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City of Miami Beach

F L O R I D A



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LETTER TO COMMISSION

December 5, 1989

Mayor and City
Commissioners
1700 Convention Center Drive
Miami Beach, Florida 33139

RE: **CARNER-MASON v. CITY OF MIAMI BEACH and
MIAMI BEACH REDEVELOPMENT AGENCY
11TH CIRCUIT COURT CASE NO. 85-35879**
Report of Trial and Recommendation for Appeal and Other
Actions

Dear Mayor and Commissioners:

On November 30, 1989, over four years after litigation commenced the jury returned a verdict in the amount of \$20,643,875 in favor of Carner-Mason Associates, Ltd. (Carner-Mason) arising out of their claims against the City and Redevelopment Agency for damages alleged to have been suffered as a result of alleged breaches of the lease agreement between the partnership and the City of Miami Beach.

BACKGROUND

The Lease

On June 24, 1983, the City of Miami Beach entered into a Lease Agreement (LEASE) with Carner-Mason Associates, Ltd. for a period of thirty (30) years with three ten year options for renewal. This Lease was the culmination of negotiations with the limited partnership resulting from their having been the successful proposer under a request for proposal for the development, construction and operation of a first-class marina facility on Miami Beach on Alton Road between McArthur Causeway and Biscayne Street. The Lease called for Carner-Mason to construct the piers in a relatively brief period of time due to the City's belief that if substantial construction were not commenced presently the necessary construction permits from the Corps of Engineers and State Agencies' could be lost. Almost from the inception of the

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of thirty (30) years with three ten year options for renewal. This Lease was the culmination of negotiations with the limited partnership resulting from their having been the successful proposer under a request for proposal for the development, construction and operation of a first-class marina facility on Miami Beach on Alton Road between McArthur Causeway and Biscayne Street. The Lease called for Carner-Mason to construct the piers in a relatively brief period of time due to the City's belief that if substantial construction were not commenced presently the necessary construction permits from the Corps of Engineers and State Agencies' could be lost. Almost from the inception of the Lease, there was controversy between Carner-Mason and the City with respect to the interpretation of the Lease. After the signing of the Lease Carner-Mason radically changed the proposed design of the piers, the site plan for the marina including the dry stack storage area, Core building and the proposed width of the baywalk area. These conflicts continued unabated and, as a matter of fact, intensified. One of the bench marks for this intensification came when the Redevelopment Agency had a judgment in excess of \$2.5 million entered against it and in favor of South Shore Developers Inc. (SSDI) for money loaned to it for the operation of the Miami Beach Redevelopment Agency. To secure the repayment of the loan, SSDI was granted certain options in the Marina area. Unfortunately, part of the marina site leased to Carner-Mason has been optioned to SSDI. This particular controversy lead to a great deal of negotiation cumulating in a settlement of the SSDI issue

in July of 1985. The following month Carner-Mason filed its first lawsuit against the City.

Heller Mortgage

In order to finance the construction of the Marina project Carner-Mason referred in their proposal to Flagship Bank as their lender. Ultimately though Flagship Bank refused to make the loan and a loan was granted by Heller Financial for approximately \$7.1 million. Carner-Mason never paid the mortgage payments and Heller filed its complaint in Foreclosure. Heller was successful in the prosecution of their foreclosure claim. Carner-Mason defended the Foreclosure claim not on the basis of the City's alleged breach of contract but on the basis that Heller charged them criminal usury and, therefore, they were absolved from both interest and principal payments. This position was rejected finally by the court in September, 1988 and Final Judgment was entered in October, 1989. The subsequent sale of the property was to a subsidiary of Heller Financial for \$11.3 million, while the judgment was in the amount of \$14,565,807.70.

Settlement Attempts

From February/March 1985, attempts were made on an almost continuous basis to resolve the issues surrounding the Carner-Mason claims of breaches of contract, lack of cooperation and the like. Most recently almost a year was spent in an attempt to have the Marina sold to a third-party purchaser with the City cooperating

to the extent of amending certain more onerous lease terms and providing additional funding for construction which was to have been accomplished by Carner-Mason directly. Most recently, prior to the commencement of the jury trial Carner-Mason Counsel was asked to submit a settlement demand. They would not submit a settlement demand at that time.

Post Trial and Appellant Issues

Prior to the commencement of the jury trial the court had determined by partial summary judgment, that the City had breached the lease in the following areas:

(1) (a) The Lease Agreement required the defendant, the City of Miami Beach, to obtain, in conjunction with the Miami Beach Redevelopment Agency, permits for shoreline restoration work at the marina site. Under the Lease Agreement, the defendants were required to obtain these shoreline restoration permits from the appropriate government regulatory agencies prior to June 24, 1983, the date of execution of the Lease Agreement.

(b) Contrary to the defendants' covenants and warranties in the Lease Agreement, neither the City nor the Agency had any permit for shoreline restoration as of June 24, 1983, the date of the execution of the Lease Agreement.

(c) The City and the Agency did not obtain any permit for shoreline restoration until April 1985 -- i.e., twenty two months after the execution of the lease agreement and eleven months after Carner-Mason was required to have substantially completed the Marina under the terms of the Lease Agreement.

(2) (a) The defendants breached the Lease Agreement with Carner-Mason in that contrary to the defendants' representations, warranties, covenants, and certifications in the Lease Agreement, neither the City nor the Agency had any sovereignty submerged land lease in Biscayne Bay for the waterside portion of the Marina as of June 24, 1983, the date of the execution of the Lease Agreement.

(b) The defendants breached the Lease Agreement with Carner-Mason in that the City and the Agency never obtained a sovereignty submerged land lease for the duration of the term of the Lease Agreement, i.e., thirty years plus three ten-year renewal option periods.

(c) The defendants breach the Lease Agreement with Carner-Mason in that the City and the Agency did not obtain a five-year sovereignty submerged land lease until December 18, 1984 -- i.e., 18 months after the Lease Agreement was executed, and seven months after Carner-Mason was required, under contract, to have substantially

completed the marina.

(d) The defendants breached the Lease Agreement with Carner-Mason in that the City and the Agency did not have an approved and executed twenty-five year sovereignty submerged land lease until July 25, 1986, more than three years and one month after the execution of the Lease Agreement with Carner-Mason and more than two years and two months after Carner-Mason was required, under contract, to have substantially completed the Marina.

(3) The defendants breach the Lease Agreement with Carner-Mason by cutting the width of the entire length of the Marina baywalk in half to 25 feet and conveying that strip of land to a third party, South Shore Developers, Inc. ("SSDI"), to settle a claim among the City, the Agency, and SSDI.

(4) (a) The defendants breached the Lease Agreement with Carner-Mason in that contrary to the defendants' representations, warranties, covenants, and certifications in the Lease Agreement, neither the City nor the Agency had an easement of any kind for the construction of a baywalk on the land behind Hope & Rebecca Towers as of June 24, 1983, the date of the execution of the Lease Agreement.

(b) The defendants breach the Lease Agreement with Carner-Mason in that the City and the Agency did not

obtain a utility easement for placing utilities on the property behind Hope & Rebecca Towers until July 23, 1984 -- thirteen months after the execution of the Lease Agreement and fifty-three days after Carner-Mason's contractual deadline for substantial completion of the Marina.

(c) The defendants breached the Lease Agreement with Carner-Mason in that the City and the Agency did not obtain an access easement for the construction of a baywalk on the land behind Hope & Rebecca Towers until May 7, 1986 -- more than two years and ten months after the execution of the Lease Agreement and more than twenty-three months after Carner-Mason's contractual deadline for substantial completion of the Marina.

(5) The defendants breached the Lease Agreement with Carner-Mason by failing to provide and to timely provide Carner-Mason with basic survey information concerning the Marina Site to allow plans and specifications to be prepared consistent with the contractual construction schedule.

(Court Instruction #14)

In addition at the beginning of the trial the court held that the City could not set off the Heller mortgage foreclosure sale or any portion of the Heller debt against the verdict. This issue came about when Plaintiff claimed that the Heller Mortgage represented a "Collateral Source" within the purview of the "Collateral Source Rule". This rule is generally applied in personal injury litigation and felt to be inapplicable in this case in any event. We believe that the above rulings and other rulings at trial as well, constitute a basis for post trial motions and appeal to the Third District Court of Appeals.

Towards the end of October, Sam Daniels, Esquire of the firm of Daniels and Hicks was consulted and retained to assist in the preservation of the trial record for appeal as it became clear that this case one way or another would end up in the Appellate Court. With the capable assistance of Mr. Daniels it is believed that an excellent record for appeal is in place.

Recommendations:

It is recommended that the City Commission take the following actions:

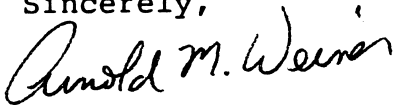
- (1) Authorize the filing of all appropriate post trial motions including motions for a new trial at the Circuit Court level.

(2) Authorize the filing of Notice of Appeal and the prosecution of same.

(3) Authorize the retaining of Sam Daniels, Esquire as Appellate Counsel.

(4) Authorize the retaining of E. Allan Farnsworth, Esquire, Alfred McCormack Professor of Law, Columbia University and author of CONTRACTS (the leading treatise on the subject in publication today).

Sincerely,

Handwritten signature of Arnold M. Weiner in cursive script.

AMW/rlw