Attorney for final resolution.

We wish to express our appreciation for the cooperation and courtesies extended to us by the BL management and accounting staff as well as the City’s Department of Real Estate and Asset Management while conducting the audit.

Sincerely,



Theodore P. Guba, CPA, CIA, CFE
Independent Auditor General
Office of the Independent Auditor General

cc: The Honorable Mayor Tomas Regalado
Daniel Alfonso, City Manager
Victoria Mendez, City Attorney, City Attorney’s Office
Nzeribe Ihekweba, Assistant City Manager/Chief of Operations
Alberto N. Parjus, Assistant City Manager
Fernando Casamayor, Assistant City Manager/Chief Financial Officer
Barnaby Min, Deputy City Attorney, City Attorney’s Office
Robin Jones Jackson, Senior Assistant City Attorney, City Attorney’s Office
Daniel Rotenberg, Director, DREAM (Department of Real Estate and Asset Management)
Mark Burns, Lease Manager, DREAM (Department of Real Estate and Asset Management)
Jose Fernandez, Director, Finance Department
Miguel Augustin, Controller, Finance Department
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Robert W. Christoph, Bayshore Landing, LLC
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Bob Toomey, CFO, Bayshore Landing, LLC
Members of the Audit Advisory Committee
Audit Documentation File

Audit conducted by: Mala Khilnani, CPA, CISA, Senior Auditor
Audit reviewed by: Lewis Blake, CPA, CIA, Audit Manager

**AUDIT OF BAYSHORE LANDING, LLC
AUGUST 20, 2004 THROUGH SEPTEMBER 30, 2011
AUDIT NO. 15-019**

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SCOPE, OBJECTIVES AND METHODOLOGY

The scope of the audit was to determine Bayshore Landing, LLC's (BL) compliance with the rental payment provisions of its Lease Agreement (Lease) with the City of Miami (City). The audit primarily covered the period August 20, 2004 through September 30, 2011 and focused on the following objectives:

- To determine whether BL reported the accurate amount of Gross Receipts/Revenue for the period October 1, 2002 through September 30, 2010, which were the basis of percentage rental payments made to the City from August 20, 2004 (the date BL assumed its leasehold interests) through September 30, 2011.
- To determine whether BL rental payments were accurate and in compliance with the Lease terms.
- Other audit procedures as deemed necessary.

We conducted this performance audit in accordance with *Generally Accepted Government Auditing Standards*. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence in order to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. The audit methodology included the following:

- Interviews and inquiries of appropriate personnel.
- Reviews of written policies and procedures in order to gain an understanding of the internal controls.
- Observations of current practices and processing techniques.
- Tests of applicable transactions and records.
- Other audit procedures as deemed necessary.

BACKGROUND

The City of Miami (City) owns a 6.70 acre waterfront site in Coconut Grove at Dinner Key, consisting of 2.14 upland (dry land) acres and 4.56 submerged acres. Bayshore Landing, LLC (BL) assumed its leasehold interest in this property on August 20, 2004. Based on the commencement date of the Lease, BL was in the 29th year of the 50 year Lease when it transferred its rights and leasehold interests to another party on May 20, 2015.

In accordance with the terms of the Lease, BL's predecessor redeveloped the waterfront property formerly known as the Kelley and the Miley Property into a full-service marina complex known as "Bayshore Landing Marina". BL provides "wet slips" and "lift slips" (where vessels are moored in and above the water, respectively) to boat owners/customers for a stipulated rental rate. In addition, BL operates a raw bar restaurant "Monty's" which is located on the ground floor of the leased premises. BL also generates revenue from the rental of "retail facilities" (retail and office space).

Based on revenues generated from the Marina, restaurant ("Monty's"), and retail facilities (Mall), BL is required to pay the City the greater of "Percentage Rent" or "Minimum Annual Guaranteed Rent", as outlined in the Lease. During the period August 20, 2004 through September 2011, BL made percentage rent payments to the City totaling \$6,008,545 which were based on Gross Receipts totaling \$54.6 million.

AUDIT FINDINGS AND RECOMMENDATIONS

From August 20, 2004 through September 2011, BL made percentage rent payments to the City totaling \$6,008,545 which were based on Gross Receipts totaling \$54.6 million. It should be noted that rather than auditing the books and records of BL, we calculated an estimate of additional percentage rent due for the period based on the results of the prior audits, since BL stated that it did not “keep records older than five years, and any records prior to 2010 simply are not available and no longer exist”.

Overall, we have concluded that **as a result of differences in our calculated estimate of additional percentage rent due totaling \$210,676 and actual calculations of additional minimum rent payments due totaling \$61,259, BL owes the City \$271,935 during our scope period.** However, after adding the amounts owed that were identified in the previous two audits (less: the previously remitted payment of \$34,685) and applying the \$150,000 escrow payment, BL owes the City **\$236,598** (See Schedule 1 below).

Finally, it should be noted that as of the date of this report and after several requests, BL has not provided a written response to the report’s findings; however, in response to the amounts due noted in the previous two audits, “BL disagreed with our finding that additional rent is due to the City.” Consequently, this matter will be referred to the City Attorney’s office for final resolution.

SCHEDULE 1

Summary of Bayshore Landing, LLC Additional Rent Due to the City

Time Period	Additional Rents Owed		Comments
FY 2004 thru FY 2011	\$210,676		Estimated Percentage Rent Due
FY 2004 thru FY 2011	61,259		Minimum Annual Rent Due (FY 2011)
	Additional Rent Due 2004 thru 2011	\$271,935	
FY 2012 & FY 2013 (Audit No. 15-004)		126,887	Includes additional minimum rent of \$61,761, and additional percentage rent of \$65,126
FY 2014 thru May 20, 2015 (transfer of leasehold interests - Audit No. 15-015)		22,461	Bayshore Landing's prorated share of additional percentage rent due totaling \$35,255
	Totals owed City before payments & use of escrow	\$421,283	
	Less: Additional Rent Paid on 1/30/15	(34,685)	
	Less: Escrow Payment	(150,000)	
	Total Additional Rent Due	\$236,598	

Details of our findings and recommendations follow:

FINDING 1: DIFFERENCES IN CALCULATIONS OF GROSS RECEIPTS RESULTED IN UNDERPAYMENTS OF PERCENTAGE RENT TOTALING \$210,676

Percentage and Minimum Rent Lease Provisions

The Lease stipulates that BL must pay the greater of “Minimum Annual Guaranteed Rent” or “Percentage Rent”. The percentage rental rate is based on the following components:

- **Restaurant (“Monty’s”)**: 8% of the annual Gross Receipts of the Restaurant up to one million dollars (\$1 million) and 10% of the annual Gross Receipts of the Restaurant in excess of \$1 million.
- **Retail Facilities (Mall)**: 10% of the annual rents received from the rentals paid by the respective retail subtenants, licensees and concessionaires.
- **Marina**: 15% of the annual Gross Receipts collected from dockage rentals for boats on the property.
- **Crab**: 5% of the Gross Receipts generated by the restaurant located on the second floor of the building.

The greater of Minimum Annual Guaranteed Rent or Percentage Rent payments are payable monthly “in advance” on the first day of each month. The amount of the Percentage Rent payable each month is equal to the aggregate totals of Gross Receipts for the Restaurant, Retail Facilities, Marina, and Crab for the immediately preceding fiscal year multiplied by the applicable percentage rates (as described above) divided by twelve.

Previous Audit Findings

During audits previously described, we performed a reconciliation of all cash deposited by BL to the Gross Receipts that should have been reported to the City in order to determine whether BL paid the correct amount of Percentage Rent. In doing so, we obtained all bank deposits and made adjustments for accrual (timing) differences with respect to accounts receivable, advance rent, and deposits in transit. In addition, we made adjustments for various items that should have been excluded from Gross Receipts including sales and use taxes collected, service charges (gratuities/tips), and other non-revenue items such as security deposits. When performing these reconciliations, we discovered a shortfall between the total reconciled Gross Receipts and the Gross Receipts that BL previously reported to the City, and noted that the differences were primarily attributed to unreported credit card fees and electricity utility charges.

With respect to the credit card fees, these amounts represent business expenses to BL and should not be used to offset Gross Receipts. With respect to the electricity utility charges, we reviewed a BL “Dockage Application and License Agreement” and noted that although boat owners are charged both a dockage fee and an “Electric Charge” for a wet slip’s electricity utility usage at the Marina, the electricity charges were not included as a part of reported Gross Receipts to the City. Rather, BL informed us that they classified the charges as “pass-through” expenses to tenants.

According to the Lease, Gross Receipts is synonymous with “Gross Sales” and includes **all income** to BL collected or accrued from all business conducted on the Property, “...Including, **but not limited to**, the rental of space, the sale of food and beverage, goods and services, **or from any source whatsoever.**” Therefore, since the “Electric Charges” are another source of income, BL was required to report the revenue obtained from the electricity utility charges as Gross Receipts.

When we compared our reconciled fiscal year 2012 (FY 2012), 2013 and 2014 Gross Receipts collected to the Gross Receipts amount reported to the City, there were short-falls of \$268,581 (or -3.5%), \$302,170 (or -3.5%) and \$308,647 (or -3.2%) respectively. We noted that the average percentage difference for the three year period was **-3.42%**.

Current Audit Procedures Based on BL's Response to Request for Records

Based on our previous audit findings that utility and credit card fee revenues were not included in Gross Receipts reported to the City for the period FY 2012 through FY 2014, we requested BL to provide us with certain accounting records to document revenues in order to conduct an audit for the period August 20, 2004 through September 30, 2011. However, BL stated that it did not "...keep records older than five years, any records prior to 2010 simply are not available and no longer exist." Also, BL stated that the City issued an estoppel letter (Letter) on March 20, 2013 that stated that BL:

"...was in compliance and current on their lease. Furthermore, since all periods prior to the most recent audits beginning October 2011 had been reviewed and audited, clearly the City of Miami had full and complete knowledge of all prior activities and agreed with their handling."

However, according to a legal opinion rendered by the Office of the City Attorney (OCA), **BL's remittance of \$34,685 and the \$150,000 escrow payment** described above:

"...waived any reliance rights given to it by the Estoppel Letter...At the time of Bayshore's payment of \$34,685.12, Bayshore had actual knowledge of its reliance rights under the Letter, yet acknowledged the balance owed both verbally and in writing, directly contradicting the Letter upon which it now relies. Bayshore's payment(s) to the City, as well as its reserving of funds in escrow for future payment, caused Bayshore to unequivocally relinquish its reliance rights..."

In response to OCA's opinion, we employed alternative auditing procedures by using the 3.42% average percentage difference (estimated error rate) described above, and calculated the estimated difference in FY 2003 through FY 2010 Gross Receipts that were the basis of percentage rent payments for the period FY 2004 through FY 2011 (i.e., **FY 2003 through FY 2010 Total Receipts x 3.42%**). The resulting percentage rent underpayment totals **\$210,676**. (See Schedule 2, page 6)

As noted earlier in this report, due to BL previously disagreeing with our findings that additional rent is due to the city, this matter will be referred to the City Attorney's office for final resolution.

SCHEDULE 2
Bayshore Landing, LLC
Percentage Rent Underpayment

Total Receipts - FY03 THRU FY10		Total
Average % rate of error		\$54,578,254
		3.42%
Estimated Difference in Gross Receipts		-\$1,866,576
Prorated Difference: Grove Raw Receipts		\$1,440,146
Prorated Difference: Crab Receipts		66,714
Prorated Difference: Mall/Retail Revenue		88,050
Prorated Difference: Marina-Dockage Revenue		271,433
Prorated Difference: Marina-Misc. Revenue		233
Difference in Gross Receipts		\$1,866,576
% Rent Per Lease		
Grove Raw Receipts	10%	\$144,015
Crab Receipts	5%	3,336
Mall/Retail Revenue	10%	8,805
Marina-Dockage Revenue	15%	40,715
Marina-Misc. Revenue	10%	23
Sub-total		\$196,894
Plus: Sales & Use Tax (7%)		13,783
Additional % Rent Underpayment		\$210,676

FINDING 2: MINIMUM RENT DUE EXCEEDED ACTUAL RENT PAID RESULTING IN \$61,259 DUE TO THE CITY

The Lease stipulates that Bayshore Landing, LLC (BL) pay the greater of “Minimum Annual Guaranteed Rent” (Minimum Rent) or “Percentage Rent”. The Minimum Rent amount is the average of the immediately preceding three years rental payments to the City.

Accordingly, we recalculated the Minimum Rent due to the City for fiscal years (FY) 2008 through 2011 and compared the Minimum Rent due to the amounts actually paid by BL during those years. Based on our analysis, we noted that BL underpaid the City in FY 2011 resulting in additional rent due to the City totaling \$61,259 (See Schedule 3, page 7 for the details of our calculations and analysis).

SCHEDULE 3
CALCULATION OF ADDITIONAL MINIMUM RENT OWED TO THE CITY
FOR FY 2011

Minimum Rent Calculations		Additional Minimum Rent Owed To City
Fiscal Year	Actual Rent Paid	
FY 2008	\$814,522	
FY 2009	884,062	
FY 2010	837,696	
Total	\$2,536,279	
3 year average - Minimum Rent	845,426	
FY 2011 Rent Paid To City	788,175	
Additional FY 2011 Rent Owed		\$57,252
	Plus: 7% Sales Tax	4,008
Total Minimum Rent Due to City		\$61,259

As noted earlier in this report, due to BL previously disagreeing with our findings that additional rent is due to the city, this matter will be referred to the City Attorney's office for final resolution.