

LAW OFFICES OF  
**STEVEN J. PARSONS**

7201 WEST LAKE MEAD BOULEVARD, SUITE 108  
LAS VEGAS, NEVADA 89128-8354

TEL: (702) 384-9900  
FAX: (702) 384-5900  
info@SJPlawyer.com

Tuesday, May 8, 2012

via email  
[Jmehta@ag.nv.gov](mailto:Jmehta@ag.nv.gov)  
original by mail

Jasmine K. Mehta  
Deputy Attorney General  
Office of the Attorney General  
State of Nevada  
100 N. Carson St.  
Carson City, NV 89701-4717

Re: Trustees' (of the Herman Kishner Trust – Maryland Square Shopping Center) Response to Mary A. Siders, Ph.D., April 16, 2012 Request for Detailed Description of Work Implemented to Date on the Corrective Action Plan for Groundwater at the Maryland Square PCE Site (Al Phillips the Cleaner (former))NDEP Facility ID No.: H-000086

Dear Jasmine:

I offer the following as the substantive response of my clients, the Trustees of the Herman Kishner Trust, to the April 16, 2012 letter from Mary Siders, Ph.D., of Nevada Department of Environmental Protection ("NDEP") your client. As requested, attached are: (1) Pilot Studies Schedule; and (2) Draft Timeline of Pilot Study Activities.

Upon your and your client's accommodation of the scheduling problems among the lawyers for my client, this letter was delayed from the due date of Monday, April 30, 2012 until now. All of us certainly appreciate your ongoing cooperation.

As I related yesterday afternoon, I am the reluctant author of the following, as I am simply relating the work and knowledge of others, and nothing else.

Generally, the time specified for the pilot studies has been exceeded by demands upon the Trustees and their professional consultants well beyond their control. Some of the pressures continue, and even now, we are substantially unable to offer a firm revised deadline, on account of uncertainties as to when approvals of our third-party contractor and sub-contractors will be granted by Boulevard Mall. The schedule of work proposed by Tetra Tech (attached) assumes that we will not experience delays in receiving access to the Boulevard Mall property in the future

Among the largest reasons the Trustees could not meet the existing schedule is that no contractor can go on Boulevard Mall property without first executing Boulevard Mall's access agreement form. We have already had one driller (WDC Exploration & Wells) that refused to sign the agreement.

The provision which concerns contractors and sub-contractors is the defense and indemnity language which requires the contractor to defend and indemnify Boulevard Mall against any claim arising out of the contractor's work. The effect of such a provision is that if a claim is made against Boulevard Mall arising out of a contractor's work, that contractor must defend and indemnify Boulevard Mall even if it is ultimately proved that the contractor did nothing wrong. It's our collective experience that such is a fairly harsh condition on the contractor and some (especially the bigger ones) simply will not agree to it. But from the standpoint of Boulevard Mall, it really is not an unreasonable condition – as a private property owner, their attitude is in essence that we and our contractors can come on their property to investigate our problem, but if a claim is ever made against Boulevard Mall, the contractors and sub-contractors have to protect Boulevard Mall to ensure it has no exposure to any potential costs or liability arising out of our contractor and sub-contractor's work.

Moreover, Boulevard Mall has some very rigorous insurance requirements and a lawyer – Jeff Diver – and insurance professionals are taking a magnifying glass to all insurance provided by contractors and are objecting to even the slightest inconsistencies. However, it is important to note that generally, we don't feel Boulevard Mall is being unreasonable; the mall and its lawyer are simply being rigorous, as is their right.

The problem is that contractors, especially smaller contractors, aren't used to this kind of scrutiny of their insurance. Most of the time they just provide their insurance to a general contractor, and general contractors typically only look to be sure there is insurance, the amount is correct, and the additional insureds are named correctly. Here, we have a lot of small sub-contractors having to satisfy insurance requirements they don't understand (and typically they are with smaller brokers who themselves don't understand) such that getting the requirements satisfied takes time and somewhat unprecedented efforts. To date it has on average taken weeks for each contractor to satisfy Boulevard Mall – typically, it's because the contractors simply don't obtain and submit the correct endorsements or the correct policy provisions and there is a multi-week back-and-forth dialogue between the contractors and Boulevard Mall. Sometimes in the course of this process, we have experienced that increasing scrutiny occurs with each pass between the parties, and that inevitably causes some sense of friction. Nonetheless, overall, no one issue pressed by the mall and its owners has been inappropriate or objectively unreasonable.

Sincerely,

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c: Thomas F. Vandenburg (via email)  
Robert G. Russell, Jr., Esq. (via email)  
Trustees of The Herman Kishner Trust (via email)