

Simrat Dhadli

From: Shimko, Anna C. <AShimko@bwsllaw.com>
Sent: Thursday, October 18, 2018 5:26 PM
To: Young, Joshua; Sekhri Neil; Steve Eimer (seimer@related.com); 'Hart, Gordon E.'
Cc: Deanna Santana; Brian Doyle; Manuel Pineda; Ruth Shikada; Kartiganer, Deborah L.
Subject: City Place -- Response to September 24 Force Majeure Letter
Attachments: ACS Response to JY and NS 10-18-2018.pdf

Please see the attached letter.

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October 18, 2018

VIA EMAIL AND U.S. MAIL

Related Santa Clara, LLC
c/o The Related Companies, L.P.
60 Columbus Circle
New York, NY 10023
Attn: Joshua Young

Gibson, Dunn & Crutcher LLP
555 Mission Street
San Francisco, CA 94105
Attn: Neil H. Sekhri, Esq.

Re: Response to Letter Dated September 24, 2018, Regarding Force Majeure Events Under That Certain Disposition and Development Agreement dated August 12, 2016 (the "DDA"), by and between the City of Santa Clara (the "City") and Related Santa Clara, LLC ("Related")

Dear Josh and Neil:

The City is in receipt of Neil's September 24, 2018, letter on behalf of Related, notifying the City of "certain events of Force Majeure that have or are anticipated to occur" with respect to City Place Santa Clara (the "Project").* Related asserts that the fact that the Parties have not yet entered into a Landfill Operation and Management Agreement (the "O&M Agreement") with respect to the Project constitutes an event of Force Majeure pursuant to the DDA, which Related contends commenced on August 17, 2017, and will expire "after the parties enter into the final O&M Agreement and Related is able to procure the type and amount of insurance required thereunder to implement the Project."

The City does not dispute Related's statement that "without the O&M Agreement, Developer cannot implement the Project," and is prepared to accept Related's assertion that the Parties' delay in entering into the O&M Agreement constitutes an event of Force Majeure pursuant to Article 24 of the DDA. However, two issues must be clarified: (a) the degree to which the City and its consultants have engaged with Related about the O&M Agreement, and (b) the date that any Force Majeure event associated with the O&M Agreement commenced and when it will expire.

* Capitalized terms used but not defined herein shall have the meanings given to them in the DDA.

Communications Regarding O&M Agreement

As to the first point of clarification, contrary to Related's assertion that the City has simply "failed to act" within a required timeline, the City has in fact been moving forward with its review of the second draft of the O&M Agreement that Related provided on July 17, 2017,[†] and has kept Related apprised of its activity with respect to the agreement. These communications have included the following:

- During the week of October 2, 2017, City staff informed Steve Eimer of Related that they had recently met with the City's consultants to discuss comments on the O&M Agreement.
- On October 11, 2017, Anna Shimko sent an email to Gordon Hart, acknowledging that the new City Manager was being brought up to speed on the O&M Agreement, and noting that the City needed to coordinate further internally on such matters before the revised draft of the agreement could be returned to Related.
- On April 10, 2018, Anna Shimko sent a detailed email to Gordon Hart, Related's counsel, providing a substantive update as to both the City's current activities concerning the O&M Agreement as well as a detailed description of the types of changes that the City would be proposing to the agreement.
- On April 23, 2018, Anna Shimko and Gordon Hart discussed the status of the agreement, and it was acknowledged that Related was aware that the City was looking at risk management issues and hiring a risk management consultant to advise the City on the issues addressed by the O&M Agreement.
- In late May, 2018, Related's counsel supplied data to (and has subsequently met with) the City's risk management consultant on landfill-related issues, with the full understanding that the purpose of the risk management consultant's work is to advise the City on the contents of the O&M Agreement to ensure that all agreed strategies will protect the public and the City.
- Representatives from Langan, Related's environmental engineers, have been meeting with the City and its consultant over the past three months on landfill-related issues.

[†] As Neil's letter noted, the City provided comments on the first draft of the agreement 28 days after receiving that draft.

- On August 28, 2018, expert consultants to the County of Santa Clara's Department of Environmental Health submitted a "Third-Party Review of Test Pile Report" that raised concerns regarding both the feasibility and the effectiveness of the pilings design for project structures. City Manager Deanna Santana expressed to Steve Eimer on October 8, 2018, that the City feels these concerns need to be addressed before the O&M Agreement can be finalized.

In fact, the City's exercise of prudence will serve both the City's and Related's interests. The City anticipates that the consultants we have retained to review the O&M Agreement will recommend strategies that will address both current and future conditions at the Project site as construction progresses. Recognizing that the City's internal review has taken additional time, the City will agree that this delay constitutes an event of Force Majeure pursuant to the DDA.

Timing of Force Majeure Delay

Although the City agrees to characterize the current delay with respect to the O&M Agreement as an event of Force Majeure, we do not agree that the period of Force Majeure delay commenced as August 17, 2017, as Related has claimed. There are two main reasons for this: first, in March of 2018, Related and the City exchanged letters acknowledging prior events of Force Majeure and agreed upon a new Schedule of Performance, with no mention of any potential additional Force Majeure delays. Therefore, at that time, Related clearly did not contemplate that any Force Majeure delay existed with respect to the O&M Agreement.

Second, Neil's letter relies upon the first two sentences of Section 24.2 of the DDA when calculating the "commencement date" for the event of Force Majeure; however, the letter fails to acknowledge the sentence that immediately follows:

If, however, notice by the Party claiming such extension is sent to the other Parties more than sixty (60) days after the commencement of the cause, the period shall commence to run only sixty (60) days before the giving of such notice, provided that the Party claiming the extension gives notice within a reasonable time following the commencement of the cause.


Thus, the earliest that the Force Majeure event can be deemed to have commenced is sixty (60) days prior to the day that the City received Related's September 24 letter, *i.e.*, July 27, 2018. By definition, the end of the Force Majeure event is the end of any delay caused by City, which will occur as of the date the O&M Agreement is actually executed. As such, the City will agree that an event of Force Majeure commenced on July 27, 2018, and will end on the date as of which the O&M Agreement has been executed by both Parties.

Joshua Young
Neil Sekhri, Esq.
October 18, 2018
Page 4

As you know, the O&M Agreement is a very complex document that will have substantial, ongoing implications with respect to the management of hazardous materials issues related to the Project for decades to come. The City has taken time and care to review the document in order to ensure the safety of its citizens, including the future residents and occupants of the Project. Now that our review (and that of our consultants) is wrapping up, we anticipate providing to you our further comments on the draft agreement in the near future, and look forward to continue engaging with Related in good faith in order to finalize and execute the document.

Please do not hesitate to contact me or Debbie Kartiganer with any questions you may have.

Very truly yours,


Anna C. Shimko

cc: (via email only)
Deanna Santana
Manuel Pineda
Brian Doyle, Esq.
Ruth Shikada
Deborah L. Kartiganer, Esq.
Steve Eimer
Gordon Hart, Esq.