

SAUL EWING
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February 12, 2021

Ms. Renee Jadusingh
Executive Director
Delray Beach Community Redevelopment Agency
20 N. Swinton Avenue
Delray Beach, Florida 33444

RE: Force Majeure

Dear Ms. Jadusingh:

As you know, the law firm of Saul, Ewing, Arnstein and Lehr, represents BH3 Mangement LLC, your selected developer for the 600-800 block redevelopment project. The purpose of this correspondence is to formally notice Seller, pursuant to Section 1.10 of the PSA, that Purchaser is formally triggering its rights to request a 383-day extension to the Approval Date and all subsequent dates in the PSA as a result of Force Majeure related to the COVID-19 global pandemic. I previously sent email correspondence on March 17, 2020, and on May 11, 2020 related to my client's Force Majeure rights and respectfully request that the CRA Board place this item on the agenda for the upcoming February meeting as required pursuant to the PSA. I had previously formally made this request in my May correspondence, but said request was not honored and as you know my client instead attempted to pursue a route of amicable discussions and negotiations at the directive of the CRA Board to seek a traditional extension, which was denied. **We formally request that BH3's submission of Force Majeure be put on the February agenda to allow for the CRA Board to vote on this matter expeditiously.**

It is our position, that Purchaser is entitled pursuant to Section 1.10 of the PSA and by executive orders of the Governor to significantly more time than it previously requested. Contemporaneously herewith we have submitted separate correspondence pertaining to the 563 days that are applicable under executive orders.

The COVID-19 pandemic and associated impacts amount to Force Majeure as defined in the Purchase and Sale Agreement ("PSA"). Section 1.10 of the PSA expressly provides for Force Majeure.

"Force Majeure: Force Majeure Events include, without limitation, floods, storms, hurricanes, and other acts of God (including reasonable preparation therefore); war, terrorism, riots, civil commotion, fire, and other casualty; strikes, lockouts,

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February 12, 2021

Attn: Renee Jadusingh

*labor disputes, and any inability to procure or a general shortage of labor, equipment, facilities, materials, or supplies in the open market; acts of the other party; delays in obtaining permits and approvals from regulatory authorities; and all other causes and circumstances similar to the foregoing. Force Majeure extensions must be approved by the CRA Board of Commissioners **and shall not be unreasonably withheld.***”

While “global pandemic” is not specifically expressed in the language above, the words, “all other causes and circumstances similar to the foregoing” certainly incorporates the COVID-19 pandemic and its impacts on my client’s performance under the PSA. Further, it is clearly apparent that the judiciary frowns upon any attempts of counterparties to hinder, impair, or remove rights of tenants, purchasers or borrowers as a result of COVID-19.

It is undeniable that COVID-19 has caused significant market disruptions in the capital markets as well as the commercial real estate market. These impacts created significant delays for my clients as they continued to refine the plans for the Fabrick project. These unforeseeable delays included months of delays from prospective tenants, commercial lenders and financing outlets, our required grocer, and even receiving deliverables from our consultants. As you know, the most important part of this project was obtaining a grocer and developing a grocery store. This was so important, that my clients drastically altered their initial plans several times, at their expense, for the project in order to accommodate the grocer. BH3’s grocer is a national corporation, with hundreds of stores across the country and when the pandemic began, all conversations and negotiations paused due to greater concerns of all grocers relating to employee/customer safety, supply chain logistics, and compliance.

The numerous emergencies that triggered executive orders by both the City of Delray Beach and the State of Florida have impacted BH3’s ability to adequately conduct its business and otherwise hindered its ability to adhere to the timelines established in the PSA. As a reminder, the site plan submission was filed on February 23, 2020, just weeks before the world was upended by the global pandemic which still persists in maintaining a state of grave uncertainty.

Further, the City of Delray Beach has set a precedent when it comes to force majeure due to the COVID-19 pandemic. On May 5, 2020, the City Commission unanimously approved excusal of payments from four different companies by invoking force majeure due to COVID-19. On June 2, 2020, the City Commission again gave staff direction to excuse payments from five additional City vendors on the basis of force majeure due to COVID-19. Again on August 18, 2020, the City Commission unanimously agreed to excuse payments from an additional City vendor based on force majeure related to COVID-19. As current as February 8, 2021, the City Commission agreed to excuse payments due from a City vendor, based on force majeure related to the COVID-19 pandemic. On four different occasions, the City has used force majeure due to COVID-19 to excuse payments for eleven different City vendors. Any attempt to prejudice BH3 to be treated differently would be arbitrary and capricious.

The COVID-19 pandemic has created significant challenges to the project, just as any global pandemic would have on a development project of this magnitude and at this stage of development. BH3 is seeking a 383-day extension (the same tolling period pursuant to all applicable executive

February 12, 2021

Attn: Renee Jadusingh

orders exclusive of the additional 6-month period) to the Approval Date as a result of Force Majeure and to continue to perform under the PSA. **We formally request that the CRA Board place this item on the February agenda to review and approve our request and respectfully remind the Board that this approval “shall not be unreasonably withheld.”**

Sincerely,

A handwritten signature in black ink, appearing to read "Neil M. Schiller". The signature is fluid and cursive, with a long horizontal stroke at the end.

Neil M. Schiller, Esq.

CC: Christine Tibbs, CRA Deputy Director
Kim Phan, Esq., CRA Attorney
Donald Doody, Esq., CRA Attorney
Glen Waldman, Esq., BH3 Litigation Counsel
Client