

Jody Weaver

From: Jody Weaver
Sent: Monday, April 1, 2024 5:52 PM
To: Alex H. Davila
Cc: Jim Rudellat; Jack Whitlow
Subject: FW: Opinion Letter on the Helena Ground Lease
Attachments: Opinion Letter on Helena Ground Lease issues.pdf

Attached please find an opinion letter written by Sandra Witte regarding tomorrow's agenda item #2. I did further clarify with her that Helena's lease language would allow for Helena to be obligated to pay the rail use fee in the tariff in addition to any invoices for rail maintenance.

To date (since the execution of Helena's current lease), the City has spent \$81,365.97 on rail improvement services from Diamond K including quarterly inspections).

Helena is paying the monthly rail fee and with the April payment, will have paid \$27,825.00 to date.

Recall, in September 2020, Council had adopted a rail fee of \$75/railcar/day, but after talks with Helena, Council amended this to \$10,000/year in September 2021 and then \$12,000/year in September 2023.

See you in the morning.

JoAnna P. "Jody" Weaver, P.E.

Interim City Manager

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CITY OF PORT LAVACA
TEXAS



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From: Sandra Witte <sandra.witte@portlavacalaw.com>
Sent: Monday, April 1, 2024 4:41 PM
To: Jody Weaver <jweaver@portlavaca.org>
Cc: Anne Marie Odefey <amo@portlavacalaw.com>; Tricia Koenning <tricia@portlavacalaw.com>
Subject: Opinion Letter on the Helena Ground Lease

Jody,

Please see my opinion letter on the Helena Ground lease issues. Please contact me if you have any questions.



ROBERTS, ODEFEY, WITTE & WALL, LLP
Attorneys At Law

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Sandra Witte
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ATTORNEY-CLIENT PRIVILEGE

April 1, 2024

VIA Email Only jweaver@portlavaca.org
Ms. Jody Weaver, Interim City Manager
City of Port Lavaca
202 N. Virginia
Port Lavaca, Texas 77979

Re: Legal Opinion on railroad provisions in the
Ground Lease Agreement between the City of Port
Lavaca, Texas and Helena Agri-Enterprises, LLC

Dear Jody:

I have received your request for a legal opinion regarding Helena Agri-Enterprises, LLC's obligations with regard to rail services under the Ground Lease Agreement dated September 10, 2018 ("Lease"). Specifically, the query pertains to whether Helena is mandated to cover the expenses for replacing the culvert under the railroad to ensure its functionality and if Helena is responsible for maintenance costs incurred during the Lease term. After examining the Lease, I've identified Article 7 as the primary section that governs the pertinent issues, and I have emphasized the relevant clauses.

Article 7. Fencing, Rail Service and Utilities. Tenant shall, at its sole cost and expense, provide for appropriate fencing for the Leased Premises which shall become a permanent fixture on the Lease Premises. **Tenant shall, at its sole cost and expense, provide for whatever additional services and utilities it may desire, including but not limited to railroad services for the Leased Premises and water, both potable and nonpotable, fire water, gas, electricity, telephone, sewage treatment, waste water collection and drainage and any other utilities or similar services used in or on the Leased Premises, but shall have no obligation to provide such services or utilities except as needed by Tenant. Tenant may, at its sole option, receive railroad services for the Leased Premises.** Tenant shall be responsible for

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all costs and charges in connection therewith and agrees to pay the same promptly as such charges accrue, and to protect, indemnify and hold City harmless from and against any and all liability for any such costs or charges.

After examining these clauses, it is clear that Helena is not obligated to cover expenses for bringing rail services to the Leased Premises unless it chooses to utilize such service. Should Helena decide to opt for rail services, then it would be accountable for the associated costs. Nevertheless, this decision rests solely with Helena, and the City cannot compel them to utilize rail service. As such, you cannot require Helena to repair the culvert if they choose to not use the rail service.

The next question is whether or not Helena is obligated to pay the maintenance costs associated with the rail service incurred by the City since September 10, 2018, that being the commencement date of the Lease with Helena.

Under Article 7, pertaining to additional services, it states that Tenant, only if it chooses to use an additional service, such as rail service, shall be responsible for all costs and charges in connection therewith. Tenant is required to pay for such costs and charges promptly as such charges accrue. My opinion is that Helena would be responsible for any of the maintenance charges incurred by the City for the railroad during the period Helena was using the rail service. However, the absence of invoicing for these services as they accrued raises a potential impediment for collection as it could be a term of the Lease that it had to be billed as it accrues. While the Lease specifically requires the City to bill all Dockage Charges (tariff charges) as they accrue, Article 7 does not have the same exact provision for billing costs for additional services as they accrue but it does require that Tenant shall promptly pay as such charges accrue. This creates a potential argument by Helena that the City was required to timely bill for such charges in order to collect them.

In summary, Helena is not required to pay for the repair of the culvert to make the rail service useable, if it chooses to not use the rail service. Helena is required to pay any tariff charges for the rail spur, as those are Dockage Charges under the Lease, but the City needs to discuss if these can be charged if there is no useable rail service. Helena is responsible for all costs associated with receiving rail services during the time the rail spur was usable under the Lease, but as previously mentioned, there's a potential argument that the City was required to invoice the rail costs promptly as they accumulated to ensure collection of the same.

If you would like to discuss this matter further, do not hesitate to contact me.

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Respectfully submitted,

ROBERTS, ODEFY, WITTE & WALL, LLP



Sandra Witte

SW/li