

Memo

To Haskell C. Brown III, Interim City Attorney, City of Richmond, Virginia

From Darrin Glymph, Esq & Matthew Neuringer, Esq.

Date November 11, 2019

Re Navy Hill Development Project – Protections and Legal Safeguards Summary Memorandum

This briefing memorandum is intended to identify certain key legal issues relating to the Development Agreement and the Arena Lease for the proposed Navy Hill Development Project in Richmond, Virginia. This briefing memorandum is not intended to be, and should not be construed as, a complete summary or restatement of either such agreements or the provisions cited throughout this document and is not a substitute for the full and complete review of either such documents by the City, the City Council, the City's Navy Hill Development Advisory Commission (the "**Advisory Commission**") or their respective personnel.

Any capitalized term used, but not otherwise defined, has the meaning given to such term in the applicable agreement.

DEVELOPMENT AGREEMENT (DA)

1. **Events of Default** – The Development Agreement includes Developer events of default that are consistent with best market practice, including defaults for a failure to timely close on any Private Development Parcel, failure to timely commence construction or achieve Substantial Completion on any Private Development Parcel or Road Project, bankruptcy defaults, violation of the assignment or transfer provisions or any breach of any of the construction or use covenants. The City may terminate the Development Agreement following the occurrence of any Developer Default that is uncured or remedied, as required by the DA, and the City may also make a legal claim against the Developer for any losses the City directly sustained as a result of a termination for Developer Default. (**DA Section 11.1**)
2. **Construction Covenant, Hotel Use Covenant and Affordable Housing Covenant** - Upon conveyance of any Private Development Parcel the portion of the Purchase Price allocated to such respective parcel will be released to the City. Each parcel will be encumbered by a Construction Covenant, Construction Deed of Trust, and as applicable, an Affordable Housing Covenant and Hotel Covenant, each of which will be recorded in the land records. These covenants require, among other things, development of the applicable parcel as obligated by the Development Agreement, the Master Plan and the Purchase and Sale Agreement and each provide the City with remedies in the event such obligations are not met. These remedies are as follows:
 - a. **Prior to Substantial Completion/Operations** – If in connection with the Private Development component of the Project a parcel is conveyed to the Developer and the Developer either (1) fails to timely commence construction in accordance with the Project Schedule, (2) commences construction but fails to timely complete such project in



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accordance with the Project Schedule or (3) fails to construct such project in accordance with the Master Plan, the City will have the following rights:

- i. retain the Purchase Price and draw on the full remaining portion of the \$15.8 million performance security;
 - ii. revert ownership of the applicable defaulted parcel to the City (subject to lenders' interest) and all improvements, repairs, alterations, and modifications made by the Developer to such parcel;
 - iii. obtain a legal transfer of all work product, designs, and intellectual property owned by the Developer for such defaulted parcel(s);
 - iv. obtain a legal transfer of all subcontracts, documents, records, leases, concessions, or other contracts and insurances otherwise in place or created by the Developer and the Developer indemnifies the City against all losses suffered or incurred by the City in connection with any breach by the Developer under such transferred documents or agreements;
 - v. terminate the Development Agreement and all future rights of the Developer to close on future parcels that have not yet achieved closing;
 - vi. each Private Development Parcel may have a performance and payment bond guaranteeing full delivery of the construction of such project by a surety. Where the applicable contractor is in default and the Developer has been terminated on a parcel by the City, the City can claim under such performance bond (subject to lenders' interests) to require that the surety completes the applicable project. In this scenario the City can then sell the completed or partially constructed project to a third-party and (subject to lenders' interests) retain the proceeds; and
 - vii. exercise all rights and remedies available at law, including claiming under the indemnity clause (Article 7 of the Development Agreement) against the Developer, its affiliates, its Subcontractors, CCP, CCD and any Construction Contractor or OM&C Contractor who has caused losses to the City due to a breach of the Development Agreement.
- b. **Following Substantial Completion/Operations** – With respect to the Private Development component of the Project, the rights that exist in the Development Agreement and the Armory Lease for a Developer Default following Substantial Completion/commencement of operations are as follows:

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- i. with respect to the Armory, (i) require a remedial plan to be put in place to remedy any such default or breach, (ii) claim against the Developer, the Armory's OM&C Contractor and the OM&C Contractor's Guarantor (where applicable) under the indemnity clause, (ii) (subject to lenders' rights) terminate the Armory Lease and (iii) revert possession and ownership of all Improvements (subject to lenders' rights) made to the Armory;
- ii. with respect to the hotel, require through a hotel covenant filed with the land, that the applicable terms and conditions in the development agreement be satisfied by any owner and user of such parcel, ensuring a long-term high-quality hotel and minimum number of rooms. Failure to comply with such covenant will entitle the City to seek specific performance through judicial enforcement action of such requirements;
- iii. with respect to any private development parcel including affordable housing, require through an affordable housing covenant filed with the land, that the applicable terms and conditions in the DA be satisfied by any owner and user of such parcel, ensuring long-term compliance with the minimum affordable housing conditions and a minimum number of affordable housing units on such parcel. Failure to comply with such covenants will entitle the City to seek specific performance through judicial enforcement action of such requirements; and
- iv. to the extent that any other Private Development Parcel has achieved Substantial Completion / operations and has subsequently defaulted for a failure to be operated or maintained in accordance with the Master Plan, but other parcels have not yet achieved Closing, the City can terminate the Developer's right to close on any such future parcels that have not yet achieved Closing and retain the full purchase price / developer performance security.

(DA 11.3-11.6; Armory Lease Article 20; & Purchase and Sale Agreement 3(c)-(e).

3. **Financial Close Conditions Precedent** – The City established over 15 conditions precedent for the Developer to satisfy prior to being able to issue any bonds for the Arena. These conditions precedent, among other things, ensure the Project as a whole is sufficiently developed and funded by the Developer in advance of the City issuing any bonds for the Arena, including the Developer having \$290 million in debt term sheets and \$150 million equity commitments for the private development. **(DA Section 6.1(c))**. Failure to issue bonds within 180 days of execution of the Arena Lease will result in a default under the Development Agreement and the City would then be entitled to terminate the Developer and unwind the transaction at such time. **(DA Section 4.3)**

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- 4. Private Development Parcel Conditions Precedent** – Prior to Closing on each Private Development Parcel (and the City being required to convey each Private Development Parcel to the Developer), the Developer must satisfy certain conditions precedent for each such parcels, including (i) the Arena’s Financial Close has been achieved, (ii) the Developer cannot be in breach under any of the Contract Documents, any Subcontract or any Financing Document, (iii) a Conceptual Design of the development on such parcel has been delivered to the City and it is consistent with the Master Plan Requirements, (iv) any existing construction by the Developer on any other parcel must be proceeding in accordance with the Development Agreement and the applicable Construction Covenant, (v) all governmental approvals, variances, rights-of-ways, and boundary line adjustments which are required to commence construction on the applicable parcel have been obtained, (vi) all required equity commitments and debt term sheets have been provided for such Private Development Parcel, (vii) the representations and warranties made by the Developer in the Development Agreement are true and correct in all material respects, (viii) with respect to the Hotel development, the Hotel Key Contracts are in full force and effect and (ix) several other parcel specific conditions precedent exist made on the specific use and issues relevant to each such parcel. **(DA Section 2.2 and Purchase and Sale Agreement – Schedule 2)**
- 5. Performance Targets & Job Training** – NHDC expressly agreed to \$300 million in Emerging Small Business and Minority Business Enterprise subcontract targets for the construction of the Project as a whole. **(DA Section 10.3 / 10.4)**. The Developer also committed to work in good faith to develop training and outreach programs within the City of Richmond to identify opportunities to secure job skills needed for construction and operations of the Project. **(DA Section 10.5)**.
- 6. Affordable Housing Commitment** – The Development Agreement provides that in the first instance the Developer has an affirmative obligation for the Developer to directly develop, or provide financing for, 480 Affordable Housing Units in Downtown Richmond as follows: 280 must be built directly by the Developer on the Project Site, with the remaining 200, if not feasible to be constructed directly by the Developer, such Affordable Housing Units must be developed in Downtown Richmond by the Better Housing Coalition through a contribution of \$10 million by the Developer. This commitment is firm and committed in phases, ensuring Affordable Housing Units are not back ended on the project. **(DA Section 6.4 and 10.2)**
- 7. Developer Performance Security / Closing** – The Developer is required to deposit the full \$15.8 million purchase price for the Private Development Parcels in escrow for the benefit of, and secured by, the City. The Development Agreement includes a mechanism requiring closing to be achieved on each Private Development Parcel by a date certain. Extensions will only be granted subject to approval by the City, in its sole discretion, and failure to timely achieve Closing on any Private Development Parcel entitles the City to draw on the Developer Performance Security and retain an amount equal to such parcel’s Purchase Price. **(DA Section 3.6 and 4.3)**. It should be noted that

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in order to allow the Project to be financeable, after one Private Development Parcel has achieved Closing, any termination of the Development Agreement thereafter will only impact those parcels which have not yet Closed.

- 8. Indemnification & Insurance** – The City obtained generally market standard indemnity and insurance mechanics from the Developer for the benefit of the City. Additionally, these indemnity provisions are required to be made by each of CCP and CCD. These indemnities will practically need to be passed down to the Developer’s subcontractors as well because they cover not only the actions of the Developer, but also the actions of its subcontractors, invitees and agents. **(DA Section 7.1 and Article 8).**
- 9. Project Reporting Manager / Key Personnel** – The Developer is required to have a third-party project manager or CCP provide regular reports and status updates on each component of the Project and coordinate with the City on the Project’s progress and development. The Development Agreement requires Marty Barrington, Susan Eastridge and Michael Hallmark, in particular, to all personally remain as key personnel managing the Project through stabilization of all of the Private Development Parcels. Stabilization is defined as 90% full lease-up on Retail-Uses and residential units, respectively, 80% full lease-up on office space, and 65% occupancy on the Hotel. **(DA Section 4.14)**
- 10. Schedule of Submittals / Master Plan** - A Schedule of Submittals provision requires certain key design submittals (100% schematic and 100% design and construction documents) to be approved by the City for each Private Development Parcel. The purpose of these submittals is for the City to confirm that each Private Development Parcel’s development is implemented in a consistent manner with the Master Plan Requirements and do not include any Material Changes. Material Changes are defined as a (i) 5% or greater reduction in Floor Area of Retail Uses, Office Uses and Residential Units or other applicable uses (e.g. Open Space required by the DA), (ii) a Capital Investment on any Private Development Parcel less than the amounts identified in the Master Plan Requirements, (iii) in the case of Affordable Housing, any change to the location, number or type of Affordable Housing Units inconsistent with the provisions of the Development Agreement or any decrease in the size of any Affordable Housing Units greater than 15% of the square footage required thereof and (iv) any other material changes in the function use, purpose or operation of a Private Development Parcel from those included in the Master Plan. **(DA Section 4.5 / 4.6 / 4.8)**
- 11. Transit Center** – The DA includes a process requiring the Developer and the City to negotiate and agree on a binding term sheet to be used to develop the subsequent GRTC lease, as a condition precedent to Financial Close. The bus transfer facility will be built in accord with Federal Transit Administration regulations. It will be the responsibility of GRTC to secure federal approval of the project and to minimize the regulatory impact of that project on the overall development.

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Additionally, executing the GRTC is a condition precedent to the Developer closing on Parcel C for private development. **(DA Section 3.1(g)).**

- 12. Hotel Use Covenant** – As referenced above, a hotel use covenant will be recorded with the parcel to be used to develop the hotel and will require that the Developer construct and operate a 4/5 star 320,000 sqft 500 room guest hotel, and that such hotel must be operated and maintained consistent with such standards for at least 20 years. **(DA Exhibit N)**
- 13. DSS Office Space** – The DA includes a clear process for ensuring that Block I will not be transferable without the Developer identifying a suitable location to consolidate DSS and otherwise facilitate the leasing of a site by DSS. The Developer's right to close on Block I is conditional on finding an alternative location for DSS's offices. In the event the Developer should fail to close on Block I, the City shall retain the purchase price allocable to Block I and can terminate the Development Agreement as to all other parcels that have not yet achieved Closing. **(DA Section 2.2)**
- 14. Performance Bond and Payment Bond & Required Contractor Provisions**– Where any Private Development parcel's or any road project's contractor provides a performance and payment bond to the Developer, such bond must also name the City as an additional obligee. **(DA Section 4.16).**
- 15. Road Projects** – The required road projects include the 5th and 7th Street Project, the 6th Street Plaza Project and the Clay Street Project. These projects are detailed in a Right-of-Way Reconfiguration Exhibit H to the DA. Each of these projects include City oversight and require the City's approval over all design and construction documents iteratively throughout their development. Once completed, the City must also certify Substantial Completion confirming that the Road Projects satisfy the requirements in the DA, applicable law and are fully operational. To the extent that the Developer fails to complete construction of any Road Project the City can complete such construction at the Developer's sole cost and expense and the Developer must promptly thereafter reimburse the City for its relevant costs and expenses. **(DA Exhibit H)**



ARENA LEASE AGREEMENT

1. Conditions Precedent to Commencement of Construction -

- a. Design & Construction Documents** – Prior to commencing construction on any portion of the Arena the Developer must deliver 100% Final Design and Construction Documents for the City's / EDA's verification. The purpose of this verification will be to review and confirm that the designs and documents are consistent with the performance criteria and technical requirements and the initial Schematic Design provided to the City prior to execution of the Lease. This will help to ensure that the City will have an Arena constructed in a manner that is consistent with what was originally authorized by City council and that substantive elements of the Project have not been modified without the City's express written approval. (**Arena Lease Section 7.2 / 7.4**)
- b. Plans for Performance** – The Construction Contractor and the Developer must deliver all required plans that will be necessary for construction, including demolition plans, health and safety plans, risk management plans, quality management plans, project management plans and project schedules. These plans will be provided to ensure that the Developer is implementing the Project in a manner that is consistent with the terms of the Lease and Good Industry Practice. (**Arena Lease Section 7.2 / 7.4**)
- c. Insurance Requirements** – The Developer is required to have industry standard insurances in place at all times, including, among others, property insurance in an amount equal to 100% of the then-current full replacement cost of the Arena, Builders Risk Insurance covering 100% of the Construction Contract Price, and a \$14 million commercial general liability umbrella policy. These insurances may protect against unknown or unanticipated events that could impact the Project, including certain site conditions or force majeure events that could otherwise would have materially adversely impacted successful delivery of the Project. These insurance amounts may be adjusted upward based on lender requirements once the financing of the Project is negotiated with underwriters. The EDA and City must be named as additional insureds on such policies. (**Arena Lease Article 15**)

2. Performance Security -

- a. Guaranty** – The Construction Contractor is required to deliver for the benefit of the Developer and the City/EDA a construction guaranty from its parent companies, guaranteeing full performance and payment of all the Construction Contractor's obligations under the Construction Contract. This is a fundamental protection to ensure the largest corporate balance sheet available to the Construction Contractor is standing behind the full completion of the Project. The guarantee will be made available for the benefit of the EDA/City in the event of a termination of the Lease for a Developer Default. (**Arena Lease Section 7.6.2 / Exhibit F**)

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- b. Performance and Payment Bond** – The Developer’s Construction Contractor are required to deliver for the benefit of the Developer and the City/EDA a 100% performance and payment bond. This instrument is available as security to be claimed upon by the Developer or the City/EDA following a Construction Contractor event of default under the Construction Contract. This is a unique performance and payment bond, in that it is tied to a mandatory expedited dispute resolution process. The benefit of the expedited dispute resolution process is that it can better ensure that a surety will perform the Construction Contractor’s obligations or pay an amount equal to the penal sum (approx. \$300m), within a period not to exceed 72 days from the Surety’s dispute that it is not obligated to perform the Construction Contractor’s obligations under the Construction Contract. (**Arena Lease Section 7.6.1 / Exhibit G**)
- c. Retainage** - The trustee for the Arena’s Bonds will retain 5% as retainage security in a subaccount for the EDA’s/City’s benefit, from each advance made to the Developer for construction work performed on the Arena Project. The EDA/City will be entitled to apply such amount (i) to reimburse the EDA/City for any of their losses incurred in connection with any Developer Default caused by the Construction Contractor or (ii) any third-party claims against the EDA/City caused by the Construction Contractor. (**Arena Lease Section 7.6.3**)
- 3. Development Management Fee** – As a general rule, the Developer (i.e. CCP/CCD) will only be entitled to be paid its development fee for the Arena Project, incrementally based on a percentage of the total design and construction work completed on the Arena. A specified amount will be paid on financial close to cover only out-of-pocket expenses of the Developer as of the date of financial close (**DA Section 6.5**)
- 4. Project Schedule**

 - a. Defaults** - The following are Project Schedule Developer Defaults: (i) failure to timely receive a notice to proceed to commence construction within 8 months of execution of the Lease, (ii) failure to timely commence construction on all other aspects of the Project within 2 months of receiving the required governmental permits and (iii) failure to timely achieve Substantial Completion within 48 months following submission of complete and compliant final building permits to the City. (**Arena Lease Section 7.1 / 19.1**)
 - b. Liquidated Damages** – If there are no Delay Events, and the Developer fails to achieve Substantial Completion within 36 months following submission of complete and compliant final building permits to the City, then the Construction Contractor must pay liquidated damages equal to an amount starting at \$5,000 per day, escalating to \$10,000 on the 31st day of delay and to \$15,000 per day after the 60th day of delay. Such liquidated damages

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are capped at \$5,025,000, an amount equal to the 12-month Long Stop Substantial Completion Date following the Substantial Completion Deadline. If the Developer still has not achieved Substantial Completion by the Long Stop Substantial Completion Date, then the City/EDA may terminate the Developer for a Developer Default and the Developer would be required to pay the City's damages incurred as a result of such termination. **(Arena Lease Section 7.1.3 / 20.1)**

5. **Landlord Project Monitor** – The Arena's bond proceeds will cover the costs for an independent project representative dedicated to the Project and hired by the EDA/City to oversee the design, demolition, construction and commissioning of the Project. The Landlord Project Monitor's primary responsibilities will include, among others, that it will help enable efficient coordination among the project stakeholders by acting as the reviewer and where authorized, the verifier of the Developer's submittals. The \$500,000 budget for the project monitor will be paid for by the bonds (not the City/EDA) and will cover the monitor's costs through the Substantial Completion Deadline, and any amounts required thereafter due to a Developer caused delay will be reimbursed by the Developer to the EDA/City. **(Arena Lease Section 7.3)**
6. **Submittals** - The Developer is required to submit the Major Submittals to the EDA/City for verification of compliance with the Benchmark Requirements. These submittals include: (i) 100% schematic design documents, (ii) 60% design and construction documents, and (iii) 90% design and construction documents. Any final design and construction documents will be required to be submitted to the EDA/City for verification at any request for a notice to proceed with construction. **(Arena Lease Section 7.2)**
7. **Performance Criteria & Technical Requirements** – The Developer, the Construction Contractor and OM&C Contractor will be required to satisfy detailed performance criteria and technical requirements for the Project. These documents layout granular detail about the City's expectations from a performance perspective, as well as regarding certain baseline mandatory technical aspects, for the Project. The Developer will be held to these requirements and any certification of Substantial Completion or ongoing operations and maintenance compliance will ensure that these requirements have been satisfied. **(Arena Lease Section 7.1 / Exhibit H)**
8. **Subcontract Requirements** – The Developer cannot change its Construction Contractor without the EDA's/City's approval. Additionally, the Construction Contractor has certain required terms that must be included in its Construction Contract, including that (i) the City/EDA can step-in and takeover such agreement where the Developer is terminated for default, (ii) the Construction Contractor must satisfy all of the Developer's requirements for design and construction under the Arena Lease on a fully-back-to-back basis, (iii) compliance with the State's prompt payment requirements for subcontractors, (iv) a minimum 1-year warranty period, among others and (v) that

the Construction Contractor and its subcontractors must participate in meetings with the City/EDA, at their reasonable request. (**Arena Lease Section 7.12 - 7.13**)

9. Unknown Site Conditions –

- a. Allowance –** While the Developer has advised they do not expect to encounter any material unknown site conditions prior to, or during construction, to mitigate the risk of such unlikely occurrence, and avoid paying for unnecessary contractor contingency, the parties agreed to establish and fund an Unknown Site Condition Contingency subaccount. The account will be funded with Arena bond proceeds at Financial Close and will be funded in an amount to be agreed between the parties, but that is intended to reflect the amount the Construction Contractor would have otherwise included as contingency in its schedule of values for unknown site conditions. This allowance will be in place to ensure that to the extent any such Unknown Site Condition materializes, then the funds will be available as when costs are incurred; however, if such unknown conditions never materialize the money will be returned to the bondholders and accelerate repayment of the bonds instead of being retained by the Construction Contractor as upside / profit. (**Arena Lease Section 16.2.2.1 - 16.2.2.2**)
- b. Conditions -** The types of conditions that qualify as unknown site conditions, include those that are either (i) not disclosed in any reports or public information available prior to the date the Developer takes possession of a portion of the Premises and (ii) were not the type of condition that should have been reasonably identified or discovered by an appropriately qualified and experienced contractor, engineer or expert working in that field exercising due care and skill and Good Industry Practice in the same or equivalent circumstances. (**Arena Lease Section 1.1**)
- c. Shortfall in Contingency –** Where there is a shortfall in the contingency, the Parties must meet to develop a remedial plan on how to address such shortfall, either through contributions by either party, insurance or other means. If no solution is resolved within 120 days, and the parties don't agree on a longer period to continue to seek resolution, then either party may terminate the Lease without fault or claim by the other party and the Construction Contractor and Developer will be paid solely from the bond trustee, for out-of-pocket costs incurred to date and for terminating any such contracts, excluding lost-profits or business opportunity. (**Arena Lease Section 16.2.2.3 - 16.2.2.4**)

10. Conditions to Substantial Completion – The EDA/Landlord Project Monitor will be responsible for certifying that the Arena has achieved Substantial Completion once notified by the Developer that it believes it has achieved Substantial Completion. As part of certifying Substantial Completion the EDA/Landlord Project Monitor will confirm that, among others: (i) the Arena functionally and

technically meets the performance criteria and technical requirements in the Lease, (ii) all necessary governmental approvals for completion and operation of the Arena are in full force and effect, (iii) the OM&C Contract has been executed and a plan for operations, maintenance and concessions has been provided and is consistent with the term sheet attached to the Lease, (iv) the City's use agreement for access and use of the Arena has been negotiated and agreed between the City and NHDC and (v) any operational manuals have been provided to the City/EDA to ensure the City has the necessary information to be able to exercise its step-in rights and operate the Arena in the event of a default by the Developer. **(Arena Lease Section 7.14)**

11. Title – Upon installation of any improvements to the premises, the City will automatically obtain title ownership of such improvements, except for any of the Developer's personal property (e.g. computers, furniture, other moveable equipment, etc.). **(Arena Lease Section 7.11)**

12. Operations and Maintenance

a. OM&C Plan – As stated above, prior to Substantial Completion, the Developer will be required to deliver a plan for its operations, maintenance and concessions for the Arena. Prior to executing the Lease, the parties agreed on an outline for such plan for purposes of ensuring the City will receive a final OM&C Plan that is consistent with what the City Council signed-off on prior to execution of the Lease. The plan, at a minimum, is required to cover the Developer's approach to routine maintenance, its estimated timing and costs for Renewal Work during the subsequent 5-years and the long-term scope of operations, maintenance and concession work for the subsequent 10 years. **(Arena Lease Section 8.1)**

b. Performance – Performance of all routine maintenance and repairs will be at the Developer's sole cost, and any Renewal Work must be performed (subject to certain exceptions for Developer breach or Renewal Work Advances), to the extent funds are available in the Renewal Work Reserve Account described further below. **(Arena Lease Section 8.2 / 8.4)**

c. Renewal Work Account –

i. Funding - As a condition precedent to Substantial Completion, the Developer must establish a separate Renewal Work Account to be used solely for the purpose of the Developer's performance of Renewal Work, and funded solely from both the Developer and the City as follows:

1. after the City has covered all of its costs and expenses for operating and maintaining City parking assets within the areas specified in the Cooperation Agreement, during each City fiscal year, the City must

contribute the next \$500,000 in excess parking revenues from such area to the Renewal Work Account;

2. the Developer is required to deposit \$500,000 annually after the Developer and its OM&C Contractor collectively have earned \$1 million in Net Operating Income, for each fiscal year; and
 3. On each of the anniversary of the 10th and 20th years of Substantial Completion, the Developer must contribute \$1 million, on each such year, respectively. (**Arena Lease Section 8.4**)
- ii. **Definition of Renewal Work** – Renewal Work is defined as all repair, reconstruction, rehabilitation, restoration, renewal or replacement of any worn-out, obsolete, deficient, damaged or underperforming element of any Improvement (that is not Routine Maintenance), so that such element does not prematurely deteriorate and remains fully functional. Examples include, elevator and escalator replacement, HVAC system replacement, major pipes, roof, etc. (**Arena Lease Section 1.1**)
 - iii. **Deposit Account Security Interest** - The City will have legal control over the Renewal Work Account through a deposit account control agreement between the City, the Developer and the depositing bank. (**Arena Lease Section 8.4.2**)
 - iv. **Approval of Expenditures** - Expenditures from the Renewal Work in excess of \$50,000 must be first approved by the City prior to be funded with amounts from the Renewal Work Account. (**Arena Lease Section 8.4.3**)
 - v. **Audit Rights** - The Renewal Work Account is subject to audit by the City at any time and to the extent that such audit finds any discrepancies in excess of 2.5% or more of the annual Renewal Work Revenue, the Tenant is required to reimburse the City/EDA for its reasonable costs performing such audit. (**Arena Lease Section 8.4.5**)
 - vi. **Shortfall** - To the extent there is a shortfall in the Renewal Work Account and Renewal Work is required to be performed in such fiscal year, the Developer agrees to perform such Renewal Work notwithstanding any such shortfall if (i) the work must be performed due to the Developer's breach or the shortfall is due to a Developer breach or (ii) such amount does not exceed \$500,000 in any fiscal year or \$1.5 in the aggregate over two years. (**Arena Lease Section 8.4.6**)

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- d. **OM&C Contractor** – The OM&C Contractor cannot be changed or modified without the City's prior written approval. (**Arena Lease Section 8.5**)
- e. **Security / Vandalism** - The Developer is required to provide 24-hour security to the Arena and properly repair or remedy any vandalism to the Arena that may occur at any time. (**Arena Lease Section 8.7.1 – 8.7.2**)
- f. **Traffic Management** – The Developer is solely responsible for traffic management at the Arena, but may coordinate with the City's Parking Division to facilitate (in the City's discretion) parking services at City owned parking facilities. (**Arena Lease Section 8.7.4**)

13. Handback Requirements –

- a. **Handback Standards** - At early termination or expiration the premises must be surrendered by the Developer to the City with all Improvements made by the Developer to the property (excluding any Personal Property). Additionally, the Arena must be returned to the City/EDA in compliance with the following minimum standards:
 - i. the Arena will be in good order and condition, subject to reasonable wear and tear;
 - ii. the main civil and structural work must not exhibit any excessive signs of damage, wear, stress, cracking or other issues, such that the improvements installed cannot be expected to reach their full expected design life;
 - iii. certain limited life and “wear and tear” components have been replaced in accordance with Good Industry Practice;
 - iv. major electrical and mechanical components are in good operating condition; and
 - v. the Arena must have an operational capability to allow for an independent 3rd party to perform and deliver the same types of services at the same level, standard and frequency as the Developer during the final 5-years of the term, for a minimum of an additional 5-year period. (**Arena Lease Article 29**)
- b. **Handback Process** –
 - i. The Developer will be required to handover all operational manuals, tests and certifications, historical records, subcontracts and concession agreements, and any other documents or information reasonably necessary for the City or its designee to take over the Arena.

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- ii. The parties are required to begin meeting up to 3-years prior to the expiration of the term to start facilitating this transition and during the final 120-days will undergo joint inspections of the Arena to ensure that it meets the above listed standards.
- iii. The Landlord will be entitled to retain any remaining amounts in the Renewal Work Account following termination or expiration of the Agreement. **(Arena Lease Article 29)**

14. Events of Default – The Lease includes market standard events of default, including the following:

- a. **Construction** – As stated above there are events of default for the Developer failing to either timely commence construction within 8 months of the Lease’s execution, and failing to achieve Substantial Completion within 48 months of permit issuance.
- b. **Assignment** - To the extent the Lease is impermissibly assigned, it would trigger an automatic event of default.
- c. **Performance Security / Insurance** – All performance and payment bonds, guaranties and insurances must be in place at all times to avoid triggering an event of default
- d. **Termination** – If the Construction Contract or the OM&C Contract, or any guaranty of either such agreement is terminated or the Construction Contractor or OM&C Contractor becomes insolvent, then the Developer will have 90 days to replace such contract or contractor, prior to triggering an event of default. **(Arena Lease Section 19.1)**

15. Step-in Rights – The City/EDA (or its designee) retains the right to step-in, take control of the Arena or applicable portion of the Arena and perform any of the Developer’s obligations in the event of (i) an emergency, (ii) material interruption or disruption to the City, the EDA, the public or any of the City’s or EDA’s contractors, (iii) failure by the Developer to comply with any environmental remedial plan, (iv) a substantial degradation of the Premises or Improvements that has continued for a period of 45-days, (v) a material or recurrent violation of any Health and Safety Plan, or (vi) where the EDA/City reasonably considers that any of the foregoing has occurred or is objectively certain to imminently occur. **(Arena Lease Article 18)**

16. Direct Agreements – The Developer is required to have the Construction Contractor and the OM&C Contractor enter into a direct agreement with the City, recognizing the City’s rights to take over such contracts in the event the Developer is terminated for a Developer Default. **(Arena Lease Section 7.13.4 and Exhibit E)**



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17. Availability of Funds – Any obligations for payment of any amounts to any person by the EDA (and for the avoidance of doubt, the City) under the Lease are all subject to, and dependent upon, appropriations made by the City Council. Any failure of the City Council to appropriate will not constitute an Event of Default under the Lease or the Development Agreement. The Parties under the Lease also acknowledge that the City is not a party to the Lease and will not have any legal, moral or financial obligation to either Party under the Lease. (**Arena Lease Section 37.2**)

To the extent the City, the City Council or the Advisory Commission wish to have any further explanation or discussion regarding any of the below, we can be made available either in-person or remotely, as may be required.

The contact persons for this memorandum, are Darrin Glymph, Partner – **Phone:** 202-339-8401 / **E-mail:** dglymph@orrick.com and Matthew Neuringer, Managing Associate – **Phone:** 212-506-5290 / **E-mail:** mneuringer@orrick.com.