



DLA Piper LLP (US)
33 Arch Street
26th Floor
Boston, Massachusetts 02110-1447
www.dlapiper.com

Bruce E. Falby
Bruce.Falby@dlapiper.com
T 617.406.6020
F 617.406.6120

January 30, 2020

By UPS Overnight Delivery

Nancy Colbert Puff
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

Re: **Notice of Default** under Development Agreement and Agreement to Lease (the "Agreement") made as of August 29, 2019 between the City of Portsmouth (the "City") and SoBow Square, LLC (the "Developer")

Dear Ms. Puff:

We represent the Developer under the Agreement, which sets forth the terms under which the City will acquire and the Developer will develop the McIntyre property. Capitalized terms used herein and not otherwise defined shall have the meanings given to them by the Agreement.

Pursuant to Section 7.2 of the Agreement, this letter constitutes written notice of default by the City in the performance of its obligations under the Agreement. On January 28, 2020, the City Council voted to reject the Ground Lease. The City Council did so at a public meeting after an astoundingly irresponsible and unreasonable refusal to heed requests by (a) the City Attorney to go into nonpublic session before voting because he had new and special information concerning legal advice to share with the council and (b) the City Manager imploring the council on behalf of the staff of the City to obtain the City Attorney's legal advice in nonpublic session before proceeding with a vote.

The City Council's vote on the Ground Lease was premature and its rejection of the Ground Lease is a breach of the Agreement. The rejection of the Ground Lease breaches numerous sections of the Agreement, including Section 3.1.5 "Ground Lease," requiring the City to "negotiate in good faith with the Developer the terms and conditions of the Ground Lease"; Section 8.1 "Cooperation," requiring the City to cooperate with the Developer "and to act reasonably and in good faith in order to achieve the purposes of this Agreement"; and Section 8.15 "Good Faith and Fair Dealing," requiring that "whenever a party's consent or approval is required under



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this Agreement . . . such consent [or] approval . . . shall be reasonably made or done.”

The Developer demands that the City promptly cure its default in the performance of its obligations under the Agreement. The City Council must rescind its vote rejecting the Ground Lease and proceed as outlined below.

As we have previously informed the City Attorney and the City Council, orally and in writing, on August 12, 2019 the City Council voted to approve the Agreement and thereby approved the key terms of the Ground Lease, which were contained in Exhibit E to the Agreement. The City Council did so having seen an essentially complete 91-page draft of the comprehensive Ground Lease that was part of the Application that the City Council also approved by August 12, 2019 vote. The City then submitted the Application, with the 91-page form of Ground Lease, to the National Park Service (“NPS”) on August 30, 2019. The NPS responded to the Application with requested changes, all of which are correctible. The Developer has revised the Application in response to the NPS’s comments and provided the revised Application to the City.

The Agreement in Section 2.1.6 now requires the City to work with the Developer to submit a corrected Application (“If the Application is initially rejected by the Park Service for technical reasons or correctible issues then the City agrees that it will work with the Developer to submit a corrected application.”). Only after the NPS approves the revised Application and its attached Ground Lease will the Ground Lease be ready for approval by the City Council before it is executed. In exercising its approval of the final form of Ground Lease after the revised Application is approved, the City Council will be obligated by the Development Agreement to act reasonably and in good faith in order to achieve the purposes of the Agreement. See Sections 8.1 and 8.15. Having already approved the material terms of the Ground Lease contained in the Agreement, and having already approved the Application that included the proposed draft Ground Lease that was essentially complete reflecting agreement on all material terms, the City Council would breach the Agreement, including Sections 3.1, 8.1 and 8.15 described above, by then rejecting the final form of Ground Lease in almost exactly the same form.

The City has certainly breached the Agreement by its premature January 28, 2020 rejection of the Ground Lease. If the City does not cure this default within thirty



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days by rescinding the rejection of the Ground Lease and proceeding as outlined above, the Developer will commence litigation against the City to pursue all rights it has at law and in equity to address the City's breach. If litigation ensues, the Developer will be entitled to recover significant damages in the tens of millions of dollars, proof of which will include the financial projections of the City's own consultants to the project, and/or to obtain injunctive relief to preserve the benefit of its bargain under the Agreement.

We hope that the City will cure its default and that litigation does not become necessary. We still hope to achieve a continued positive and productive private public partnership with the City to bring the McIntyre project to fruition in accordance with the parties' respective obligations under the Agreement.

Very truly yours,

A handwritten signature in blue ink that reads 'Bruce E. Falby'. The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Bruce E. Falby

BEF:

cc: Robert P. Sullivan, City Attorney (by email)
Robert D. Ciandella, Esq. (by email)