

BROAD BEACH GEOLOGIC
HAZARD ABATEMENT DISTRICT

SUPPLEMENT TO REGULAR SESSION PACKET

Sunday April 10, 2016, 2015; 9:00 a.m.

**Private Residence:
31030 Broad Beach Road, Malibu, CA 90265**

Regular Session

13) New Business

- a. **BBGHAD Engineer: Review of overall relationship with BBGHAD Engineer Moffatt & Nichol and proposed scope of work for completion of CCC's "Prior to Issuance" Conditions and SAP administration. (Project Manager)**

Kenneth A. Ehrlich

From: Huchel, David [dhuchel@moffattnichol.com]
Sent: Friday, April 08, 2016 12:51 PM
To: Kenneth A. Ehrlich
Cc: Boudreau, Russ; Mark C. C. Goss (markchristiangoss@gmail.com)
Subject: RE: Broad Beach - MN Requested Amendment and Property Owner Acknowledgement Language [IWOV-dms-01.FID99123]

Ken,

Thanks for the discussion. I think we can address the issue in 12.3 by changing "lesser" back to "greater" as in the original agreement. Please see below:

- 12.3 To the maximum extent permitted by law, Consultant's liability for damages incurred by Owner shall be capped at the greater of (a) Three Million Dollars (\$3,000,000), or (b) the remaining aggregate limits of any applicable insurance covering Engineer's professional services at the time of judgment.

To sum up, here is the existing language from our contract:

12) INDEMNIFICATION

- 12.1 Engineer shall indemnify, defend and hold harmless Owner and all its directors, officers, managers, partners, members, agents, and employees, and their respective affiliates (collectively, "Owner Parties") from and against any and all claims, demands, suits, actions, losses, claims, liabilities, injuries, costs and expenses to the extent arising out of, caused by, or related to Engineer's or its employees', agents' or sub-consultants' negligent acts, errors or omissions relating in any way to the Work. Engineer's duty to indemnify the Owner Parties shall not exist if the alleged injuries or damages sustained by the claimant are the result solely of Owner's gross negligence or willful misconduct. This indemnification provision shall survive the expiration or termination of this Agreement.
- 12.2 Notwithstanding any other provision of this Agreement, neither the Owner nor the Engineer shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages of any nature (regardless of whether such damages are alleged to have risen from negligence; breach of contract; or other act, error or omission, or from any other cause whatsoever; or any combination of the foregoing) including but not limited to diminished values of properties arising out of or connected in any way the Project or to this Agreement.
- 12.3 To the maximum extent permitted by law, Consultant's liability for damages incurred by Owner shall be capped at the greater of (a) Three Million Dollars (\$3,000,000), or (b) the amount of the Engineer's fees earned and payable hereunder.

And here is the latest iteration of MN's requested changes:

12) INDEMNIFICATION

- 12.1 Owner acknowledges that due to the unpredictable effects and results of the Work, including the effect of natural forces that cannot be predicted, results are not guaranteed and real property located within the BBGHAD may suffer adverse effects during and after construction of the Work, including but not limited to flooding, erosion, undermining, overtopping, pooling and ponding, or other results that may not be expected or predicted. Accordingly:

(a) Engineer shall indemnify, defend and hold harmless Owner and all its directors, officers, managers, partners, members, agents, and employees, and their respective affiliates (collectively, "Owner Parties") from and against any and all claims, demands, suits, actions, losses, claims, liabilities, injuries, costs, and expenses to the extent arising out of, caused by, or related to Engineers' or its employees', agents' or sub-consultants' negligent acts, errors or omissions relating in any way to the Work. Engineer's duty to indemnify the Owner Parties shall not exist if the alleged injuries or damages sustained by the claimant are the result solely of the Owner's gross negligence or willful misconduct. This indemnification provision shall survive the expiration or termination of this Agreement.

(b) Owner shall indemnify, defend and hold harmless Engineer and its respective officers, directors, agents, employees, divisions, subsidiaries, partners, members, shareholders, affiliates, successors and assigns, from and against any and all claims, demands, suits, actions, losses, claims, liabilities, injuries, costs and expenses to the extent caused by the Owner, excepting Liability arising from the sole negligence or willful misconduct of Engineer or its agents or employees. This indemnification provision shall survive the expiration or termination of this Agreement.

12.2 [No change]

12.3 To the maximum extent permitted by law, Consultant's liability for damages incurred by Owner shall be capped at the greater of (a) Three Million Dollars (\$3,000,000), or (b) the remaining aggregate limits of any applicable insurance covering Engineer's professional services at the time of judgment.

I hope this helps the discussion. I am tied up this afternoon, but please feel free to call my cell phone (562-746-7225) over the weekend if you have questions.

Once again, we appreciate your willingness to work with us on our requested changes, Ken.

Dave

From: Huchel, David

Sent: Thursday, April 07, 2016 4:25 PM

To: 'Kenneth A. Ehrlich' <KEhrlich@elkinskalt.com>

Cc: Boudreau, Russ <rboudreau@moffatnichol.com>; Mark C. C. Goss (markchristiangoss@gmail.com) <markchristiangoss@gmail.com>

Subject: RE: Broad Beach - MN Requested Amendment and Property Owner Acknowledgement Language [IWOV-dms-01.FID99123]

Ken,

Sorry for the delay. The latest iteration is below (new changes in red). Please let me know if you feel this is supportable. Also, please let me know if you have any feedback on the change to the limit of liability (12.3) or the homeowner acknowledgement language. I believe Russ will work with Mark on the other issues we discussed on 3/22.

Thank you, Ken.

Dave

12) INDEMNIFICATION

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- (a) *Engineer shall indemnify, defend and hold harmless Owner and all its directors, officers, managers, partners, members, agents, and employees, and their respective affiliates (collectively, "Owner Parties") from and against any and all claims, demands, suits, actions, losses, claims, liabilities, injuries, costs, and expenses to the extent arising out of, caused by, or related to Engineers' or its employees', agents' or sub-consultants' negligent acts, errors or omissions relating in any way to the Work. Engineer's duty to indemnify the Owner Parties shall not exist if the alleged injuries or damages sustained by the claimant are the result solely of the Owner's gross negligence or willful misconduct. This indemnification provision shall survive the expiration or termination of this Agreement.*
- (b) *Owner shall indemnify, defend and hold harmless Engineer and its respective officers, directors, agents, employees, divisions, subsidiaries, partners, members, shareholders, affiliates, successors and assigns, from and against any and all claims, demands, suits, actions, losses, claims, liabilities, injuries, costs and expenses to the extent arising out of, caused by or relating in any way the Owner the Work, excepting Liability arising from the sole negligence or willful misconduct of Engineer or its agents or employees. This indemnification provision shall survive the expiration or termination of this Agreement.*

12.2 [No change]

12.3 *To the maximum extent permitted by law, Consultant's liability for damages incurred by Owner shall be capped at the lesser of (a) Three Million Dollars (\$3,000,000), or (b) the remaining aggregate limits of any applicable insurance covering Engineer's professional services at the time of judgment.*

From: Kenneth A. Ehrlich [mailto:KEhrlich@elkinskalt.com]

Sent: Thursday, April 07, 2016 12:37 PM

To: Huchel, David <dhuchel@moffattnichol.com>

Cc: Boudreau, Russ <rboudreau@moffattnichol.com>; Mark C. C. Goss (markchristiangoss@gmail.com) <markchristiangoss@gmail.com>

Subject: RE: Broad Beach - MN Requested Amendment and Property Owner Acknowledgement Language [IWOV-dms-01.FID99123]

Dave-

We have not received suggested contract language from MN since our 3/30 e-mail exchange below. I have a fairly strong sense that the BBGHAD Board will not agree to indemnity language in favor of MN more broad than that contained in the current, operative contract.

If MN wants to suggest language other than that contained in current contract, please do so quickly to enable the BBGHAD Board can consider the matter at its 4/10/16 meeting. We prefer not to wait much longer on the substance of the pending MN work-- completion of the "Prior to Issuance" conditions in the CDP.

Thanks.

Kenneth A. Ehrlich

Elkins Kalt Weintraub Reuben Gartside LLP

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From: Huchel, David [<mailto:dhuchel@moffattnichol.com>]

Sent: Wednesday, March 30, 2016 5:14 PM

To: Kenneth A. Ehrlich

Cc: Boudreau, Russ; Mark C. C. Goss (markchristiangoss@gmail.com)

Subject: RE: Broad Beach - MN Requested Amendment and Property Owner Acknowledgement Language [IWOV-dms-01.FID99217]

Thanks, Ken.

I appreciate the feedback. Our concern is exposure to third party claims that are unrelated to our negligence. I will take another shot at balancing the language. In the meantime, do you have any thoughts about language the board might consider?

Dave

From: Kenneth A. Ehrlich [<mailto:KEhrlich@elkinskalt.com>]

Sent: Wednesday, March 30, 2016 4:49 PM

To: Huchel, David <dhuchel@moffattnichol.com>

Cc: Boudreau, Russ <rboudreau@moffattnichol.com>; Mark C. C. Goss (markchristiangoss@gmail.com) <markchristiangoss@gmail.com>

Subject: RE: Broad Beach - MN Requested Amendment and Property Owner Acknowledgement Language [IWOV-dms-01.FID99217]

Dave-

Thanks for the revised language. While I am happy to be corrected, I read the proposed indemnities together as saying essentially:

- MN will indemnify the BBGHAD for negligence, errors, or omissions associated with the Work
- BBGHAD will indemnify MN for all of the Work—except for claims arising from MN's sole negligence or willful misconduct.

Please let me know if the intent of your proposal is different than my read of it. To my eye, the requested BBGHAD indemnity of MN remains more broad than the indemnity coming from MN to the BBGHAD. As I mentioned in our meeting last week, I question whether the BBGHAD Board would agree to any form of indemnity of MN (maybe in certain circumstances where the BBGHAD somehow intentionally and adversely alters MN's Work). Overall, I sense this will be a hard sell to our Board.

The Board will consider this MN proposal at its next meeting.

Thanks.

Kenneth A. Ehrlich

Elkins Kalt Weintraub Reuben Gartside LLP

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From: Huchel, David [mailto:dhuchel@moffattnichol.com]

Sent: Wednesday, March 30, 2016 4:22 PM

To: Kenneth A. Ehrlich

Cc: Boudreau, Russ

Subject: Broad Beach - MN Requested Amendment and Property Owner Acknowledgement Language

Ken,

As a follow up to our discussion last week, I redrafted MN's requested contract amendment. This version should be more balanced.

Additionally, I prepared a draft property owner acknowledgement statement. As discussed, we recommend including this statement in the next document presented to the property owners for review and acknowledgement.

The recommended language follows:

Contract Amendment

12) INDEMNIFICATION

12.1 Owner acknowledges that due to the unpredictable effects and results of the Work, including the effect of natural forces that cannot be predicted, results are not guaranteed and real property located within the BBGHAD may suffer adverse effects during and after construction of the Work, including but not limited to flooding, erosion, undermining, overtopping, pooling and ponding, or other results that may not be expected or predicted. Accordingly:

- (a) Engineer shall indemnify, defend and hold harmless Owner and all its directors, officers, managers, partners, members, agents, and employees, and their respective affiliates (collectively, "Owner Parties") from and against any and all claims, demands, suits, actions, losses, claims, liabilities, injuries, costs, and expenses to the extent arising out of, caused by, or related to Engineers' or its employees', agents' or sub-consultants' negligent acts, errors or omissions relating in any way to the Work. Engineer's duty to indemnify the Owner Parties shall not exist if the alleged injuries or damages sustained by the claimant are the result solely of the Owner's gross negligence or willful misconduct. This indemnification provision shall survive the expiration or termination of this Agreement.
- (b) Owner shall indemnify, defend and hold harmless Engineer and its respective officers, directors, agents, employees, divisions, subsidiaries, partners, members, shareholders, affiliates, successors and assigns, from and against any and all claims, demands, suits, actions, losses, claims, liabilities, injuries, costs and expenses arising out of, caused by or relating in any way to the Work, excepting Liability arising from the sole negligence or willful misconduct of Engineer or its agents or employees. This indemnification provision shall survive the expiration or termination of this Agreement.

12.2 [No change]

12.3 To the maximum extent permitted by law, Consultant's liability for damages incurred by Owner shall be capped at the lesser of (a) Three Million Dollars (\$3,000,000), or (b) the remaining aggregate limits of any applicable insurance covering Engineer's professional services at the time of judgment.

Property Owner Acknowledgments

The Broad Beach Restoration Project is located in a dynamic shoreline environment, subject to highly unpredictable forces of nature both during construction and after Project completion. The Project is likely to be impacted by weather, storms, tides, surf, surge, erosion, undermining, scouring, differing wave heights and frequencies, overtopping, climate change, sea level rise, groundwater flow or other occurrences that may alter or

change the shoreline and cause damage to nearby property. In an attempt to mitigate the effects of these forces, the BBGHAD will hire a construction manager to monitor the project. Nevertheless, it is expected the beach profile and features will, at any given time, differ from the design, even over the course of a day. These changes may be immediate and significant, depending on the nature, type and strength of the forces or other changes exerted on the site.

In order to obtain the best possible results from the project, during and after construction each property owner in the BBGHAD must maintain their individual property in a manner that will not interfere with and/or effect the project construction or its final results. Neither the BBGHAD, the contractor nor the design team have any maintenance responsibility for your property.

Please call or email if you have any questions or comments.

Regards,

David W. Huchel
General Counsel, Vice President
Moffatt & Nichol
3780 Kilroy Airport Way, Ste 750 | Long Beach, CA 90806
P 562. 308. 5370 | F 562. 262. 2710 | M 562. 746. 7225

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From: Huchel, David
Sent: Tuesday, March 22, 2016 1:45 PM
To: 'kehrlich@elkinskalt.com' <kehrlich@elkinskalt.com>
Cc: Boudreau, Russ <rboudreau@moffattnichol.com>; McCluskie, Jim <JMcCluskie@moffattnichol.com>
Subject: Broad Beach Discussion with MN

Ken,

It was nice to meet you and Mark this morning. I will send you an updated mark up of the Broad Beach indemnity in a separate email. In the meantime, my contact information is below.

Kind Regards,

Dave

David W. Huchel
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