



Agenda Report

20-464

Agenda Date: 4/8/2020

REPORT TO COUNCIL

SUBJECT

Action on Landfill Post-Closure Operation and Management Agreement for Related Santa Clara project [Council Pillar: Promote and Enhance Economic and Housing Development]

BACKGROUND

On June 28, 2016 Council took action on a series of project entitlement approvals including certifying an Environmental Impact Report (EIR) and approving a Disposition and Development Agreement (DDA) and a Development Agreement (DA) with Related Santa Clara, LLC (Developer) for the development of the Related Santa Clara Project (Project) located on an approximately 240-acre site north of Tasman Drive.

The entire Project includes the development of up to 9.16 million gross square feet of office buildings; retail, food and beverage, and entertainment facilities; residential units; hotel rooms; surface and structured parking facilities; new open space and roads, landscaping and tree replacement; and new/upgraded/expanded infrastructure and utilities.

Development of the Project generally located at 5155 Stars and Stripes Drive involves repurposing a closed municipal golf course located on a former municipal landfill property (the Landfill). The City will continue to own the subsurface portion of the Landfill and the Developer will ground lease "airspace parcels" for development of the Project. While the first phase of the Project (involving about 14 acres along Tasman Drive) is not above the Landfill, all other phases of the Project involve the Landfill area. California state laws and regulatory agencies impose long-term maintenance and monitoring obligations on the owner and operator of closed landfill facilities.

The Disposition and Development Agreement between the City of Santa Clara (City) and Developer dated as of August 12, 2016 (DDA) requires City and Developer to execute an agreement that is consistent with the term sheet attached to the DDA as Exhibit M and that contains other mutually acceptable provisions to allocate responsibility for Landfill operation and maintenance activities required by the landfill regulatory agency approvals and related risk mitigation measures during and after construction. Accordingly, City and Developer have prepared a Landfill Post-Closure Operation and Management Agreement (Landfill O&M Agreement) that is consistent with Exhibit M of the DDA and reflects approvals and requirements issued by the Regional Water Quality Control Board after the DDA was executed. Specifically, the Landfill O&M Agreement:

- (i) Allocates responsibility between City and Developer for ownership, operation, maintenance and management of the Landfill and the "Project Landfill Systems", including the Landfill gas extraction system, leachate control system, the clay cap and the fill above it, groundwater monitoring wells, and perimeter air monitoring stations;

- (ii) Allocates responsibility between City and Developer for the design and construction of certain “Project Landfill Systems”; and
- (iii) Defines the minimum insurance programs and coverage terms to protect City’s interest in the Project and provide a primary framework for recovery of losses related to the Project development.

The Landfill O&M Agreement is in final form and requires approval through Council action.

DISCUSSION

Development of a project on a closed landfill is significantly more challenging and inherently carries with it significantly more risk than developing on non-landfill property. The Landfill O&M Agreement addresses responsibilities associated with the Landfill and Landfill systems and the insurance programs to be procured to manage the risk and protect the long-term interests of both the City and Developer.

There are three principal topics discussed and documented in the Landfill O&M Agreement:

- Design, Construction, Ownership, Operation and Management of Project Landfill Systems.
- Contractual Indemnifications
- Project Insurance Programs

A. Design, Construction, Ownership, Operation and Management of Project Landfill Systems.

The Landfill is subject to regulatory orders, directives and closure plans that obligate City (as the owner of the Landfill) to implement operation, maintenance and management activities for the Project Landfill Systems in perpetuity. Although Developer will not own any portion of the physical Landfill itself, the development of the Project involves the penetration of the Landfill with piles and includes upgrading and reconfiguring certain components of the existing Project Landfill Systems, which will be undertaken by Developer. Since the development of the Project and the ongoing Landfill operations are so closely inter-related, it is important for the respective obligations of the city and Developer to be clearly defined.

Developer Responsibilities: Developer will design and construct certain upgrades, modifications and replacements to the existing Project Landfill Systems in those portions of the Landfill ground leased by Developer, at Developer’s sole cost and expense. Developer will also build, own, operate and maintain the Landfill Gas Mitigation Systems under buildings and private streets.

City Responsibilities: City will continue to own and be responsible for operation and maintenance of all Project Landfill Systems (new and old) except for the Landfill Gas Mitigation Systems. City will operate the existing Project Landfill Systems during construction and obtain ownership of the upgraded Project Landfill Systems on a rolling basis as portions of the systems are upgraded and conveyed back to City.

By law, City is obligated to maintain the Project Landfill Systems regardless of the development of the Project, but under the Landfill O&M Agreement, City will obtain certain upgrades, replacements and

modifications to the Project Landfill System components at Developer's expense. Developer is also required to reimburse City for the increased cost of operating the Project Landfill Systems as a result of the development of the Project up to a maximum annual reimbursement of \$550,000 (the Cap Amount). This reimbursement is applied after City's expenditure of a pre-determined "baseline cost" of \$450,000, which was City's estimate of its annual Landfill operation and maintenance expenditures when the DDA was approved. At this time, City anticipates that its Landfill operation and maintenance costs upon full Project buildout will be approximately \$820,000 per year. The Landfill O&M Agreement also allows City to amortize the costs of insurance premiums paid by City pursuant to the Landfill O&M Agreement and the costs of certain capital repairs and replacements over longer periods of time, thereby facilitating reimbursement by Developer on an annual basis without City reaching the Cap Amount in any given year.

B. Contractual Indemnifications

Under the Landfill O&M Agreement, City provides a narrow indemnity to Developer for losses directly related to City's negligence or willful misconduct, but only to the extent such negligence or willful misconduct results in City's failure to perform its obligations under the Landfill O&M Agreement. There are express carve-outs from City's indemnity for: (i) Developer's negligence or breach of the Landfill O&M Agreement; and (ii) cleanup costs for on-site ground water contamination where Developer has obtained insurance for such risk, which Developer has an affirmative obligation to pursue. By carving out cleanup costs for on-site groundwater contamination (which is City's responsibility under existing law), City anticipates that it will be able to obtain insurance for most, if not all, of the risks associated with its indemnification obligations under the Landfill O&M Agreement.

Developer provides a broad indemnity to City for losses arising out of Developer's breach of the Agreement, violation of environmental laws and any release or exacerbation of a pollution condition (unless such condition was created or caused by the negligence of City). Of particular note is that liabilities arising out of the exacerbation of existing environmental conditions through the development of the Project will be a Developer risk, and as further detailed below, will be ultimately backstopped by insurance running to the benefit of both City and Developer.

The Landfill O&M Agreement is structured so that City and Developer will both look first to the broad joint insurance programs carried under the Landfill O&M Agreement for recovery of any losses. If the insurance does not provide coverage or the indemnified loss exceeds the limits of liability under the applicable insurance policy, the indemnifying party will be responsible pursuant to the terms of the indemnification. Submission and management of claims under joint insurance programs will be governed by an Insurance Administration Agreement to be executed prior to Developer commencing intrusive work on the Landfill. The Insurance Administration Agreement will establish criteria and procedures for allocating and paying self-insured retentions and establish protocols for notification and cooperation between Developer and City in making claims to the applicable insurers. This "primacy of insurance" approach is designed to reduce prolonged disputes between City, Developer and multiple insurers relating to causation and liability for specific losses by establishing centralized primary insurance programs that insure the broadest possible spectrum of project risks and directly benefit both City and Developer. Note that the insurance provisions addressed in the Landfill O&M Agreement cover all insurance requirements for the Project and will be folded into the Project ground leases as they are executed.

C. Project Insurance Programs

Developer is obligated to obtain and maintain comprehensive and robust insurance programs throughout the development of the Project and after completion of construction. The insurance terms were carefully negotiated so that City's interest in the Landfill would be sufficiently protected, even for risks that are unrelated to the development of the Project, and so that the broadest possible range of Developer's indemnification obligations would be backstopped with insurance running to both City and Developer. Developer must therefore maintain standard construction insurance programs as well as several manuscripted specialty lines programs tailored to the unique risks associated with development on the Landfill.

(i) Construction Policies. The construction policies include: (1) builder's risk insurance, (2) terrorism coverage, and (3) several general liability programs and "owner/contractor-controlled insurance" programs that will provide coverage for all tiers of horizontal and vertical contractors and subcontractors working on the Project. Developer is also obligated to seek specific modifications to the general liability insurance terms so that the unique concussive risk exposures associated with the penetration of the Landfill during development will be insured. The limits of liability will be increased based on the number of Project phases covered by each program (for example, \$200,000,000 limits of liability for a single program encompassing Phase 1, Phase 2 and Phase 3. Developer also has an affirmative obligation to require design professionals to maintain professional liability insurance/errors and omissions insurance on a primary basis with appropriate limits of liability depending on the scope of such designer's work (for example, \$10,000,000 per incident limits of liability for designers of record and \$5,000,000 limits of liability for designers of record for any portion of the Project Landfill Systems).

(ii) Specialty Surplus Lines Policies. Developer must also obtain several specialty lines insurance programs and provide City with direct access to such policies. These include:

- Owner's Protective Professional Indemnity (OPPI). OPPI programs will be obtained with at least \$20,000,000 per incident limits of liability and at least \$40,000,000 limits of liability for development all of Phase 1, 2 and 3 of the Project (*i.e.* the Landfill platform and immediately surrounding lands). OPPI coverage provides coverage to owners (*i.e.* Developer and City) excess of the coverage obtained by design professionals. Under this program, City will have affirmative coverage for defense and payment of loss for third-party claims relating to design errors and omissions on the Project Landfill Systems.
- Contractor's Pollution Liability (CPL). Developer will obtain CPL insurance that provides bodily injury, property damage and cleanup cost coverage as a result of pollution conditions arising from Developer's construction of the Project and City's Landfill operation and maintenance activities. The CPL program will cover the entire Landfill, including those areas that are not yet subject to a ground lease with Developer. All contractors performing construction or operation and maintenance activities at the Landfill will be enrolled in the program. The CPL program will contain \$50,000,000 limits of liability per incident and in the aggregate with a \$5,000,000 sublimit for City Landfill activities that are performed on those portions of the Landfill not yet subject to a ground lease.

City will reimburse Developer for ten percent (10%) of the total cost of the CPL up to a maximum reimbursement of \$200,000, which reimbursement may be amortized over the policy period for purposes of calculating Developer's annual reimbursement and to minimize the likelihood of

exceeding the Cap Amount in any given year. City's reimbursement represents a significant cost savings to City compared to City obtaining its own CPL coverage on portions of the Landfill that are not yet part of the Project. Moreover, any stand-alone CPL program City would obtain would be very difficult to underwrite in light of the difficulty of allocating the precise cause of any specific loss between City's Landfill operation and maintenance activities and Developer's construction activities. City will have the right to review and comment on underwriting submissions, quotes, policy forms and endorsements, thereby ensuring that City's interests are adequately addressed in the manuscripted CPL program.

- *Pollution Legal Liability (PLL)*. Developer will obtain PLL insurance that provides coverage for cleanup costs and third-party bodily injury and property damage claims for pre-existing and new pollution conditions for both City and Developer. Developer will seek to obtain coverage for groundwater cleanup costs imposed on Developer (which are already a direct legal obligation of City) and Developer must also use commercially reasonable efforts to obtain coverage for City's groundwater cleanup costs. Similar to the CPL program, the PLL will provide coverage to the entire Landfill, including portions that are not yet subject to ground leases with Developer. The PLL will contain a limit of liability of \$75,000,000 per incident and in the aggregate and will be maintained by Developer for 15 years.

City will reimburse Developer for twenty percent (20%) of the total cost of the PLL with a maximum reimbursement of \$250,000, which reimbursement may (similar to the CPL) be amortized over the policy period for purposes of calculating Developer's annual reimbursement. Like the CPL, the PLL will provide affirmative coverage to City on the entire Landfill and insures City's pollution related risks that exist as the owner and operator of the Landfill. City's reimbursement represents a significant cost savings to City compared to obtaining the same coverage independent of Developer. Similar to the CPL, obtaining broad PLL coverage independent of Developer would be difficult and challenging in light of the many concurrent activities occurring on the Landfill by both City and Developer and accurately determining causation of any particular loss event. City will have the right to review and comment on underwriting submissions, quotes, policy forms and endorsements, thereby ensuring that City's interests are adequately addressed in the PLL program.

Conclusion

Substantial time and effort were spent negotiating the insurance coverages terms and parameters with Developer. The multi-disciplinary and cross-departmental team involved in the proposed Landfill O&M Agreement and the insurance coverages included legal and technical expertise from outside legal counsel and environmental consultants, together with significant effort from City Attorney's office, City Risk Manager, City Manager's office, and Public Works.

The coverage parameters and the allocation of risks outlined in the Landfill O&M Agreement are "state-of-the-art" and should be sufficiently protective of City's interests for the Project and the Landfill generally. However, City may, at the City Manager's discretion, elect to consider excess coverage or independent coverage in addition to the coverage provided in the Landfill O&M Agreement for certain coverage elements.

ENVIRONMENTAL REVIEW

The action being considered does not constitute a "project" within the meaning of the California

Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15378(a) as it has no potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

In addition, the Related Santa Clara Project, including all work on and impacts to the Landfill, was analyzed in accordance with the requirements of the California Environmental Quality Act (CEQA) in the CityPlace Santa Clara EIR [SCH#2014072078] as certified and adopted by Council on June 28, 2016 by Resolution No. 16-8337.

FISCAL IMPACT

The City expects to pay up to \$450,000, starting in fiscal year 2020/21 for its share of the CPL and PLL policy, which payment will be subject to reimbursement from Developer on an amortized basis over the term of such policies. Pending the finalized cost of the insurance premiums, staff will bring forward a budget amendment recommendation to the Council at a later date to appropriate funding to cover the City's upfront share, if necessary. As part of the FY 2020/21 Adopted Operating Budget, approximately \$550,000 was allocated in the General Fund Non-Departmental to cover the costs of the closure of the golf and tennis facility and other potential costs related to the development of the landfill. Staff anticipates using the majority of that allocation to fund the City's contribution to the insurance premiums.

COORDINATION

This report has been coordinated with the Finance Department and City Attorney's Office.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall Council Chambers. A complete agenda packet is available on the City's website and in the City Clerk's Office at least 72 hours prior to a Regular Meeting and 24 hours prior to a Special Meeting. A hard copy of any agenda report may be requested by contacting the City Clerk's Office at (408) 615-2220, email clerk@santaclaraca.gov <<mailto:clerk@santaclaraca.gov>> .

ALTERNATIVES

1. Approve and authorize the City Manager to execute the Landfill Post-Closure Operations and Management Agreement with Related Santa Clara, LLC for the Related Santa Clara development project and authorize the City Manager to obtain additional insurance programs to bolster the limits of liability available to City under the Project insurance programs.
2. Do not approve the Landfill Post-Closure Operations and Management Agreement with Related Santa Clara for the Related Santa Clara development project

RECOMMENDATION

Alternative 1:

Approve and authorize the City Manager to execute the Landfill Post-Closure Operations and Management Agreement with Related Santa Clara, LLC for the Related Santa Clara development project and authorize the City Manager to obtain additional insurance programs to bolster the limits of liability available to City under the Project insurance programs.

Reviewed by: Ruth Mizobe Shikada, Assistant City Manager

Approved by: Deanna J. Santana, City Manager

ATTACHMENTS

1. Final form of Landfill Post-Closure Operations and Management Agreement