

REAL ESTATE DEVELOPMENT ISSUES  
WITHIN THE PORT OF NEW ORLEANS

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## **INTRODUCTION**

This paper was delivered at the request of the American Association of Port Authorities, in connection with its April 2015 Port Administration and Legal Issues Seminar in New Orleans. While the program addressed real estate issues in port development generally, this presentation addressed the real estate issues in public and private development of the riparian land subject to the jurisdiction of the Port of New Orleans.

The first of three sections discusses the origin of the jurisdiction of the Port of New Orleans as a servitude or easement in favor of the public based upon La. Civil Code art. 456 and the constitutional authority granted to the Board of Commissioners of the Port to administer and maintain the Port of New Orleans on behalf of the State for its citizens. The discussion also addresses the rights of the owner of the riparian land which is encumbered by the servitude and the limitations on the exercise of those rights. The riparian ownership is relevant in order for there to be development of the riverfront for uses which go beyond traditional maritime activities such as hotels, residential condominiums, retail and so forth.

The second section gives brief examples of other governmental authorities who exercise specific and limited jurisdictions over port property and whose rules must be accommodated in any real estate development within the Port.

Most of the leases with the Port are essentially ground leases with possibly some construction obligations. The third section contains a sampling of clauses which are peculiar to leases of riparian property, such as the tenant's obligation to dredge, provide marine and pollution insurance.

# **SECTION I: JURISDICTION OF THE PORT OF NEW ORLEANS AND ITS EFFECT ON RIVERFRONT DEVELOPMENT**

## **1. THE MARITIME SERVITUDE**

Pursuant to Louisiana Civil Code Article 456, the banks of navigable rivers and streams are subject to a servitude or easement for public use. Article 456 defines the bank of a navigable river or stream as “the land lying between the ordinary low and the ordinary high stage of the water,” which may sometimes be located on a levee. The concept here is that while a river bank or levee can be subject to private ownership, the public needs to be able to access the river for a navigable right of way, to fish, to load and unload vessels, etc. The current article is a revision of Articles 455 and 457 of the Louisiana Civil Code of 1870. Article 455 of the Louisiana Civil Code of 1870 stated that “everyone has a right to freely bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.” Although the Code has been updated to remove language specifying what uses the public could exercise on the banks of rivers, jurisprudence still holds that public use is limited to “purposes that are ‘incidental’ to the navigable character of the stream and its enjoyment as an avenue of commerce.”<sup>1</sup> These public rights over private property are known as the “Maritime Servitude.”

## **2. THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS**

Though narrow, the Maritime Servitude’s real impact can be seen in the powers granted by the State of Louisiana to certain political subdivisions pursuant to which they may act on the public’s behalf.<sup>2</sup> The Maritime Servitude is the foundation of the jurisdiction granted to certain political subdivisions of the state statutorily (e.g., the ability to lease the batture, the ability to restrict construction thereon, regulate marine commerce, etc.).<sup>3</sup> A key political subdivision with jurisdiction over the river banks is the Port of New Orleans, which is governed by a Board of Commissioners, sometimes called the “Dock Board” or simply the “Port.” The Port regulates maritime commerce and traffic in the port and harbor of Orleans and Jefferson Parishes. In furtherance of the Maritime Servitude, the Port is charged with the construction, maintenance and administration of wharves, docks, loading areas, etc.<sup>4</sup> Pursuant to these powers and duties, the Port has the authority to approve any use of that portion of the bank that is within its jurisdiction.<sup>5</sup> A riparian owner may not construct improvements on its land unless it obtains approval from the Port, and this approval may only be granted when the Port has determined that the land is not currently needed for maritime commerce, navigation or other public purpose.<sup>6</sup>

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<sup>1</sup> La. Civ. Code art. 456 cmt. (b); *See State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *Lyons v. Hinckley*, 12 La. Ann. 655 (1856); *Chinn v. Petty*, 163 So. 735 (La. App. 2d Cir. 1935).

<sup>2</sup> La. Civ. L. Treatise, Property § 86 (4th ed. 2012).

<sup>3</sup> *Id.*

<sup>4</sup> La. Rev. Stat. 34:21.

<sup>5</sup> La. Rev. Stat. 34:22.

<sup>6</sup> *Id.* *See also* La. Rev. Stat. 9:1102.2; La. Const. Art. XIV, § 16.

Contrariwise, if the Port desires to develop or lease the wharves and improvements for a non-maritime purpose, the Port must obtain the consent of the riparian owner.

### **3. RIGHTS OF THE RIPARIAN OWNER**

A.N. Yiannopoulos explains:

The private ownership of the banks may be severely impaired by the exigencies of public use, but, in principle, the riparian owner retains all prerogatives of ownership that are not incompatible with public use of the riverbank. In effect, the rights of the private owner of the banks of navigable rivers are residual, and the content of these rights is determined in light of the superior claims of the general public or of the public authorities that are charged with the control and administration of the servitude of public use. The riparian owner “cannot himself enjoy the bank in such a way as to prevent its common enjoyment by all,” nor is he entitled “to be preferred over others in the use of the banks as a landing place,” but he may use the bank, “provided he does not prevent the use of it by others, as regulated by ... the Code [meaning the Louisiana Civil Code] and in conformity to the police regulations [meaning the regulations promulgated by the Dock Board].<sup>7</sup>

In order to develop a site for private purposes, the Dock Board must determine that the site is not currently needed by the public for maritime use and the riparian owner must consent to the non-maritime use in the servitude area.

The restrictive nature of the Maritime Servitude is problematic for modern mixed use development of Louisiana Port sites which have gained popularity with local governments. “One of the most important prerogatives of riparian ownership is the qualified right of the owner to build structures on the banks for the accommodation of the public or for his private use and enjoyment.”<sup>8</sup> Nevertheless, pursuant to La. R.S. 9:1102.2<sup>9</sup> once it is determined that a non-maritime use is permitted on his land, the riparian owner through its consent has control over what happens on the property, and can build his own “constructions” on the land.<sup>10</sup>

### **4. SEARCH FOR THE RIPARIAN OWNER**

Most of the land forming the New Orleans Riverfront (the “Land”) today remains in private ownership, but is encumbered by wharves under the ownership and/or control of the Port of New Orleans, pursuant to the Maritime Servitude. Accordingly, where private development of the riverfront is contemplated, the consent of the riparian owner is required. The problem is riparian ownership does not prescribe, and research often goes back to transactions more than 100 years old.

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<sup>7</sup> 4 A. N. Yiannopoulos, *La. Civ. L. Treatise, Predial Servitudes* § 11:14 (4th ed. 2014) (quoting *Dennistoun v. Walton*, 8 Rob. 211, 214, 1844 WL 1529 (La. 1844); *Town of Vidalia v. McNeely*, 274 U.S. 676, 47 S. Ct. 758, 71 L. Ed. 1292 (1927)).

<sup>8</sup> *Id.*

<sup>9</sup> This statute was enacted to authorize the development of the Hilton Riverside Complex and the Riverwalk Shopping Mall, which were the first private riverfront developments in New Orleans.

<sup>10</sup> La. Rev. Stat. 9:1102.2.

In the colonial period of the eighteenth century, the Land was divided into plantations along the river, the titles of which were granted during the Colonial Period under the French or Spanish (the “Plantations”). Because the Plantations were close to the new city and river access was a key mode of transportation, river frontage was the most valuable part of the Land. Accordingly, the Plantation dimensions were usually long and thin, often only one or so arpents<sup>11</sup> wide at the river’s edge. The riparian owner could lose or gain frontage through the accretion or dereliction of the riverbank.<sup>12</sup>

The gentrification of this land in the middle to late nineteenth century divided the former plantations and their batture into Squares, Lots, Streets, and Battures. Maps from this period show a variety of commercial and residential uses on the Land. The advent of the steam engines in the boats on the River and in the Railroads on the land promoted the growth of industrial uses of the riverfront in the early twentieth century. During the period prior to World War I, the City, with unprecedented organization, developed the current system of wharves and created its own railroad to service the wharves. More than one hundred years later, this footprint of wharves, docks, railroad tracks and roads remains in place and is what you see today. The imposition of various wharf and maritime functions on the riverfront essentially stopped conveyances of the underlying land.

In this example, the title to the Squares and the subdivided lots follows a fairly normal chain. The title to the Batture and the Streets is more complicated. In some instances the title to the Batture and/or the Streets were clearly conveyed by the then owner and in other cases it was not mentioned at all, thus the title remained in the name of the last person who acquired it.<sup>13</sup> Sometimes, it was never conveyed out of the original grantee; in other instances it followed the sale of the Lots into a modern chain of title. In still other cases, the Batture was sold separately from the Lots and remains in the most recent grantee. Often it just fell out of commerce because of the encumbrance of the Maritime Servitude.

## **5. MODERN MIXED USE DEVELOPMENT**

The Hilton Hotel project, which included the Hotel, the Riverwalk Shopping Center, and One Riverplace residential condominiums, was the first major mixed use development on the New Orleans Riverfront. Each of these properties was constructed on top of a working wharf. The law was amended to allow support structures for private developments to run through the wharves from pilings in the levee or

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<sup>11</sup> An arpent, a division of French measure, calculates to 192 linear feet or 36,864 square feet.

<sup>12</sup> La. Civ. Code art. 499.

<sup>13</sup> See *Cambre v. Kohn*, 8 Mart. (n.s.) 572 (1830); *Cochran v. Fort*, 7 Mart. (n.s.) 622 (1829): “The sale of a lot front to the river, according to a plan, which shows the front line to be within the levee, does not carry with it alluvion, provided, at the time of the sale, a batture was formed of sufficient height and magnitude to be susceptible of private ownership” (Syllabus). See also *Cire v. Rightor*, 11 La. 140 (1837); *Barbera v. Midway Land Co., Inc.*, 453 So.2d 645 (La.App. 5th Cir.1984), writ denied 460 So.2d 609 (1984).

adjacent properties to provide a foundation for the mixed uses.<sup>14</sup> The concept was that while the riparian land was subject to the exercise of the maritime servitude where it was needed, it was not needed above the wharves. Thus the riparian owner could develop the air rights above his land. This follows the provisions of the Louisiana Civil Code articles state that the owner of a tract of land owns everything that is directly above and below the land.<sup>15</sup>

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<sup>14</sup> La. R.S. 9 :1102.2

<sup>15</sup> La. Civ. Code art. 490, et seq.

## **Section II: Competing Claims of Governmental Authorities**

Through the demands of 20<sup>th</sup> Century development, control of the area moved to the public domain and became more industrial. The Land and the wharf improvements (the “Wharves”) have suffered competing claims under a variety of statutes and ordinances giving authority to the Board of Commissioners of the Port of New Orleans (the “Board”), the Public Belt Railroad Commission (“Public Belt”), the United States Government (the “USA”), the Orleans Parish Levee Board (the “Levee Board”), and the City of New Orleans (the “City”). All of these rights encumber the riparian owners’ use of the Land. Louisiana law and public policy encourages full ownership and control of a person’s real estate. Article 490 of the Civil Code states that the ownership of a tract of land carries with it the ownership of everything above and under it....., “unless he (the owner) is restrained by law or the rights of others.”<sup>16</sup> This is called the right of accession and it implies a sort of vertical concept of ownership of a piece of land including everything above and below that perimeter. At the riverfront, the rights of the competing parties fall into the exception quoted above, and rights of parties, become somewhat horizontal or layered competing for the same land. Some examples follow.

### **1. NEW ORLEANS PUBLIC BELT RAILROAD**

The New Orleans Public Belt Railroad (“NOPBR”) is a political subdivision of the City of New Orleans, much as the Port is to the State. City ordinances<sup>17</sup> created NOPBR as the public rail access to the wharves. The track runs from the Jefferson Parish line to the Industrial Canal. NOPBR enjoys servitude for a railroad track along the Riverfront. This servitude is subject to the Maritime Servitude exercised by the Port.

### **2. THE LEVEE BOARDS**

Among the political subdivisions with jurisdiction over the banks are the levee boards. The levee boards are charged with performing all acts necessary to ensure their corresponding districts are protected from damage by flood, and to ensure drainage control.<sup>18</sup> Accordingly, each levee board is granted the authority to construct and maintain levees and other related constructions.<sup>19</sup> Said authority is further broadened in certain areas, to allow for public use of the levees.<sup>20</sup> Of import, the Levee Board owns and maintains the Floodwall. The authority to open and close the flood gates is within their jurisdiction.

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<sup>16</sup> See for full text, La. Civ. Code art.490.

<sup>17</sup> Ordinance no. 2683 NCS, dated October 8, 1904, et seq.

<sup>18</sup> La. Rev. Stat. 38:306(A).

<sup>19</sup> La. Rev. Stat. 38:301(A)(1); La. Rev. Stat. 38:325(A).

<sup>20</sup> La. Rev. Stat. 38:301(A)(3). For example, in certain parishes, the levee board’s servitude includes “the construction of bicycle paths and walkways along the top of levees” to allow for the recreational use of levees.

### **3. U.S. ARMY CORPS OF ENGINEERS**

In addition to the state and its political subdivisions, use of the levee is further restricted by the U.S. Army Corps of Engineers (the “Corps”). The Corps is responsible for the structure of the levees and thus has the authority to approve any “other structure” constructed in any port, harbor or navigable river outside of established harbor lines.<sup>21</sup> Prior to building a structure on a levee or other work built by the federal government, approval must be granted by the Corps.<sup>22</sup>

### **4. HOMELAND SECURITY**

As an agency of the United States Government acting under the Office of the Secretary, the Department of Homeland Security has the authority to take control of the port of New Orleans, and the Levee Board in specific instances. The Department of Homeland Security’s largest component, Customs and Border Patrol, has jurisdiction in the vicinity. In exercise of its jurisdiction, Homeland Security installed a laser beam following the Floodwall to support operations in the event of a disaster, which beam is another servitude on the property.

### **5. OTHERS**

Several other federal and state agencies have some authority over the property, such as the environmental agencies, for example.

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<sup>21</sup> 33 U.S.C.A. 403.

<sup>22</sup> 33 U.S.C.A. 408.



### **Section III: Specific Port Lease Clauses**

#### **1. GRANT OF RIGHTS IN LEASED PREMISES.**

**A. Board's Improvements.** For the purposes of this Lease, the Board Improvements consist of: (i) the wharf surface area, the wharf face and the wharf substructure (the "(Name of Wharf)" Wharf); and (ii) the encasing wharf shed located upon the (Name of Wharf) Wharf (the "Wharf Shed") space. The Board hereby leases to Lessee certain of the Board's Improvements which measure approximately \_\_\_\_\_ square feet and are comprised of: (i) that portion of the Wharf Shed located on the downriver end of the Wharf, comprised of approximately \_\_\_\_\_ square feet of interior space, formerly known as the \_\_\_\_\_ Space ("Wharf Space"), which is improved in part with offices and other structures, (the "Buildings") and that portion of the wharf shed which encloses that portion of the interior space; and (ii) that portion of the Wharf comprised of approximately \_\_\_\_\_ square feet of adjacent wharf surface apron, and adjacent wharf face and wharf substructure located on the downriver end of the \_\_\_\_\_ Wharf in Orleans Parish, State of Louisiana (collectively the "Wharf Space"), more fully shown on EXHIBIT "\_\_\_\_\_."

**B. Board's Land.** The Board hereby leases to Lessee, the Board's Land, together with all rights, and interests appurtenant thereto, upon which a portion of the Wharf Space is located, as shown on EXHIBIT "\_\_\_\_\_."

**C. Riparian Owner's Land.** The owner of that portion of the land between the floodwall and the low water mark of the Mississippi River lying adjacent to the Board's Land and encumbered by the remaining portion of the Wharf Space (the "Riparian Owners Land"), hereby leases to Lessee, the Owner's Land, together with all rights and interests appurtenant thereto, upon which a portion of the Wharf Space is located., as shown on EXHIBIT "\_\_\_\_\_."

**D. Appurtenant Rights.** In addition to the Board's Land, the Riparian Owner's Land and the Wharf Space as defined herein, the Board also does hereby lease to Lessee any and all appurtenant rights, pertaining thereto, including but not limited to: (i) a right of vehicular and pedestrian access to and from the Wharf Space over and upon the Access Roadway (as defined in Section 5.E hereof and shown on EXHIBIT "C", connecting to the open public right of way of \_\_\_\_\_ Street and to \_\_\_\_\_ Place, and (ii) access to and from the wharf and docks which are a part of the \_\_\_\_\_ Wharf connecting to the public right of way of the Mississippi River, including but not limited to the corresponding right to dock vessels and barges adjacent to the Wharf Space which are required for Lessee's Permitted Use as defined herein below, and subject to the terms and conditions of this Lease and the provisions of the Board's Dock Department Tariff, FMC T-No. 2, which Lessee acknowledges, is available for its review online at any time

at the Board's internet site. WWW.PORTNO.COM. In the event the Permitted Use requires additional wharf frontage to dock vessels and barges, Lessee shall have the right to additional wharf frontage and access thereto, in a reasonably convenient location, subject to its availability as determined solely by the Board. (The Board's Land, the Riparian Owner's Land, the Wharf Space and the Appurtenant Rights are known herein collectively as the "Leased Premises.").

## **2. LIMITATION OF OPERATIONS ON LEASED PREMISES<sup>23</sup>**

**A.** Lessee, subject to compliance with any applicable regulations of the Board and/or its Docks Department Tariff, FMC T-No.2, shall have the right to berth research vessels and/or barges at the wharf face of the Leased Premises at any and all times during the Term of the Lease, and, shall have the right to berth any additional vessels or barges necessary for the Permitted Use at other reasonably proximate wharf locations, subject to availability and payment of all applicable charges. Additionally, if an event of *Force Majeure* or other emergency adversely affects the availability of housing for faculty, staff and/or students of \_\_\_\_\_ University, and \_\_\_\_\_ University determines, as a means of providing housing, to charter a cruise ship, \_\_\_\_\_ University shall have the right, subject to the applicable regulations of the Board and/or its Docks Department Tariff, FMC T-No.2, including payment of all applicable charges, to berth a cruise ship, on a temporary basis only, at the wharf face of the Leased Premises or elsewhere along the \_\_\_\_\_ or \_\_\_\_\_ Wharves. Notwithstanding any language to the contrary herein, this Subsection shall not be construed to conflict with the Board's maritime servitude or conflict with the business or maritime needs of the Board as determined by the Board in its sole discretion, the Board hereby reserving, at all times any and all rights to the berthing of vessels or any other such use of the Leased Premises.

## **3. SUNKEN OBJECTS AND/OR OBSTRUCTIONS TO NAVIGATION**

In the event any vessel, barge or other floating craft or equipment, including any logs or lumber assembled in rafts, or separated therefrom or any sinkable object, in the care, custody and control of Lessee, or in the care, custody and control of other persons, firms, corporations or other such entities doing business with Lessee at the Leased Premises shall sink or in any manner obstruct navigation and/or dredging in the navigable waters or mooring areas of the Mississippi River or in the navigable waters or mooring areas owned by or under the jurisdiction of Board, Lessee shall promptly remove or cause same to be removed. In case Lessee fails for any cause to so remove or cause to be removed any such sunken vessel, craft or object promptly upon demand, Lessor may remove same or cause same to be removed at the cost, risk and expense of Lessee. In the event Lessor has to discharge Lessee's obligations under this Section, Lessee agrees to pay to Lessor all Lessor's actual costs and expenses (the "Recoverable Costs") plus an additional twenty (20%) percent as compensation for discharging one of Lessee's obligations hereunder (the "Penalty"). Should Lessee fail to reimburse the Board for said Recoverable Costs plus the Penalty within thirty (30) days after written demand therefor by Board, the Board shall have the option to cancel this Lease immediately or seek such other remedies now available or hereafter given to the Board, it being expressly understood that the Board reserves the right to avail itself of any and all such remedies.

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<sup>23</sup> This is a part of that Section of the Lease on Permitted Uses.

#### **4. MAINTENANCE: DREDGING**

Lessee shall be responsible at its own cost, risk and expense for all dredging of the Mississippi River which is required for performance of the Permitted Use at the Leased Premises, including dredging along the wharf face of the Leased Premises and all navigational approaches thereto. Before any such dredging is performed, Lessee shall notify the Board and any other appropriate governmental authority that dredging is necessary. Lessee shall obtain all necessary dredging permits from the appropriate governmental authority and submit a copy of the governmental permits to Lessor and a certificate of insurance for any third party dredging company before the commencement of dredging activity. Subject to the availability and at the sole discretion of the Board, the Board may offer the use of its dredge to perform this function at the sole cost, risk and expense of Lessee.

#### **5. SPECIAL MARITIME INSURANCE REQUIREMENTS**

**A. Environmental Impairment Insurance.** Lessee and its subcontractors shall maintain Environmental Impairment Insurance with a limit of \$5,000,000. Coverage shall be for damage to environment, both sudden and non-sudden, caused by the emission, disposal, release, seepage, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquid or gas, waste materials or other irritants, contaminants or pollutants, into or upon land, the atmosphere or any water course or body of water. Such insurance shall be endorsed to include: (i) Property damage, including loss of use, injury to or destruction of property; (ii) Cleanup costs which shall include operation designed to analyze, monitor, remove, remedy, neutralize, or clean up any released or escaped substance which has caused environmental impairment or could cause environmental impairment if not removed, neutralized or cleaned up; (iii) Personal injury, which shall include bodily injury, sickness, disease, mental anguish, shock or disability sustained by any person, including death resulting therefrom; (iv) Lessor as an additional insured on a primary and non-contributory basis; and (v) Waiver of subrogation in favor of Lessor.

**B. Marine Insurance.** Prior to allowing any vessels to moor adjacent to Leased Premises or any other location authorized pursuant to Section 1(C) hereof, Lessee shall provide to Lessor a certificate of insurance, procured and maintained at Lessee's sole cost and expense, for hull and machinery insurance for the full value of any vessel or barge owned, leased or chartered to Lessee and moored adjacent to the Leased Premises or used for the Permitted Use or other purposes of Lessee. Vessel liabilities in the amount of not less than Five Million Dollars (\$5,000,000.00) including collision, wreck removal and salvage coverage to satisfy Section 6 above shall be made a part of the insurance required under this Section or shall be provided as a separate policy of insurance, evidenced by a certificate. In addition, any towing vessels used to move Lessee's barge(s) or any towing vessels owned by Lessee shall be required to carry tower's liability insurance and any vessel with crew or passengers must include coverage for crew and/or passengers liability as part of the vessel liabilities limit referred to above. Lessee shall require the owners of all vessels or barges owned by others moored at the Leased Premises with Lessee's

permission or used for the purpose of Lessee's operations to provide certificates of insurance certifying these same coverages and provide them to Lessor's risk managers.

**C. Vessel Pollution Liability Insurance.** Lessee shall procure and maintain at Lessee's sole cost and expense vessel pollution liability insurance for not less than Five Million Dollars (\$5,000,000.00) for any owned vessel or barge that are moored adjacent to the Leased Premises or used for the purpose of Lessee's operations. Lessee shall require the owners of all vessels or barges, which are moored adjacent to the Leased Premises and/or used for the Permitted Use, to provide certificates of insurance certifying these same coverages and provide them to Lessor's risk managers.

## **6. LEVEES**

In order that the Board of Commissioners of the Orleans Levee District or its legal successors (hereafter the "Levee Lessors") may carry out its obligations to construct and maintain levees (where such levees exist on the Leased Premises), Lessee agrees that the Levee Lessors shall have the right at all times to enter on the Leased Premises for the purpose of inspecting, improving, repairing, maintaining and constructing levees in such manner as the Levee Lessors may deem necessary in order to carry out the obligations imposed on it by law, and Lessee's use of the Leased Premises shall conform thereto, subject, however, to the provisions of Section \_\_\_\_ ("Condemnation"), below.

## **7. ACCESS**

Notwithstanding Lessee's rights of access previously granted to and from the Leased Premises, Lessor reserves the right to the unobstructed use of the wharf rear apron and roadway ("Access Roadway") to access its corresponding properties in the path shown on EXHIBIT "\_\_\_." Lessee shall not obstruct or in any way prohibit Lessor's use of the Access Roadway and acknowledges that Lessor's unobstructed access is required for Homeland Security and the continued security, maintenance and operations of the Port of New Orleans.

## **8. PARKING**

Lessee shall provide and supervise at its expense such vehicular parking areas within the Leased Premises as may be necessary for employees and vendors and other such business related vehicles to conduct the Permitted Use, which may include parking areas within the interior space of the Leased Premises for employees and vendors. Lessee acknowledges that the Permitted Use of the Leased Premises does not permit parking of customer and visitor vehicles, buses, shuttles or taxis. Lessee shall provide off-site parking for customers, visitors and patrons. Within six months of the Commencement Date, Lessee shall provide a written vehicular and pedestrian access and parking plan ("Access Plan") to the Lessor for its approval, which shall not be unreasonably withheld. Such Access Plan shall include, but not be limited to, employee parking

on- and off-site, customer and visitor parking off-site, customer and visitor vehicular on-site drop off plan, bus and taxi staging plan, vendor staging areas and pedestrian approach plan. In no event shall Lessee Improvements, constructions, or operations and/or events under the Permitted Use inhibit access from the intersection at \_\_\_\_\_ Street over and upon the Public Roadway and/or the Access Roadway to the \_\_\_\_\_ Wharf Shed in either direction as shown on EXHIBIT " \_ " The said Access Plan shall become a part of this Lease as EXHIBIT “ \_.”

## **9. PUBLIC BELT RAILROAD COMMISSION**

**A.** Lessee hereby acknowledges that railroad services adjacent to the Leased Premises are conducted by the City of New Orleans through the Public Belt Railroad Commission and that the Public Belt Railroad Commission was granted the exclusive right to do all the switching and like service to, from and for the lessees and occupants of Lessor's properties.

**B.** If necessary for Lessee's operations, Lessee shall be responsible for making its own arrangements for switching and like service directly with the Public Belt Railroad Commission under a conventional switchtrack agreement and to pay all costs incurred or imposed for obtaining such switching service and providing and maintaining any switchtrack facilities.

**C.** Lessee acknowledges and agrees that, if necessary for Lessee's operations, Lessee shall be responsible for making its own arrangements for crossings, and maintenance thereof, directly with the Public Belt Railroad Commission to pay all costs incurred or imposed under such agreements. Lessee agrees that nothing shall be placed within ten (10) feet of the center line of any and all tracks within the Leased Premises. Lessee agrees to cooperate fully in rail car deliveries to the adjacent terminals, if applicable.

## **10. FORCE MAJEURE**

Lessee shall not be considered in default in the performance of any duty or obligation under this Lease (except the obligation to pay rent, or to turn over insurance proceeds as required above) if such performance is prevented or delayed during the pendency of any *Force Majeure* event, but for no longer time period. *Force Majeure* shall mean acts of God, lightning, earthquakes, hurricanes, fires, storms, floods, explosions, epidemics, riots, civil disturbances, wars, acts of terrorism, or any other causes not within the reasonable control of Lessee and occurring without its fault and any civil orders of general evacuation occasioned by any of the foregoing. Any delay caused by *Force Majeure* shall not be recognized unless Lessee shall notify Lessor of such in writing within fifteen (15) working days after the event of *Force Majeure*. Lessee shall use commercially reasonable efforts to remedy the *Force Majeure* with all due diligence. Neither economic impracticality nor the inability of Lessee to perform in whole or in part for economic reasons shall constitute an event of *Force Majeure*.