



OFFICE OF CORPORATION COUNSEL

Client-Driven. Community-Focused.

MARGARET C. DAUN
Corporation Counsel

SCOTT F. BROWN
KAREN L. TIDWALL
Deputy Corporation Counsel

ALAN M. POLAN
KATHRYN M. WEST
DALE R. NIKOLAY
DAVID N. FARWELL
LISA M. PROCACCIO
NELSON W. PHILLIPS III
MELINDA S. LAWRENCE
JUDD H. TABACK
CHRISTOPHER L. MORGAN
WILLIAM G. DAVIDSON
RACHEL L. EBERT
Assistant Corporation Counsel

DATE: February 17, 2023

TO: Milwaukee County Board Audit Committee
Interested Stakeholders

FROM: Margaret C. Daun, Corporation Counsel
Scott F. Brown, Deputy Corporation Counsel
David N. Farwell, Assistant Corporation Counsel

SUBJECT: File No. 22-559 - Contractual Remedies re Developer's Failure to Comply with
TBE Goals under the Rock Sports Complex Development Agreement

Brief Summary

At the September 14, 2022, Audit Committee meeting, File No. 22-559 was referred to the Office of Corporation Counsel ("OCC") to determine what, if any, contractual remedies may be available to Milwaukee County related to the alleged failure of BPC County Land LLC ("Developer") to comply with the Targeted Business Enterprise ("TBE") and workforce participation goals (collectively, the "Community Benefits Requirements") contained in the Development Agreement dated February 19, 2018, by and between the County and the Developer (the "Agreement"), a copy of which is attached to this memorandum as Exhibit A.¹

After analyzing the Agreement and relevant case law, the OCC concludes that the County's remedies for Developer's failure to meet the Community Benefits Requirements are most likely limited to liquidated damages in the amount of \$10,000 and the ability to bar the Developer from future County projects for a period of three years. A court would more likely than not find that other remedies, such as specific performance or actual damages, are not available for a breach of the Community Benefits Requirements, although such remedies likely remain available for other breaches of the Agreement.

¹ The other significant County agreement relating to the operations of the Ballpark Commons development is the lease between Milwaukee County and The Rock Sports Complex LLC relating to the latter's operation of the ski hill portion of the complex. Although obviously a key piece of the overall transaction, the lease is legally a separate agreement with a different legal entity (the Rock operator, not the landholding entity) and is self-contained without any cross-default provisions with other Rock agreements. OCC has not been asked to determine if any defaults occurred under the ski hill lease.

Analysis

Sections 2.6 and 2.7 of the Agreement provides, in pertinent part, that the Developer is required to “utilize good faith efforts to achieve” certain minimum TBE participation goals and performance of a target number of on-site construction hours by “apprentices or members of acceptable job training programs.” These Community Benefits Requirements were to be monitored through the Developer’s submission of relevant information through B2GNow and LCPTracker, two County-provided online portals. Compliance with the Community Benefits Requirements was to be “insure[d]” [sic] by means of a \$10,000 “Compliance Deposit” provided for in Section 2.8. The Compliance Deposit is expressly tied to compliance with “subparagraphs 2.6 and 2.7,” the provisions outlining the Community Benefits Requirements.

Of significant importance is language present in both Sections 2.6 and 2.7 that provides that a failure by Developer to achieve compliance with the Community Benefits Requirements “could result in the Developer forfeiting all or a portion of its Deposit [sic] to the County **as liquidated damages**² and being disqualified from participating on future County projects for a period up to three (3) years” (emphasis added). Although the term “Deposit” is used here instead of “Compliance Deposit,” in the context of the Agreement it appears clear that “Deposit” means the \$10,000. Taken together, the Community Benefits Requirements language in Sections 2.6 and 2.7 were expressly tied together, with “liquidated damages” as the remedy for non-compliance.

With respect to remedies apart from those noted above, Section 3.1 of the Agreement is the general provision relating to defaults by the Developer. Upon an event of default, subject to a notice and cure period, the County is entitled to pursue any and all remedies, including specific performance³ and actual damages. Section 3.3 further provides that the rights and remedies under the Agreement are “cumulative,” meaning that the parties may seek multiple remedies for the same default. Such language on its face would seem to suggest that the County could pursue remedies in addition to the liquidated damages. Although that may be the case with respect to other defaults under the Agreement,⁴ a court would more likely than not find the express language in the Agreement providing identified remedies for breach of the Community Benefits Requirements prohibits the County from seeking damages beyond those “liquidated” damages specified in Sections 2.6-2.8 of the Agreement.

² Liquidated damages provisions are commonly used where it is difficult if not impossible for the parties to determine what the actual damages of a particular breach would be at the time of entering into the contract. Such provisions are generally upheld if they meet certain criteria and are recognized as a reasonable method of determining and apportioning risk between the parties. While courts certainly will strike liquidated damages provisions that do not meet the criteria for such provisions under common law—in which case they typically are determined to be unenforceable penalties—courts generally will not second-guess parties’ determinations as to whether a given amount of liquidated damages is appropriate.

³ “Specific performance” is a contract remedy by which a party is required by the court to conduct the actual activity described in the contract as opposed to paying monetary damages to the non-breaching party.

⁴ OCC is not aware of any default by the Developer under the Agreement apart from the failure to meet Community Benefits Requirements for the project. If other defaults are identified and remain uncured beyond applicable cure periods, OCC can assist in analyzing related legal remedies at that time.

In addition, because of the provision for liquidated damages, actual damages are not going to be available, and regardless, the calculation for such damages would be debatable. This explains why, presumably, the County and Developer specified liquidated damages for breach of the Community Benefits Requirements.

With respect to specific performance, Wisconsin courts have taken a very narrow view of that contract remedy, particularly where the parties have negotiated express remedies for certain defaults. See Key v. William Ryan Homes, Inc., 2016 WI App 34, 369 Wis. 2d 72, 879 N.W.2d 809. Here, a court would more likely than not find that such an express remedy for default of the Community Benefits Requirements exists by virtue of three-year ban on future development opportunities and the Compliance Deposit being labeled as “liquidated damages” for that breach.

###