

TAB D

MEMORANDUM

NOVEMBER 7, 2008

MEMORANDUM

To: Lee Leffingwell

From: Bob Gregory

cc: David Armbrust, Gary Newton

Re: Austin's Restrictive Covenant with Allied and Giles.

Date: November 7, 2008

Per your request for more information, I am providing you with some suggestions on the City of Austin's Restrictive Covenant with BFI, which would make it enforceable the way City Staff thinks it is. I have attached a clean copy of the Restrictive Covenant as signed last Friday for your reference (Exhibit A). I have also attached a copy of the rejected Restrictive Covenant by BFI (Exhibit B) that was part of the proposed Memorandum of Understanding (MOU) with Travis County in July 2007. If you compare, you can see the proposed Travis County covenant is substantially similar to the Restrictive Covenant negotiated by the City of Austin staff on October 31, 2008. I believe Travis County ultimately did not accept the proposed MOU and the draft Restrictive Covenant because BFI would not agree to amendments to make it enforceable.

I submitted some suggested edits in 2007 to Travis County, which I thought would have made the Restrictive Covenant and MOU acceptable. I have attached a document (Exhibit C) that shows how those edits are still appropriate to fold into the City's October 31, 2008 document to give it the teeth it needs to be enforceable.

The main concerns in the City's October 31, 2008 Restrictive Covenant are on page 2, items 1), 3), and 4). Item 1) only restricts the current owners of the land from operating the landfill past November 1, 2015. The current owners could sell the land to another company like Waste Management, Inc. (WMI) next door and WMI could continue filling. Item 3) only allows, and does not require, some future City Council or staff to enforce the covenant and excludes the facility's neighbors and/or current affected parties who are directly impacted from bringing enforcement proceedings. Item 4) should include a financial penalty that is large enough to be sufficient to deter whoever owns the property after November 1, 2015 from violating the restrictive covenant.

The City's October 31, 2008 Restrictive Covenant was not attached to the Rule 11 Agreement filed with the Administrative Law Judge. The City and BFI can still amend it to include these edits, which I believe are necessary to accomplish the stated intent. I am not sure if the neighbors to the BFI facility agreed with my proposed edits in 2007 or would agree with them now. I suggest allowing public comment on this and any other proposal to create certainty that the BFI and Giles Holding promise to close by a certain date will be kept. You may share this email and the attachments with other City Council members or City Staff members, if you like. Please let me know if I can answer any questions or provide any information from TDS.

EXHIBIT A

RESTRICTIVE COVENANT

This Restrictive Covenant is by and between **BFI WASTE SYSTEMS OF NORTH AMERICA, LLC** and **GILES HOLDINGS, L.P.** (collectively, "the Owners") as the Owners of that 349.363 acre tract of land, more or less, as more particularly described in this Restrictive Covenant, and the **CITY OF AUSTIN**.

OWNER: **BFI WASTE SYSTEMS OF NORTH AMERICA, LLC**

ADDRESS: 2575 IH 35 South, Suite 103
San Marcos, TX. 78666

PROPERTY: A 54.13 acre tract of land, more or less, the tract of land being more particularly described by metes and bounds in Exhibit "A" attached and incorporated into this restrictive covenant.

OWNER: **GILES HOLDINGS, L.P.**

ADDRESS: 1223 Judson Road
Longview, Texas 75601-3922

PROPERTY: A 295.242 acre tract of land, more or less, comprised of certain parcels of land, the tract of land being more particularly described by metes and bounds in Exhibits "B" and "C" attached and incorporated into this restrictive covenant.

CONSIDERATION: Ten and No/100 Dollars (\$10.00) and other good and valuable consideration paid by the City of Austin to each Owner, the receipt and sufficiency of which is acknowledged.

WHEREAS, the Owners have provided sanitary waste disposal services to the citizens of the City of Austin ("City") by operating a municipal solid waste landfill on the Property ("the Landfill") since 1982;

WHEREAS, the Owners have submitted an application to the Texas Commission on Environment Quality ("TCEQ") seeking to increase the permitted capacity of the Landfill so as to continue to provide sanitary waste disposal services to the citizens of the City in future years;

WHEREAS, the Property described in this Restrictive Covenant is the same Property described in the application submitted to the TCEQ (TCEQ MSW Draft Permit No. 1447A) and currently the subject of a contested case hearing in the State Office of Administrative Hearings (SOAH Docket No. 582-08-2178);

WHEREAS, whether and the extent to which the Owners could expand the Landfill or the City could prevent or restrict expansion of the Landfill is uncertain and is a question that is ultimately decided solely by TCEQ and the courts;

WHEREAS, given that TCEQ and the courts could either allow the maximum possible expansion despite the best efforts of the City or deny an expansion despite the best efforts of the Owners, both Parties find it in their interest to compromise; and

WHEREAS, the Owners of the Property and the City have agreed that the Property should be impressed with certain covenants and restrictions; and,

WHEREAS, the Owners represent that no other person or entity other than themselves currently possesses any interest in such land, that the undersigned are hereby authorized to execute the Restrictive Covenant as the authorized representative on behalf of their respective entity, and further represent that no other person or entity is allowed to dispose of waste or operate a transfer station at the Landfill;

NOW THEREFORE, it is declared that the Owners of the Property, for the consideration, shall hold, sell and convey the Property, subject to the following covenants and restrictions impressed upon the Property by the restrictive covenant. These covenants and restrictions shall run with the land, and shall be binding on the Owners of the Property, their successors and assigns.

- 1) After November 1, 2015, Owners shall not receive, process, recycle, or dispose any waste on the Property. Further, no transfer station, as defined in 30 TAC 330.3(157) shall ever be constructed or operated on the Property.
- 2) The maximum heights and footprint for the landfill, as approved by the TCEQ under permit number MSW 1447A for the Property, shall not be exceeded.
- 3) If any person or entity shall violate or attempt to violate this Restrictive Covenant, it shall be lawful for the City to prosecute proceedings at law or in equity against such person or entity violating or attempting to violate this Restrictive Covenant, or prevent the person or entity from such actions, and to collect damages for such actions.
- 4) If any part of this Restrictive Covenant is declared invalid, by judgment or court order, the same shall in no way affect any of the other provisions of this Restrictive Covenant, and such remaining portion of this Restrictive Covenant shall remain in full effect.
- 5) If at any time the City fails to enforce the terms of this Restrictive Covenant, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.
- 6) This Restrictive Covenant may not be modified, amended, or terminated without joint approval of both (a) a majority of the members of the Austin City Council, and (b) by the owner(s) of the Property.

EXECUTED this the 31st day of October, 2008.

OWNER:

Brad Dugas
Brad Dugas, Market Vice President
for the North Central Texas District
BFI Waste Systems of North America, LLC

STATE OF TEXAS

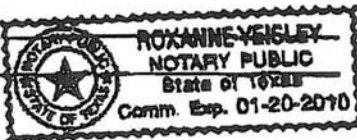
COUNTY OF TRAVIS

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§
§

SUBSCRIBED AND SWORN TO BEFORE ME by Brad Dugas on
this the 31 day of October, 2008, to certify which witness my hand
and seal of office.

Roxanne Vesley
Notary Public in and for the State of Texas

My commission expires:
Printed Name of Notary:



OWNER:

Steve Mobley
Steve Mobley, ~~VP~~ President
Mobley Management Co., L.L.C., General Partner,
Giles Holdings, L.P.

New York
STATE OF ~~TEXAS~~ §
Duval §
COUNTY OF ~~TEXAS~~ §

SUBSCRIBED AND SWORN TO BEFORE ME by Steve Mobley on
this the 31st day of October, 2008, to certify which witness my hand
and seal of office.

EVA C. RIVERA
NOTARY PUBLIC STATE OF NEW YORK
No. 01965084670
QUALIFIED IN DUVAL COUNTY
MY COMMISSION EXPIRES DEC. 9, 2010

[Signature]
Notary Public in and for the State of Texas

My commission expires:
Printed Name of Notary:

Dec 9th 2008
EVA C. RIVERA



RESTRICTIVE COVENANT

OWNER: BFI WASTE SYSTEMS OF NORTH AMERICA, INC.

**ADDRESS: 4542 SE Loop 410
San Antonio, Texas 78222-3925**

OWNER: GILES HOLDINGS, L.P.

**ADDRESS: 1223 Judson Road
Longview, Texas 75601-3922**

CONSIDERATION: Ten and No/100 Dollars (\$10.00) and other good and valuable consideration paid by Travis County to BFI Waste Systems of North America, Inc. (BFI) and Giles Holding L.P. (Giles), the receipt and sufficiency of which is acknowledged.

PROPERTY: A 349.363 acre tract of land, more or less, comprised of certain parcels of land, the tract of land being more particularly described in Exhibit "A" attached and incorporated into this covenant.

WHEREAS, Travis County desires that cost-effective, environmentally safe, sanitary solid waste disposal services are available to its citizens;

WHEREAS, BFI and Giles have provided sanitary waste disposal services to the citizens of Travis County by operating a municipal solid waste landfill on the Property ("the Landfill") since 1982;

WHEREAS, BFI and Giles have submitted an application to the Texas Commission on Environment Quality ("TCEQ") seeking to increase the permitted capacity of the Landfill so as to continue to provide sanitary waste disposal services to the citizens of Travis County in future years; and

WHEREAS, whether and the extent to which BFI and Giles could expand the Landfill or Travis County could prevent or restrict expansion of the Landfill is uncertain and is a question that is ultimately decided solely by TCEQ and the courts;

WHEREAS, given that TCEQ and the courts could either allow the maximum possible expansion despite the best efforts of the County or deny an expansion despite the best efforts of the BFI and Giles, both Parties find it in their interest to compromise; and

WHEREAS, BFI and Giles and Travis County have agreed that the Property should be impressed with certain covenants and restrictions;

NOW THEREFORE, as an inducement to Travis County (an adjoining landowner and representative for other neighbors near the Landfill) to not oppose the expansion of the Landfill, it is declared that BFI and Giles, for the consideration, shall hold, sell and convey the Property, subject to the following covenants and restrictions impressed upon the Property by the restrictive covenant. These covenants and restrictions shall run with the land, and shall be binding on BFI and Giles, their successors and assigns.

- 1) After November 1, 2015, waste shall not be received, processed, or disposed of on the Property. Further, no transfer station shall ever be constructed or operated on the Property.
- 2) The maximum heights and footprint for the landfill, will be as approved by the TCEQ under permit number MSW 1447A, and no other, for the Property. These heights and footprint shall not be exceeded.
- 3) If any person or entity shall violate or attempt to violate the terms of this Restrictive Covenant, it shall be lawful for Travis County to prosecute proceedings at law or in equity against such person or entity violating or attempting to violate the Restrictive Covenant, or prevent the person or entity from such actions, and to collect damages for such actions.
- 4) If any part of this Restrictive Covenant is declared invalid, by judgment or court order, the same shall in no way affect any of the other provisions of this Agreement, and such remaining portion of the Agreement shall remain in full effect.
- 5) If at any time Travis County fails to enforce the terms of this Restrictive Covenant, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.
- 6) This Restrictive Covenant may not be modified, amended, or terminated without joint approval of both (a) a majority of the members of the Commissioner's Court of Travis County, and (b) by both BFI and Giles.

EXHIBIT C

RESTRICTIVE COVENANT

This Restrictive Covenant is by and between **BFI WASTE SYSTEMS OF NORTH AMERICA, LLC** and **GILES HOLDINGS, L.P.** (collectively, "the Owners") as the Owners of that 349.363 acre tract of land, more or less, as more particularly described in this Restrictive Covenant, and the **CITY OF AUSTIN**.

OWNER: **BFI WASTE SYSTEMS OF NORTH AMERICA, LLC**

ADDRESS: 2575 IH 35 South, Suite 103
San Marcos, Texas 78666

PROPERTY: a 54.13 acre tract of land, more or less, the tract of land being more particularly described by metes and bounds in Exhibit "A" attached and incorporated into this restrictive covenant.

OWNER: **GILES HOLDINGS, L.P.**

ADDRESS: 1223 Judson Road
Longview, Texas 75601-3922

PROPERTY: a 295.242 acre tract of land, more or less, comprised of certain parcels of land, the tract of land being more particularly described by metes and bounds in Exhibits "B" and "C" attached and incorporated into this restrictive covenant.

CONSIDERATION: Ten and No/100 Dollars (\$10.00) and other good and valuable consideration paid by the City of Austin to each Owner, the receipt and sufficiency of which is acknowledged.

WHEREAS, the Owners have provided sanitary waste disposal services to the citizens of the City of Austin ("City") by operating a municipal solid waste landfill on the Property ("the Landfill") since 1982;

WHEREAS, the Owners have submitted an application to the Texas Commission on Environment Quality (TCEQ) seeking to increase the permitted capacity of the Landfill so as to continue to provide sanitary waste disposal services to the citizens of the City in future years;

WHEREAS, the Property described in this Restrictive Covenant is the same Property described in the application submitted to the TCEQ (TCEQ MSW Draft Permit No. 1447A) and currently the subject of a contested case hearing in the State Office of Administrative Hearings (SOAH Docket No. 582-08-2178);

EXHIBIT C

WHEREAS, whether and the extent to which the Owners could expand the Landfill or the City could prevent or restrict expansion of the Landfill is uncertain and is a question that is ultimately decided solely by TCEQ and the courts;

WHEREAS, given that TCEQ and the courts could either allow the maximum possible expansion despite the best efforts of the City or deny an expansion despite the best efforts of the Owners, both Parties find it in their interest to compromise; and

WHEREAS, the Owners of the Property and the City have agreed that the Property should be impressed with certain covenants and restrictions which is a material and decisive factor by the City not to actively oppose the permit amendment because the City's opposition could affect the outcome of the proceedings; and,

WHEREAS, the Owners represent that no other person or entity other than themselves currently possesses any interest in such land, that the undersigned are hereby authorized to execute the Restrictive Covenant as the authorized representative on behalf of their respective entity, and further represent that no other person or entity is allowed to dispose of waste or operate a transfer station at the Landfill;

NOW THEREFORE, it is declared that the Owners of the Property, for the consideration, shall hold, sell and convey the Property, subject to the following covenants and restrictions impressed upon the Property by the restrictive covenant. These covenants and restrictions shall run with the land, and shall be binding on the Owners of the Property, their successors and assigns.

- 1) After November 1, 2015, ~~Owners shall not receive, process, recycle, or dispose any waste~~ no form of liquid or solid waste shall be received, processed, disposed of or recycled on the Property. Further, no transfer station, ~~as defined in 30 TAC 330.3(157)~~ shall ever be constructed or operated on the Property. The term transfer station shall be defined as follows: "A facility used for transferring solid waste from collection vehicles to long-haul vehicles (one transportation unit to another transportation unit). It is not a storage facility such as one where individual residents can dispose of their wastes in bulk storage containers that are serviced by the collection vehicles."
- 2) The maximum heights, depths and footprint for the landfill, as approved by the TCEQ under permit number MSW 1447A and no other for the Property, shall not be exceeded.
- 3) If any person or entity shall violate or attempt to violate this Restrictive Covenant, it shall be lawful for the City or any person owning real property within one-half mile of the Property to prosecute proceedings at law or in equity against such person or entity violating or attempting to violate this Restrictive Covenant, or prevent the person or entity from such actions, and to collect ~~damages~~ actual damages or liquidated damages of \$25,000 per day for each day of violation, whichever is greater, attorneys' fees and all costs for such actions.
- 4) If any part of this Restrictive Covenant is declared invalid, by judgment or court order, the same shall in no way affect any of the other provisions of this Restrictive Covenant ~~and such remaining portion of this Restrictive Covenant shall remain in full effect~~ or Owners' obligations under TCEQ MSW Draft Permit No. 1447A.

EXHIBIT C

- 5) If at any time the City or any beneficiary fails to enforce the terms of this Restrictive Covenant, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.
- 6) This Restrictive Covenant may not be modified, amended, or terminated without joint approval of both (a) a majority of the members of the Austin City Council, and (b) by the owner(s) of the Property.

EXECUTED this the _____ day of _____, 2008.

OWNER:

BEI WASTE SYSTEMS OF NORTH AMERICA, LLC

By:

Brad Dugas, Market Vice President
for the South Central Texas District
~~BFI Waste Systems of North America, LLC~~

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

SUBSCRIBED AND SWORN TO BEFORE ME by Brad Dugas, Market Vice President for the South Central Texas District on behalf of BFI Waste Systems of North America, LLC on this the _____ day of _____, 2008, to certify which witness my hand and seal of office.

(seal)

Notary Public in and for the State of Texas

My commission expires: _____
Printed Name of Notary _____

EXHIBIT C

OWNER:

GILES HOLDINGS, L.P.

By: MOBLEY MANAGEMENT CO., L.L.C.,
General Partner

By: _____

Steve Mobley, President

~~Mobley Management Co., L.L.C., General Partner,~~
~~Giles Holdings, L.P.~~

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

SUBSCRIBED AND SWORN TO BEFORE ME by Steve Mobley, President of Mobley Management Co., L.L.C., general partner of Giles Holdings, L.P. on this the _____ day of _____, 2008, to certify which witness my hand and seal of office.

(seal)

Notary Public in and for the State of Texas

My commission expires: _____

Printed Name of Notary _____