

August 21, 2020

Marc B. Heath
Tel: (802) 846-8306
Fax: (802) 862-7512
mheath@drm.com

VIA ELECTRONIC MAIL

BTC Mall Associates LLC
c/o Brian Dunkiel, Esq.
Dunkiel Saunders Elliot Raubvogel & Hand
91 College Street
Burlington, VT 05401
bdunkiel@dunkielsaunders.com

Re: Final Notice of Default

Dear Attorney Dunkiel:

This law firm represents the City of Burlington (“City”) and writes in furtherance of the City’s notice, dated July 18, 2020, that BTC Mall Associates LLC (“BTC”) is in default of its obligations under the Development Agreement entered into as of October 26, 2017 (“Agreement”). Despite being on notice of its default for more than thirty (30) days, BTC has taken no steps to cure or correct its manifest breaches of the Agreement. The City is therefore left with no choice but to demand that BTC deliver to the City the unrealized benefit of the bargain without further delay.

As the Agreement makes clear, BTC committed to deliver to the City—in addition to other benefits that were to have flown from a more vibrant and modern multi-purpose development that BTC has failed to construct—certain “Public Improvements” that included the re-establishment of St. Paul Street, the re-establishment of Pine Street, and the activation of Bank and Cherry Streets. BTC’s commitment to the City is repeatedly and unambiguously reflected in the Agreement, including, without limitation, Sections 1(b), 3(b), and 4(c). In addition to these Public Improvements, the Agreement further contemplated the construction of “Additional Public Improvements” including the activation of additional sections of Bank Street and of Cherry Street, among others. Both the Public Improvements and the Additional Public Improvements “shall in all cases be subject to the reimbursement provisions of Section 4 of this Agreement.” (Section 3(b).)

As Section 4 of the Agreement clearly sets forth, the City’s obligation to reimburse BTC for the cost of designing, constructing and equipping the Public Improvements and Additional Public Improvements is only triggered by BTC’s compliance with each of the conditions set forth in Section 4(c) of the Agreement. Those conditions precedent to reimbursement included, among others, that BTC “shall have, by December 31, 2019, provided to the City, for submission to the Vermont Economic Progress Council, an executed construction contract and a completion guarantee evidencing [BTC’s] commitment to construct not less than \$50,000,000 of private

development on the Property[.]” (Section 4(c)(vii).) Moreover, BTC expressly “[a]cknowledge[d] that . . . the City’s ability to reimburse [BTC] for the hard and soft costs of constructing and equipping the Public Improvements, plus the costs of acquiring real property interests in St. Paul Street and Pine Street . . . is **dependent on** [BTC’s] compliance with the statutory requirements and approvals required in this provision.” (Section 4(a) (emphasis supplied).) Thus, because BTC has failed to comply with the conditions set forth in Section 4(c), it is not entitled to reimbursement for construction of the Public Improvements and Additional Public Improvements.

BTC’s failure to satisfy the conditions for reimbursement does not, however, obviate its contractual obligations to construct the Public Improvements and Additional Public Improvements. In entering into the Agreement, the City bargained for, and expects to receive, the Public Improvements and Additional Public Improvements that BTC committed to construct. It has been nearly three years since the City entered into the Agreement and nearly four years since the voters of the City authorized the City Council to pledge the credit of the City to reimburse BTC for constructing the Public Improvements in an amount not to exceed \$21,830,000.00—had BTC upheld its end of the bargain. The City has, at all times, upheld its obligations under the Agreement. It simply cannot wait any longer for BTC to deliver the Public Improvements and Additional Public Improvements on an uncertain timeline.

The City therefore demands that BTC construct, at its own expense, the Public Improvements and Additional Public Improvements described in the Agreement and convey to the City unencumbered fee simple title to the segments of St. Paul Street and Pine Street as provided in the Agreement. To be clear, it is the City’s position that it has no obligation to reimburse BTC any portion of the approximately \$21 million and that BTC’s obligation to pay this amount to construct the Public Improvements and Additional Public Improvements without such reimbursement is a consequence of BTC’s overriding breaches of the Agreement and failure to diligently prosecute the Project to completion.

If BTC persists in its default, the City will be forced to resort to litigation to enforce its rights under the Agreement. In addition to seeking damages for BTC’s various breaches of the Agreement, the City will also seek equitable remedies of specific performance and injunctive relief in the form of a court order that BTC immediately construct these improvements and restore these thoroughfares to the public. *See* Section 3(b) (BTC “agrees that the City will not have an adequate remedy at law for [BTC’s] noncompliance with the provisions of this Section 3(b) and, therefore, the City shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance, to enforce the foregoing covenant and agreement.”). Please be advised that this letter represents the City’s final demand. The City reserves all of its rights to take appropriate action.

We look forward to your prompt response.

Sincerely,

/s/ Marc Heath

Marc B. Heath, Esq.

MBH/eob

cc: Mr. Jeffrey Glassberg (via email only)
Eileen Blackwood, Esq. (via email only)
Jeremy Farkas, Esq. (via email only)
Jennifer E. McDonald, Esq. (via email only)
Timothy S. Sampson, Esq. (via email only)
Evan J. O'Brien, Esq. (via email only)
James B. Aronoff, Esq. (via email only)
Lisa B. Shelkrot, Esq. (via email only)