



# City of Rialto

## Legislation Text

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**File #:** 18-019, **Version:** 1

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For City Council Meeting and Rialto Utility Authority [January 9, 2018]

TO: Honorable Mayor and City Council

FROM: Robb R. Steel, Interim City Administrator/Development Services Director

Request Rialto Utility Authority to Approve the First Amendment to the Ground Sublease by and between the Rialto Utility Authority and Rialto Bioenergy Facility LLC.

### **BACKGROUND:**

On March 22, 2016, the Rialto Utility Authority (RUA) approved a Ground Sublease Agreement ("Sublease" attached hereto as **Exhibit A**) by and between the RUA and Rialto Bioenergy Facility LLC (RBF) and various other agreements intended to facilitate the reuse of the former Enertech Environmental Facility ("Site") located adjacent to the Wastewater Treatment Plant.

On July 26, 2016, the RUA approved a Facility Operation Agreement to operate the Facility to process various sources of organic waste including food waste in the form of source separated organics and wet fraction from mixed waste sources, liquid waste, digestate, and biosolids from treatment plants throughout the region and convert such materials for use as an alternative fuel or for other industrial applications.

On November 1, 2016, the parties satisfied all of the conditions precedent to effectiveness of the sublease identified in Section 20.1 of the Sublease and established the Commencement Date for purposes of setting the Term of the Sublease and the start date for payment of rent. RBF pays \$10,000 per month to the RUA.

### **ANALYSIS/DISCUSSION:**

Section 20.2 of the Sublease established various Conditions Subsequent that the responsible party must satisfy within 18 months after the Commencement Date (or June 1, 2018). Section 20.2 authorizes the RUA Executive Director to extend the outside date for up to 90 days with good cause (or September 1, 2018). Either party may terminate the Sublease if the Conditions Subsequent are not satisfied within the allowed time.

The Conditions Subsequent are:

- (a) Authority shall use its best efforts to secure and maintain annual renewal of the encroachment permit(s) issued by the San Bernardino County Flood Control District (for access rights and utility maintenance and operation) and secure long-term easement(s) for the paved road that provides the sole point of access, both ingress and egress, to the Site and the water line that serves the Site. In the event the San Bernardino County Flood Control District fails or refuses to renew such encroachment permit(s), license agreement(s), or easement(s), Authority shall cooperate with RBF in good faith and utilize its best efforts in an effort to secure reasonable alternate access to the Site and alternate water line connections. In the event reasonable alternate access or water line connections

are unavailable, RBF shall have the right to terminate this Sublease upon written notice to the Authority; provided, however, that such termination shall be RBF's sole and exclusive remedy and RBF shall not be entitled to recover any form of damages or restitution (**the RUA satisfied this Condition**);

- (b) RBF securing a Precise Plan of Design (PPD) from the City pursuant to the requirements of City Resolution No. 2507 for property located in the Heavy Industrial, Agua Mansa Specific Plan (**the RBF submitted a PPD application that is pending completion of the EIR by 2Q/2018**);
- (c) RBF securing a Conditional Development Permit (CDP) from the City pursuant to Rialto Zoning Code, Chapter 18.108 for recycling facilities (**the RBF submitted a CDP application that is pending completion of the EIR by 2Q/2018**);
- (d) Prior compliance with CEQA for approval of the PPD and CDP (**public review process for the EIR ends on January 5, 2018 with Planning Commission consideration by 2Q/2018**);
- (e) Parties approving and recording the Easement Agreement in the form attached as Exhibit H (**Completed**); and
- (f) All other necessary permits and entitlements to operate and maintain the Facility (**RBF has initiated steps to procure all necessary permits and entitlements to operate the Facility, but some permits will be issued upon completion of the improvements - operations are expected to commence in 1Q/2020**).

RBF reports that Section 20.2(f) creates problems with Southern California Edison as RBF seeks an interconnect permit for its cogeneration distribution. SCE requires absolute site control, and they deem the RUA's authority to terminate the Sublease if RBF does not satisfy any of the unfulfilled Conditions Subsequent as an unacceptable limitation. Further, RBF states that its potential lenders express the same concerns.

To remedy this issue while retaining a schedule of performance important to the RUA and City, the First Amendment to Ground Sublease (First Amendment) attached hereto as **Exhibit B** removes Section 20.2(f) essentially establishing that the parties will satisfy all Conditions Subsequent upon receipt of the entitlements. The First Amendment extends the time period to receive all entitlements by 6 months (from 18 months after the Commencement Date to 24 months after the Commencement Date) or until October 31, 2018). RBF expects to secure all land use entitlements by the 2Q/2018 and then proceed to construction drawings and further permitting and grant seeking opportunities.

To ensure that the City/RUA may reclaim the site if, after entitlements are received, but the project does not commence, the First Amendment adds Section 24.8 (Further Rights of Authority to Terminate) allowing RUA to terminate if RBF does not satisfy the following performance objectives:

- Commence construction of the Facility by June 1, 2019;
- Complete construction of the Facility by June 1, 2021;
- Commence commercial operations by December 31, 2021;

The RUA Executive Director may extend these deadlines by up to 120 days for good cause.

In summary, the Sublease currently requires RBF to commence operations by April 30, 2018 (or secure an extension from RUA). RBF will probably secure all entitlements to construct by that date, but will not be operational. The proposed First Amendment extends the deadline for commencement of operations until December 31, 2021, but also imposes certain incremental performance objectives to ensure that adequate progress toward facility operations continues.

#### **ENVIRONMENTAL IMPACT:**

The First Amendment does not create an environmental impact. RBF has submitted applications for all land use entitlements related to the Project and has commenced the CEQA process. The Sublease does not grant land use entitlements or CEQA approvals.

#### **GENERAL PLAN CONSISTENCY:**

The proposed First Amendment is consistent with the Guiding Principal that “Rialto is committed to environmental sustainability, which means meeting the needs of the present without compromising the ability of future generations to meet their own needs and with the following goals and policies:

**Goal 2-34:** Achieve waste recycling levels that meet or exceed State mandates. Achieve maximum waste recycling in all sectors of the community: residential, commercial, industrial, institutional and construction.

Policy 2-34.1: Develop programs that promote reuse and recycling throughout the community.

Policy 2-34.2: Utilize source reduction, recycling, and other appropriate measures to reduce the amount of solid waste generated in Rialto that is disposed in landfills.

**Goal 3-10:** Minimize the volume of solid waste that enters local and regional landfills.

Policy 3-10.1: Encourage additional recycling in all sectors of the community.

**LEGAL REVIEW:**

The City Attorney prepared the First Amendment to Ground Sublease. The City Attorney reviewed and approved the staff report.

**FINANCIAL IMPACT:**

From the Commencement Date (November 1, 2016), RBF began rental payment to RUA of \$120,000 per year, with inflationary adjustments every 5 years and a fair market value reset in Year 20. The potential lease revenue over the first 20-year term of the Sublease is \$2.6 million (assuming 5% inflationary adjustments). All rental income accrues to the RUA Wastewater Account for the ultimate benefit of the ratepayers.

If RBF does not satisfy the remaining Conditions Subsequent and the additional performance objectives, either party could terminate the Sublease and then the RUA will not realize the various revenues under the Sublease and the Facility Operation Agreement.

**RECOMMENDATION:**

Staff recommends that the Rialto Utility Authority Approve the First Amendment to the Ground Sublease between the Rialto Utility Authority and Rialto Bioenergy Facility LLC.