



## **Management of the silting up of the outer harbor and its memorandum of understanding**

Following bad weather in November 2011 (floods and mudslides), a sandbank, whose volume was estimated at 30,000 m<sup>3</sup>, formed between the mouth of the non-state-owned watercourse " La Giscle" and the entrance pass to the port of PORT-GRIMAUD, in its part located outside the concession.

Although indicated by regulatory markings set up by the municipality, the positioning of this sandbank varies according to bad weather and currents, in fact constituting a real danger for entering and leaving the harbor since it obstructs the unique access to the sea for boaters.

Considering that the burden of dredging this part of the port was not theirs, as it was located outside the perimeter of the port concession, the concessionaires have always refused to carry out the dredging work necessary to restore navigability in this area, despite the dangerous situation for the boaters.

However, at the meeting of the Local Nautical Commission held on April 16, 2012, Ms. SELLIER, Deputy Director for the Sea and Coast, did not fail to remind that despite the public domain of the funds (domain of the State), the sand removal works remain the exclusive responsibility of the users of this common space.

This analysis was confirmed by two legal consultations carried out in October 2012 and in June 2016, at the request of the Municipality, by the Law Firm GENESIS, concluding that: the maintenance obligations of the concessionaires extend beyond physical limits of the concession, because the outer port area is inseparable from the operation of the port itself (user-pays principle).

On the basis of this observation, and in the absence of consensus with the concessionaires, the Municipality requested on its own initiative, the appointment of a judicial expert to the Administrative Court of Toulon, with the aim of obtaining clarifications. additional information on the origin of the disorders and potential liabilities. Contrary to what has been said and written, the municipality has never been put on notice on this point. This "referral-expertise" procedure was introduced on June 18, 2013.

The conclusions issued on December 19, 2017 did not live up to expectations. The opinion expressed by the expert is limited to recalling that the silting is the result of natural phenomena (terrigenous contributions from the Giscle, silting up of the mouth of the Giscle and silting up of the entrance pass to the port) without specifying the management of disorders.

At the same time and for safety reasons, given the risk of bottoming out resulting from the presence of this bench, several dredging operations were carried out by the Municipality between 2014 and 2017, after obtaining the required authorizations, in order to ensure the navigability of the access channel to the port perimeter.

After several years of unsuccessful discussions, the concessionaires finally agreed to the principle of financial participation in the dredging work, in return for an extension of the duration of their concession.

Although the law bases the principle of "non-extension of concession contracts", this is however authorized, by way of derogation, in the cases expressly listed by the provisions of articles L.3135-1 and R.3135-7 of Public Order Code.

Under these dispositions that the Article 6 of the Memorandum of Understanding modified in a non-substantial way the duration of exploitation of each concession as follows:

- SPA city lake PG1: operating period extended from 2025 to 2030
- ASL Port Grimaud 2: operating period extended from 2025 to 2030
- SNPG: operating period extended from 2028 to 2033

To reach the drafting of this protocol, it is a real "way of the cross" that was imposed on the Municipality by the concessionaires, in order, in the end, to refuse to sign it.

Coming back on long-term instruction with multiple episodes:

A first meeting was held between the Municipality and the concessionaires on December 12, 2016, in order to recall the obligations of each of the parties, the estimated cost of the work still to be carried out, the provisional implementation phasing, the proposed financing method and its possible impact on the extension of the duration of the concessions.

A second meeting was held on May 24, 2017, in the presence of all the concessionaires and the CISMA Environnement firm (assisting the Municipality in defining the dredging work program). It allowed to specify the technical and financial elements of the file and to confirm in particular the principle of shared financing between concessionaires of the cost of the works, the cost of which will be distributed on the basis of the number of rings operated by each one.

This agreement in principle was unanimously confirmed by the members of the Port Council meeting on July 12, 2017.

Pending the initiation of the concession contract revision procedure necessary for the formalization of this agreement, the parties decided to enter into a memorandum of understanding setting out:

- the cost of dredging works carried out by the Municipality in the outer harbor area since November 2011 (696 684, € 15 including tax);
- the cost and phasing of the dredging work remaining to be carried out in this same area (€ 549,600 including tax);
- the method of contribution to the payment of the work and costs incurred by these intervention programs (distribution by number of rings, reimbursement schedule), and to extend this participation to all future work and ancillary costs made necessary to ensure the navigability of the area;
- the lengthening time of the current concession contracts (5 years) resulting from this additional investment effort which will take place by way of amendment.

For this purpose, the parties undertake to conclude an amendment to the on-going concession contracts to include this obligation to dredge the outer port area and thus maintain continuous access to the public port of Port Grimaud.

This draft protocol was sent to the concessionaires on November 08, 2017, before presentation for opinion to the Port Council and deliberation of the Municipal Council.

At the Port Council which took place on February 20, 2018, the President of PG2 indicated that the concessionaires were "in favour at 99% to the terms of the Protocol and that the remaining 1% was to be discussed". To this end, he proposed "to send a note to the Commune, recapitulating the points on which the concessionaires were still in disagreement".

On March 07, 2018, the Municipality received a note by which the President of PG2 questions the substantive clauses of the Protocol (duration, cost, distribution of charges, years of renewal, title of the contract). Given the level of disagreement noted, the Municipality interrupted negotiations and communicated its decision to the concessionaires by letter of March 30, 2018.

At the request of the representatives of the ASP of PG1 and the SNPG, the Municipality resumed discussions during a meeting held in town hall on July 17, 2018. However, noting the lack of consensus on the proposed project, the Municipality informed the concessionaires, during the Port Council of December 11, 2018, that it would limit itself to carrying out, in 2019, a security dredging operation intended to facilitate navigation in the outlying area outside the concession.

At the same meeting, it was suggested to the Municipality to sign the Protocol with the favourable parties, namely PG1 and the SNPG. A meeting was held in this regard in Town Hall on February 21, 2019 with the two dealers concerned. Nevertheless, PG2 having been informed of this meeting, informed the Municipality, by email of February 26, 2019, of its willingness to remain open to any discussion.

In order to hope for a positive outcome of the case and definitively close this case, the Municipality has drawn up a new draft Protocol incorporating the griefs of the parties and the text of which was submitted to the three concessionaires, by letter dated March 29, 2019 (deletion the obligation of the concessionaires to ensure the maintenance of the out-of-concession outer port area, although intrinsically linked to the operation of the port; cost of transporting the dredged sediments and recharging of the gummed public beaches of the amount of charges to be shared between the parties).

Taking into account the new remarks made, a new meeting was held in Town Hall on May 22, 2019, at the end of which new modifications were made to the draft Protocol (change of terminology, in particular concerning the notion of outer harbor...).

It was on the basis of this draft, which provided for the following points, that the dealers were asked to give their opinion before June 30, 2019:

- the cost of dredging operations carried out by the Municipality in the outer harbor area since November 2011 (updated to € 652,656.15 including tax);
- the cost and phasing of the dredging work remaining to be carried out in this same area (updated to € 413,730 including tax);
- the method of contribution to the payment of the work and costs incurred by these intervention programs (distribution by number of rings, reimbursement schedule), and to extend this participation to all future work and ancillary costs made necessary to ensure the navigability of the area;
- the length of the current concession contracts (5 years) as resulting from this additional investment effort which will take place by way of amendment.

Once again and like a never-ending story, the three concessionaires issued new observations on this latest version (replace the term “public port” by “marina”, mention the lapsing of the commitments made in the Protocol at the end of the concession, decision of general meetings, etc.).

The Municipality told them that they no longer understood this new refusal to sign, apprehended as ill will on their part, which is now indisputable.

Consequently, exchanges between the Municipality and the concessionaires were again interrupted. The PG1 ASP subsequently signed the draft protocol sent by mail on July 24, 2020. The Municipality, wishing for a global agreement, did not wish to enter into a contract.

At the same time, a technical, legal and financial audit of the port concessions was initiated by the Municipality (contract award on January 28, 2019) with a view to proceeding with the closing operations of the concessions in progress. The audit began in April 2019 and the conclusions were returned to the Municipality in December 2019 - January 2020. The service provider worked on the basis of documents provided by the municipality and in part by the entities de Port Grimaud, since many requests for parts went unanswered.

Nevertheless, the presentation of the results of the audit in front of the concessionaires has not been done before December 11, 2020, due to the health crisis linked to the Covid-19 epidemic and the delay it caused in the in place of the new municipal councils resulting from the elections of March 2020.