

**REPORT OF THE PARLIAMENTARY
STANDING COMMITTEE ON THE PUBLIC ACCOUNTS
FOR THE FINANCIAL YEARS ENDED
31st MARCH 2009 and 31st March 2010,
AND ON THE SPECIAL REPORT OF THE
AUDITOR GENERAL ON THE MISUSE OF PUBLIC FUNDS**

TO HIS HONOUR THE SPEAKER AND THE MEMBERS OF THE HONOURABLE
HOUSE OF ASSEMBLY:

The Parliamentary Standing Committee on the Public Accounts has the honour to submit the following Report:-

Your Committee is pleased to report to the Honourable House of Assembly that we have reviewed new information that has come to our attention as it relates to our previous investigation of the Bermuda Department of Tourism, and we have deliberated extensively on the Special Report of the Auditor General on the Misuse of Public Funds as it relates to the Bermuda Land Development Company. Time has not permitted us to investigate the second part of the Special Report on the Misuse of Public Funds. Furthermore, your Committee has not, in the usual fashion, been able to investigate the Auditor General's Annual Report on the Government's Accounts for the Years 1st April 2008 to 31st March 2009 and 1st April 2009 to 31st March 2010.

Your Committee has met 13 times since our last report, and 2 of these meetings have been open to the public. The decision to have meetings in public has been a great step forward in modernizing our democracy, as there has been keen interest shown by the public. In fact, even though there was not much publicity given prior to our last meeting, our decision to use a larger, non-government venue was justified by the attendance.

In addition, your Committee has expanded the boundaries of its inquiry both in breadth as well as depth. New ground was broken as interviewees included members of the general public as well as Members of the Legislature. The collection of relevant documents was also unprecedented.

A. BERMUDA DEPARTMENT OF TOURISM (BDOT)

1. Tourism remains a critical industry for Bermuda and the handling of multimillion dollar advertising budgets requires an approach that is professional and compliant with Financial Instructions.

2. Your Committee was presented with new information provided by the former Director of Sales & Marketing - North America (DSM). This information provided further insight and perspective around the conclusions that we reached last year, namely that Financial Instructions were not properly adhered to when the advertising agency contract with GlobalHue was "rolled over" without going to tender.

3. Billings by GlobalHue to BDOT had been handled in Bermuda. The responsibility for these payments was subsequently transferred to BDOT's New York office and therefore came under the supervision of the DSM, who noticed that GlobalHue's billings did not have the relevant invoices of the media that was being purchased attached, as was required by Financial Instructions, the contract between BDOT and GlobalHue, and by US Federal Communications Commission regulations.

4. GlobalHue's payments were stopped, pending submission of proper invoices. Instead of willingly providing the invoices, documents provided to the Committee indicated that GlobalHue proceeded to try to destroy the career of the DSM, a Bermudian veteran tourism officer of 20 years.

5. The CEO of GlobalHue wrote a shockingly strident and totally unprofessional letter directly to the Premier/Minister of Tourism and Transport, containing insulting personal attacks on the DSM; thereby short circuiting the Director of Tourism and the Ministry Permanent Secretary.

6. In fact, in an email dated 21 March 2007 to the Secretary of the Cabinet from a well known public relations agency hired by BDOT, the relationship was described as "unusual" and the email also noted that "for the client to cede so much power to an individual agency, which, in this case, provides the perception - and perhaps the attitude - that it is the agency that is leading the client, rather than the opposite." Based on the evidence presented, your Committee concurs with this statement.

7. The direct access to the Premier/Minister of Tourism and Transport gave GlobalHue the licence to ignore established protocols. This relationship is the perspective from which the breaches in Financial Instructions must be viewed.

8. The GlobalHue letter to the Premier/Minister of Tourism and Transport would have catastrophic consequences for the DSM, who revealed that he was later offered a job with the title 'Director of International Development' (DID), and that the job offer was printed on GlobalHue letterhead. He was unsure at the time if this job was to be with

BDOT or GlobalHue, and he concluded that he was being shunted aside out of his DSM post to one which would soon evaporate.

9. The post of DID turned out to be a government position. Although approved by the Cabinet, it was a temporary position, with no job description nor any place in the BDOT management structure being specified.

10. The DSM testified that tremendous pressure was applied on him by senior Ministry officials to take the position of DID and he was told that he could "name his price." An email, sent by a senior Ministry official, criticizing the DSM for not taking the DID position was apparently erroneously copied to DSM, thereby adding to the pressure. The DSM declined the position and resigned from the department a few months later.

11. Evidence presented to your Committee showed that the civil servants' responsibilities were over-ridden by the Premier/Minister of Tourism and Transport and GlobalHue. The evidence also showed that Financial Instructions were not adhered to. Under these circumstances, value for money for the public purse was not likely achievable.

12. Your Committee is appreciative of the testimony and evidence provided by the DSM.

13. **Your Committee recommends** that the Civil Service Executive be reminded that inappropriate interference by any outside agents in the work of civil servants contravenes Financial Instructions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

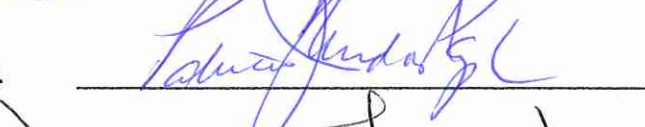
Mr. Everard T. Richards, J.P. M.P. - Chairman



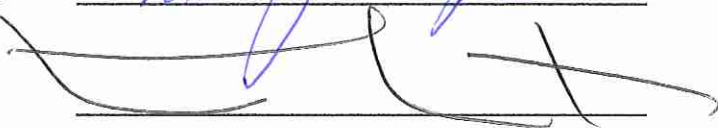
Ms. Lovitta F. Foggo, J.P. M.P.



Mrs. Patricia J. Gordon Pamplin, J.P. M.P.



Hon. Walter M. Lister, J.P. M.P.



Dated: 20th July, 2012

B. BERMUDA LAND DEVELOPMENT COMPANY

1. In the Auditor General's Special Report on the Misuse of Public Funds, one of the principal matters that was highlighted was an incident whereby the Chairman and Deputy Chairman of the Board of the Bermuda Land Development Company (the Company) entered into a paid consultancy arrangement with the Company to investigate and report on certain Company matters, with the report to be presented to the Board. The Auditor General found this arrangement to be highly irregular and a breach of the Chairman and Deputy's fiduciary responsibilities.

2. In testimony before the Committee, both the Chairman and Deputy repeatedly claimed that they had been given a directive (or directives) to carry out this consultancy arrangement by the Minister of Public Works (the Minister). They agreed there was an urgent need for their intervention and felt that they were therefore justified in their actions. Moreover, they testified that they provided value for money and that the position taken by the Auditor General was incorrect. The findings of your Committee are set out below.

(A) THE DUTIES OF DIRECTORS

1. The Chairman and Deputy have used as their defense to the Auditor General's assertion of conflict of interest, the position that the Bye-Laws of the Company did not prohibit them from engaging themselves as consultants. If one considers the Company to be an ordinary Bermuda company, this may be valid.

- The Company was created by The Base Lands Development Act 1996 (the Act). Section 5 of the Act refers to, "...creation of opportunities for increased employment now and in the future...in furtherance of the well being of the present and future generations of Bermudians." These are very public sector objectives, not private sector objectives.
- But Section 6 says the Company, "...shall not be regarded as the servant or agent of the Crown or as enjoying any status, privilege or immunity of the Crown."
- However, in Section 14, government specifically indemnifies directors of the Company against liabilities and legal costs so long as they have, "...acted honestly and in good faith with a view to the best interest of the Company."
- Section 12 provides that the Minister may give directions to the Company, "...and the Company shall out carry any such directions."

2. Normally company bye-laws are the arbiters of the conduct of business within a company, but the Company is no ordinary company.

- The fact that the Auditor General (the constitutionally appointed auditor of the entire public sector) has been specified as its auditor makes the Company unusual.
- The fact that the Minister may issue directives clearly establishes that there is an authority higher than Company bye-laws. The ultimate arbiter is the Minister. In a commercial company the Board would be the ultimate arbiter, operating under the aegis of the bye-laws. But here the bye-laws are silent on the conflict of interest issue.
- But the Act also establishes that the Company is essentially a part of the public sector, despite Section 6.
- Section 14, which says government indemnifies directors that have, "...acted honestly and in good faith with a view to the best interest of the Company," is key to this case. This clearly implies that government, the sole shareholder, **EXPECTS** directors to act this way; that it is **THEIR DUTY TO ACT IN THE INTERESTS OF THE COMPANY ONLY**. The "Final Recommendation" in the consultancy report prepared by the Chairman and Deputy (dated April 2010) was, in effect, to continue the consultancy arrangement, presumably at the already established hourly rate, for yet another six months to "monitor the CEO"; an extension of the arrangement that was not brought before the Board. And this recommendation was, in fact, carried out.

3. The question is, have these directors acted in, "...good faith with a view to the best interest of the Company?". At the very least, one could say that this consultancy arrangement represented a profound conflict between their own interests and the Company's interests. This was the same conclusion arrived at by the Auditor General.

4. During the conduct of our deliberations, it was also revealed that the Company had engaged and signed a painting contract (valued at \$24,897.50) with an assigned contractor. The Deputy Chairman instructed the CEO to terminate that contract, and give the contract to a company operated by the son of the Chairman. The CEO refused, on principle, but he was overruled and the switch was consummated. The subsequent contract with the Chairman's son's company was for \$31,630.00, and there was an additional request to apply another finish coat at a cost of \$6,600, for a total of \$38,230. The originally assigned contractor filed suit against the Company. The matter was settled out of court in June 2011, with the Company having to pay \$9,500 including \$1,000 for legal fees. Thus, the total cost for this project including legal costs escalated to \$47,730; that is \$22,832.50 or 92% more than the originally assigned contract.

5. These anecdotes caused your Committee to question whether the Chairman and Deputy were acting "...honestly and in good faith with a view to the best interest of the Company." The incident of granting the painting contract to the company operated by

the Chairman's son also contravened Financial Instructions, the tenets of fairness and good governance, and was a clear misuse of taxpayers' money.

(B) THE MINISTER'S ROLE

1. The Base Lands Development Act 1996 sets out the relationship between the Company and the Minister. The Minister may give directives to the Company and the Company must follow them, however:

- the other shareholder, i.e. the Minister of Finance, must give **prior** consent to said directives;

- the Company must confirm to the Minister, in writing, that the directive has been carried out; and

- the written text of "every directive" given by the Minister must accompany the Company's financial statements, which have to be laid in the House of Assembly.

2. It is clear from the above that the Minister's power to direct is one to be used strategically, or in special or extraordinary circumstances. The rules that govern the use of the power to direct are deliberately cumbersome so that this power should not be used for routine management of the Company's affairs.

- In correspondence to the Minister, the Permanent Secretary for Public Works and the CEO of the Company dated 30 December 2010, the Minister of Finance stated that she had no prior knowledge of the consultancy arrangement, and took action.
- It is also clear that the power of the Minister to direct cannot be used orally, as the text of every directive must be appended to the Company's financial statements.

3. During the conduct of a public hearing, the Minister dismissed the constraints on his authority. He did not appreciate his role as Minister and the appropriate use of his power to direct as laid out in the Act. He explicitly testified that he gave frequent oral operational orders and claimed there was no other way to run a company. The Minister testified that "it was in his remit to issue operational directives to the BLDC." Your Committee determined that he conducted his role as an "executive chairman" rather than the role envisaged by the Act, which could be described as "oversight by exception."

4. Although it is the Act that prescribes his powers and their limitations, the Minister did not appear to be familiar with the Act, having emphatically stated once that he had not read it, although later admitting that he had. He felt he had the discretion to ignore the Act if impractical, and further stated that the requirement for written instructions specified in the Act "should not be taken literally".

5. Both the Chairman and Deputy testified that the Minister gave them multiple oral directives which were never subsequently put in writing. A letter signed by the Permanent Secretary for Public Works authorizing the consultancy retrospectively (one year later in February 2011), confirming that the Minister had authorized the Company to engage the services of the Chairman and Deputy, clearly does not meet the requirements of the Act. This was an ineffective attempt to address the irregularities that the Auditor General had uncovered.

6. Furthermore, the Minister neither sought nor received prior approval from the other shareholder, the Minister of Finance, as per the Act. Section 12(2) of the Act states that before the Minister gives a directive to the Company, he shall consult the Minister of Finance and the Directors with respect to the content and effect of the directive. Therefore the directives given to the Chairman and Deputy were not valid under the Base Lands Development Act 1996. This is a fundamental issue which supports the Auditor General and the Minister of Finance's recommendation that the funds paid to the Chairman and Deputy be repaid to the BLDC. Not only does this issue represent a conflict of interest, it also speaks to a misuse of public funds.

7. Your Committee took note of four other ministerial directives in the preceding year which were not in compliance with the Act, as reported by the Auditor General to Senior Management on 21 September 2010. These directives all related to the use of land and other property on which the Minister of Finance was never consulted by the Minister, and speak to a pattern of behavior inconsistent with the requirements of the Act.

8. It is interesting to note that the Minister of Finance, once notified of the Auditor General's concerns on 21 December 2010, subsequently commissioned an external accounting firm to undertake a review of the BLDC's Governance. That review was completed in May 2011 and confirmed that "the Chairman, Deputy Chairman, Board members and Permanent Secretary of the Ministry of Public Works indicated that the work performed between May and December 2010 was done at the verbal request of the Shareholder [the Minister of Public Works]."

9. As the most senior officers of the Company, the Chairman and Deputy should have known that oral directives were not valid unless they followed the requirements of the Base Lands Development Act 1996, for which they, along with the Board, were responsible. Like the Minister, the Chairman and Deputy did not appear to be familiar with the Act and the rules governing their conduct contained therein.

(C) BLDC CODE OF CONDUCT

1. The Company set out a Code of Conduct in 2002 which clearly stated "Directors and Employees must avoid conflicts of interest between their private financial activities and the conduct of BLDC business". However, this Code was amended in January 2008

and instead of referring to Directors and Employees the term "members" was used. While the term "member" is not defined in this context, the balance of the document referred repeatedly to employees, so one could surmise that "member" refers to employees only.

2. Your Committee could find no evidence that the Chairman or Deputy Chairman sought to clarify what was meant by "members" prior to undertaking the work referred to herein. The Code was subsequently updated again in 2010/11 to once more specify Directors, after the matter was reported by the external accounting firm.

(D) DID THE CONSULTANCY PROVIDE THE COMPANY WITH VALUE FOR MONEY

1. The question of value for money hinges on the circumstances surrounding the problems besetting the Company; the qualifications of the Chairman and Deputy to professionally address the problems; and what they accomplished for their time spent.

2. It is clear that the Company had significant problems, particularly with collecting its receivables. The CFO position had been vacant for three years and testimony was given to the Committee that the Minister had refused, on more than one occasion, to allow the Company to retain a full time CFO, even though that position had long been provided for in the Company budget. Moreover, the Company CEO's effectiveness had been compromised a year and a half to two years before the consultancy started, due to severe illness.

3. The Act allows the secondment of civil servants to the Company. However, in his testimony the Chairman testified that the Company did not formally seek the secondment of a civil servant to fill the gap in the management structure of the Company. The CEO testified that he requested that the Company fill the vacant CFO position multiple times but was refused by the Minister, although he claimed such a move had the support of the other shareholder, the Minister of Finance.

4. The directive of the Minister for the consultancy work was not put in writing; neither were the terms of reference for the work to be done by the Chairman and Deputy. In fact, the Board retroactively approved payment and hourly rates for these two officers after a considerable amount of time had already been billed. The consultancy carried on well past the time the Board had authorized. Clearly, the consultancy was not properly authorized by the Board as there was no quorum at the meeting of 23 March 2010, when the arrangement was approved with only two Directors being present.

5. Having determined the backgrounds of both the Chairman and the Deputy, via their own testimony, it does not appear that either separately or together they would have qualified as management consultants for an undertaking of this nature. While both

had considerable real world experience in their respective fields, neither had any experience in analysis or reporting on management structures and solutions. Moreover, the rates they charged the Company were comparable to consulting management professionals, which they were not.

6. While there appears to have been a litany of issues with respect to the operations of the Company, the one stressed the most was the ballooning and aging Accounts Receivable. The Minister himself intervened in an attempt to get a major receivable regularized, and some progress on receivables was made by the Chairman and Deputy. However, the recruitment of a new CFO may have been a better solution to this problem.

(E) FURTHER OBSERVATIONS

1. The Bermuda Land Development Company is a Quasi Autonomous non-Government Organization (a Quango), and is not an ordinary company. Quangos carry out public sector functions and therefore are subject to the same scrutiny and oversight as any other part of the public sector. The directors of a private company could very well be its owners, in which case the interests of the company may be congruent with those of the directors. But with a Quango this is impossible, hence the importance of the separation of the interests of directors from those of the Quango.

2. In the case of the Company, it appears that all the players, except for one director, completely ignored this key distinction between personal interests and the Company's. This error of judgement was made more egregious by the refusal of the directors to acknowledge their mistake, instead, conveniently making repeated references to the Company bye-laws and failing to look up the authority ladder to the Act which makes clear reference to conflicts of interest.

3. **Therefore, your Committee's first recommendation** is for government to make the personnel it appoints as directors of Quangos aware of their legal duties and responsibilities, with particular reference to the canons of conflicts of interest. This is consistent with the recommendation made by the Auditor General.

4. The behavior of the Chairman and Deputy in this matter appears to be derived from their perception that they had been given a valid directive by the Minister to address a real problem. It was their duty to know the rules under which that Minister was empowered to give those directions and that he did not adhere to those rules. Given that the Minister's directives were invalid, it was their duty to know that.

5. As a minister of the government, the Minister must know the conditions and limits under which the law grants him power. The Minister also must know his role is not to micro-manage assets or enterprises under his charge. In this case, it is clear his power to direct was meant to be used strategically as opposed to casually or routinely. The

Minister did not appear to know his appropriate role nor the constraints of his power to direct. He used his power routinely and orally.

6. The Minister, in his testimony, confirmed that he gave the Chairman and Deputy instructions to carry out the investigation, but that he had not specifically authorized them to receive remuneration as consultants, saying that was the Board's decision, even though he agreed with the Board's right to do so under the bye-laws, citing the legal opinion provided by a private law firm. Your Committee noted that the stated legal opinion was not given until after the December 2010 objections by the Auditor General to the consultancy arrangement had been made known to the Company. So the time line does not support the Minister's testimony suggesting that the legal opinion empowered the Board to engage in the consultancy arrangement. The legal opinion was obtained ex-post facto.

7. The Minister testified that he found out about the consultancy agreement from the other shareholder, the Minister of Finance, in December 2010. However, the Minister had access to Board minutes which explicitly discussed the arrangement on several occasions. In view of the hands-on role the Minister had taken with respect to the Company, your Committee questions how he missed the fact that his Chairman and Deputy, whom he directed to perform the investigation, were receiving consultancy remuneration.

8. Your Committee heard evidence that the Minister also used his power of influence to inappropriately give unfair advantage to a political colleague as it relates to the leasehold of a Company property. The Committee was also apprised of another incidence of the Minister's intervention in insisting that a carpentry shop have its rent reduced and unpaid rents written off.

9. While the Chairman and Deputy cannot be absolved of their responsibilities in this matter, the root cause is the manner in which the Minister executed his responsibilities relative to the Company, a manner that encouraged this inappropriate behavior.

10. In his testimony, the Minister complained that the matters in the external accounting firm's report should have been raised with him by the Auditor General. However, your Committee reviewed evidence that standard procedure had in fact been adhered to by the Office of the Auditor General, which included the provision of a Management Letter to the senior management of the Company (and a copy of the said letter to the Chairman of the Board and the Financial Secretary) outlining issues of concern that were uncovered through the annual audit. Your Committee could not determine whether any action had been taken in response to these concerns.

11. It should also be noted that correspondence between the Auditor General and the Company, when this matter was uncovered, was copied to the Minister, the Minister of Finance and the Director of Internal Audit - most notably correspondence dated 22 December 2010, 31 December 2010 and 27 January 2011. A copy of the

applicable section of the draft Special Report was also submitted to the Ministry for a response before the final document was produced and released. This is standard procedure. The Ministry of Public Works later responded to the Auditor General, with a copy to the new Minister of Public Works.

12. The Minister testified that because the CFO position was vacant he initiated the investigation to determine what needed to be done at the Company. Your Committee concluded that by filling the vacant CFO post the Company could have not only found out what the problems were but also had them rectified.

13. The Minister refused to dismiss the Chairman and Deputy when instructed by the Premier and Minister of Finance who, as the other shareholder, on becoming aware of the situation, immediately deemed the situation as unacceptable and sought to have it rectified.

14. Your Committee fully subscribes to the principle that those responsible for these breaches in fiduciary responsibility be held accountable. As indicated above, the Minister neither sought nor received prior approval from the other shareholder, the Minister of Finance, as per the Act. His directives were not in writing and not reported to the House of Assembly as per the Act. Therefore, the directives given to the Chairman and Deputy were not valid under the Base Lands Development Act 1996. Moreover, the Board meeting at which the matter was discussed was not properly constituted. The Committee supports the Auditor General's recommendation that the funds paid under the consultancy be refunded to the Company forthwith.

C. CONCLUSION

1. **The second recommendation of your Committee**, consistent with the recommendation of the Auditor General, is that ministers make themselves fully aware of their role as it relates to Quangos and the limitations and conditions under which their power can be exercised. Ministers should then operate within the strict parameters the law provides. A minister of the government cannot decide which laws to abide by and which ones to flout, at his discretion. As members of Cabinet, ministers, more so than ordinary citizens, must abide by the law.

2. Your Committee would like to extend its sincere gratitude to the Deputy Clerk to the Legislature, Mr. Clark W. Somner, in recognition of his tremendous sterling work done on behalf of the Committee throughout the past year. Also, we must acknowledge the excellent advice and support provided by the Auditor General, Mrs. Heather Jacobs Matthews, and her professional Staff during our deliberations, without which the Committee would not have been able to expand its reach on behalf of the taxpayers of

Bermuda in the way it has this past year. We would also like to thank MG Court Reporting & Transcription Services for their support in our public meetings.

3. **Your Committee recommends** that the Minister of Finance be requested to inform the Honourable House of Assembly of the action to be taken on the points raised in this report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Mr. Everard T. Richards, J.P., M.P. - Chairman

Mrs. Patricia J. Gordon Pamplin, J.P., M.P.

Hon. Terry E. Lister, J.P., M.P.

Mr. N.H. Cole Simons, J.P., M.P.

Dated: 20th July, 2012