



City of Chesapeake

Office of the City Attorney
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Chesapeake, Virginia 23322
(757) 382-6586
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September 17, 2008

Ms. Dolores A. Moore
City Clerk
Municipal Center
Chesapeake, Virginia 23322

**Re: RESOLUTION AUTHORIZING THE CITY MANAGER
TO EXECUTE AN AMENDMENT TO THE AGREEMENT
WITH MJM GOLF, LLC REGARDING THE OPERATION
OF THE BATTLEFIELD GOLF CLUB ON CENTERVILLE
TURNPIKE.**

Dear Ms. Moore:

Please place the above-referenced resolution on the agenda for the City Council meeting on September 23, 2008, under the City Attorney's regular portion, and include the attached letter as backup.

Very truly yours,

Ronald S. Hallman
City Attorney

RSH:fmh
enclosures

cc: Mr. William E. Harrell, City Manager
Ms. Anna M. D'Antonio, Assistant to the City Manager
Ms. Mary Ann Saunders, Assistant to the City Manager
Richard H. Matthews, Esq., Pender & Coward, P.C.
bc: *Bryan Plummer*



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To the Honorable Mayor, Vice-Mayor,
and City Council Members

**Re: RESOLUTION AUTHORIZING THE CITY MANAGER
TO EXECUTE AN AMENDMENT TO THE AGREEMENT
WITH MJM GOLF, LLC REGARDING THE OPERATION
OF THE BATTLEFIELD GOLF CLUB ON CENTERVILLE
TURNPIKE.**

On May 20, 2008, the Chesapeake City Council approved an agreement between the City and MJM Golf, LLC (MJM Golf) relating to the Battlefield Golf Club on Centerville Turnpike. An amendment to the original agreement is now proposed in order for the Battlefield Golf Club to remain operational pending the conclusion of environmental testing and any necessary remediation. A short history is as follows:

Commencing in 2001, the Battlefield Golf Course was constructed over a six year period using 1.5 million tons of fly ash supplied by Dominion Virginia Power for fill material. In 2007, the Virginia Department of Environmental Quality accepted final certification that the "beneficial use" of the fly ash satisfied state regulations. The golf course was conveyed to MJM Golf, which began work on finalizing the site plan and opening the course to members. However, at the same time that final site plan review was underway, the residents living in adjacent communities along Whittamore Road, Centerville Turnpike and Murray Drive began to raise concerns regarding the safety of the fly ash, especially with regard to their wells. The City promptly took action to begin testing individual drinking water wells, on-site surface waters and on-site groundwater for potential fly ash contamination.

In accordance with the Chesapeake Zoning Ordinance, MJM Golf cannot obtain final site plan approval for the golf course until completion of the environmental tests. Without final site plan approval, the property cannot be occupied. Earlier this year, upon observing occupancy of the golf course, the Department of Neighborhood Services issued a notice of violation to MJM Golf for operating without an approved site plan and certificate of occupancy. Due to financial hardship, MJM Golf requested the City to defer enforcement of the applicable zoning regulations and allow the use of the golf course subject to several conditions designed to protect the health and safety of the residents, golfers, employees and the general public. The adjacent residents largely supported the original agreement in order to avoid abandonment and deterioration of the golf course, which could lead to erosion of the topsoil capping the fly ash, crumbling of

slopes in the stormwater management ponds, tall grasses and associated vermin, and trespass and vandalism.

The original agreement was fully executed by the parties on May 22, 2008. While many of MJM Golf's responsibilities under the agreement are perpetual or of long-standing duration, the City's primary obligation, the promise of forbearance, expires on October 1, 2008. Based on results from the City's preliminary environmental tests, the fly ash is now suspected of leaching metals into the on-site groundwater, thereby necessitating the need for continued environmental analysis. As an example, the U.S. Environmental Protection Agency is currently conducting tests to determine whether these contaminants have moved beyond the golf course property or pose a future threat to the adjacent residential communities. These and other similar environmental evaluations are expected to continue for an unspecified period of time, during which MJM Golf cannot obtain site plan approval or a certificate of occupancy. Accordingly, MJM Golf has asked for an extension of the promise of forbearance made in the original agreement and agrees to abide by the existing terms as follows:

- 1) Extend in perpetuity the promise of well replacement in case of failure.
- 2) Continue to work with the City to resolve issues relating to protection of groundwater, surface water and the public health, safety and welfare. Such full and complete cooperation shall include access to the property for environmental testing and to the extent necessary, the owner shall provide solutions and seek remedy from responsible parties.
- 3) Post at least two signs indicating that the golf course was constructed by previous owners using fly ash and that the use of this material was approved by the Virginia Department of Environmental Quality.
- 4) Prohibit the use of groundwater for any purpose. Water used for irrigation will be obtained from the stormwater lakes.
- 5) Refrain from using any permitted temporary structure as a clubhouse. Approved and permitted temporary structures may be used only for lawful purposes such as office, construction and security uses.
- 6) Maintain the golf course with a minimum of 18 inches of topsoil covering the fly ash at all times.
- 7) Immediately cease operations and prevent public access in the event any regulatory agency or agreed-upon expert determines that the fly ash poses a hazard to the golfers or adjacent residents
- 8) Refrain from filing in a court of law any action or request for relief relative to, or arising out of, the issuance, delay or denial of permits and approvals by the City.

The City has been monitoring compliance with the foregoing conditions. MJM Golf has been very cooperative in allowing persons on the property to inspect and conduct tests. Recently, MJM Golf deposited new topsoil on the site in order to maintain the fly ash cap and also agreed to expedite some of the more pressing failed well claims. In response to coverage denial by the one of the insurance companies, MJM Golf assured the City that challenges will be filed as necessary to provide the protection required by Chapter 62 of the City Code.

The enclosed amendment to the original agreement will extend the City's promise of forbearance until April 1, 2009, at which time the City Manager may exercise non-delegable discretion to extend the promise up until October 1, 2009. All other terms of the original agreement shall remain in effect.

Very truly yours,



Ronald S. Hallman
City Attorney

RSH:fmh
enclosure

cc: Mr. William E. Harrell, City Manager
Ms. Anna M. D'Antonio, Assistant to the City Manager
Ms. Mary Ann Saunders, Assistant to the City Manager
Richard H. Matthews, Esq., Pender & Coward, P.C.

RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AN AMENDMENT TO THE AGREEMENT WITH MJM GOLF, LLC REGARDING THE OPERATION OF THE BATTLEFIELD GOLF CLUB ON CENTERVILLE TURNPIKE.

WHEREAS, the City of Chesapeake, Virginia ("City") entered into an agreement with MJM Golf, LLC ("MJM Golf"), dated May 22, 2008, for the operation of the Battlefield Golf Club during environmental testing and analysis relating to the use of fly ash as a fill material (the "Agreement"); and

WHEREAS, the terms of the Agreement included a promise of forbearance on the part of the City, subject to MJM Golf meeting a number of requirements and conditions designed to protect the public health, safety and welfare of residents, golfers, employees, and other persons on or near the Battlefield Golf Club; and

WHEREAS, the promise of forbearance expires on October 1, 2008, and environmental studies by the Environmental Protection Agency and others are expected to continue beyond this date; and

WHEREAS, MJM Golf has requested a six month extension of the promise of forbearance, subject to the same terms and conditions of the Agreement, and

WHEREAS, the City is not aware of any reason to suspect that the use of the golf course will endanger golfers, employees or other persons entering upon, or living in the vicinity of, the Battlefield Golf Club; and

WHEREAS, the Council finds it to be in the best interest of the public welfare to extend the promise of forbearance as requested by MJM Golf and to provide the City Manager with the authority to approve another six month extension, subject to demonstration of need and continued compliance to the terms and conditions of the

Agreement, all for purposes of preventing abandonment and deterioration of the Battlefield Golf Club and facilitating environmental analysis and remedies.

NOW, THEREFORE, BE IT RESOLVED that the Council of the City of Chesapeake, Virginia, hereby authorized the City Manager to execute the attached Amendment to the Agreement with MJM Golf LLC to extend the period of forbearance until April 1, 2009, and to provide the City Manager with the non-delegable discretion to authorize a second extension of the period of forbearance, not to extend beyond October 1, 2009.

ADOPTED by the Council of the City of Chesapeake, Virginia, this _____ day of _____, 2008.

APPROVED:

Mayor

ATTEST:

Clerk of the Council

FIRST AMENDMENT TO AGREEMENT

THIS FIRST AMENDMENT made this ____ day of September, 2008, by and between MJM Golf, LLC, a Virginia limited liability company, hereinafter known as MJM Golf, and the City of Chesapeake, Virginia, a municipal corporation, hereinafter known as the City.

WHEREAS, the parties entered into an Agreement dated May 22, 2008 and approved by the Chesapeake City Council on May 20, 2008, for the continued operation of the Battlefield Golf Course subject to several conditions and restrictions (the "Agreement"); and

WHEREAS, the City's promised forbearance under Paragraph 1 of the Agreement was for a period of time ending on October 1, 2008; and

WHEREAS, MJM Golf has requested a six month extension due to continued environmental studies on the Battlefield Golf Club, said studies currently being conducted by various parties, including the Environmental Protection Agency and Dominion Virginia Power; and

WHEREAS, MJM Golf is willing to assume all risk and liability associated with the operation of the Battlefield Golf Club and agrees to continue to abide by all terms, conditions and commitments in the Agreement; and

WHEREAS, MJM Golf acknowledges and agrees with the City that preserving and protecting the public health, welfare and safety is paramount to all other concerns and objectives, which includes the safety of nearby residents and all persons entering upon the Battlefield Golf Club; and

WHEREAS, subject to the terms and conditions of the Agreement, the City agrees to extend the forbearance period for the requested six months, with a option of another six month extension to be exercised at the discretion of the City Manager.

NOW, THEREFORE, for and in consideration of the promises made herein, and for those memorialized in the Agreement by and between the parties dated July 22, 2008, the parties hereto agree as follows:

1. Paragraph 1 of the Agreement is hereby amended to extend the period of the City's forbearance until April 1, 2009, subject to conformance with the terms and conditions of the Agreement.

2. On or before April 1, 2008, the City Manager may exercise his discretion to extend the City's promise of forbearance, under the same terms and conditions of the Agreement, for a period of time to expire no later than October 1, 2009. The City Manager's authority to approve an extension of forbearance shall be non-delegable.

3. All other terms and conditions of the Agreement shall remain in full force and effect.

SIGNATURES ON FOLLOWING PAGE

WITNESS the following signatures:

MJM GOLF, LLC

CITY OF CHESAPEAKE, VIRGINIA

By _____
Manager

By _____
City Manager

ATTEST:

City Clerk

COMMONWEALTH OF VIRGINIA,
CITY OF CHESAPEAKE, to-wit:

The foregoing instrument bearing date of _____, 2008, was acknowledged before me this _____ day of _____, 2008, by William E. Harrell and Dolores A. Moore, City Manager and City Clerk respectively, of the City of Chesapeake, Virginia.

Notary Public

Notary ID# _____

My Commission expires: _____

COMMONWEALTH OF VIRGINIA,
CITY OF _____ to-wit:

The foregoing instrument bearing date of _____, 2008, was acknowledged before me this _____ day of _____, 2008, by _____, Manager of MJM Golf, LLC.

Notary Public

Notary ID# _____

My Commission expires: _____