Re: Responses to Soccer Stadium Questions

Dear Council Members:

Please find below our responses to your questions posed last week on the soccer stadium development deal. As discussed with Steve, I appreciate your understanding that we would not be able to answer these 15 questions and subparts until the first part of this week as our chief contracts lawyer and bond counsel were on vacation when your request was received. As you review these responses, if you find other areas you wish to explore, please let us know.

A. Response to Questions 1, 2, 3, and 4

The questions contained in numbers one through four seem to be variations of the same basic questions: Whether and who may modify the Development Agreement and the Development Plan for the Butchertown Stadium District? If amendments are permitted to the agreements, when do the amendments require approval from Metro Council? And, what terms of the Development Agreement and the Development Plan for the Butchertown Stadium District may be amended?
The Development Agreement may only be modified by unanimous agreement of all parties to the agreement. Any modification to the Development Agreement would be in the form of an amendment with whatever term(s) the parties have agreed to change. The amendment signed by all the parties to the contract would then modify the original Development Agreement.

The executed Development Agreement dated September 20, 2017 is attached as an exhibit to Resolution No. 141-17 determining certain parcels of real property as surplus. Metro Council may condition its approval of this resolution with modification of terms contained in the Development Agreement. The parties would then be obligated to comply with Metro Council’s terms in order to receive the appropriated funds from Metro Government. Alternatively, Metro Council could negotiate with the parties to the Development Agreement to encourage the desired amendments be finalized and attached as an amendment to the Development Agreement.

If Metro Council approves the pending ordinances and resolutions regarding the stadium development, changes to the Development Agreement would only necessitate review and approval by Metro Council if Louisville Metro seeks to appropriate additional funds for the project. Otherwise, the mayor may enter into agreements with the parties to the Development Agreement to modify its terms except as it relates to appropriating more money. Approval from Metro Council would be required if the changes to the Development Agreement request additional appropriations from Louisville Metro.

Changes to the Development Plan for Butchertown Stadium District Development Area are controlled by state law. If Metro Council approves the Development Plan attached to Ordinance No 337-17, any changes to the Development Plan for the Butchertown Stadium District must be approved by Metro Council and in compliance with the terms set forth in Kentucky Revised Statute § 65.7055. Given that changes to the Development Plan require Metro Council approval, Metro Development Authority, Inc. does not have the unilateral authority to change the terms of the Development Plan. Rather, as required by state law and typical of any redevelopment district, Metro Development Authority, Inc. acts as an inspector and type of “escrow agent.” As an inspector, Metro Development Authority, Inc. “oversee[s] and administer[s] the implementation of the Project within the Development Area.” As a type of “escrow agent,” Metro Development Authority accepts the pledged increments and remits them to Metro.

B. Response to Questions 5, 6, 7, and 11

Your statements and questions contained in numbers 5, 6, 7, and 11 express concerns that the financial obligations promised by the Louisville City Stadium in Section 1.02 are unenforceable. Specifically, the language regarding anticipated spending by the Louisville City Stadium is insufficient to guarantee its investment in the soccer stadium. The applicable provisions of Section 1.02 state: “It is anticipated that upon satisfaction of the applicable Conditions Precedent (as herein defined), Louisville City Stadium will expend at least

1 Butchertown Development District, LLC; Louisville City Stadium, LLC; Louisville Metro Government; and Metro Development Authority, Inc.
2 Section IV of Ordinance O-337-17.
$45,000,000, and likely in excess of $50,000,000, in financing and capital to fund the construction of the Stadium and the development of the Stadium Parcel” and the “expected” private investment in excess of $100 million” to be spent “with respect to the development of the Commercial Property”.

It is my understanding that Louisville City Stadium has agreed to amend Section 1.02 to mandate Louisville City Stadium to expend at least $45,000,000 in financing and constructing of the Stadium and the Stadium Parcel. This amendment addresses your questions 5 and 7. The question presented in number 6 is addressed by the definition of the term Stadium Parcel. Section 2.02 states that the term Stadium Parcel is depicted in the Exhibit C as attached to the Development Agreement, which is a rendering of the soccer stadium. Therefore, upon the promised amendment, the Louisville City Stadium’s investment of $45,000,000 could not be used for development of the Commercial Property surrounding the soccer stadium.

The anticipated investment of $100 million by private investors is not an enforceable term but merely as a goal of the development project.

C. Response to Question 8

The construction of the proposed Louisville FC Soccer Stadium is governed by Article II of the Development Agreement. Section 2.03(B) requires Louisville City Stadium to share a copy of the stadium plans with Metro, but gives sole discretion to Louisville City Stadium on the final plans and specifications for the Stadium. As detailed above, the Development Agreement may be amended through agreement of all parties or as conditionally approved by Metro Council.

If your question relates to whether Metro Council is authorized to amend ordinances and resolutions pending before the body, that answer is clearly yes.

D. Response to Question 9

This question seems to address the Commercial Property identified in Article III of the Development Agreement. The details governing Butchertown Development District ability to lease and/or sell parcels of property to third-party purchasers or lessors is in Section 3.02. Specifically, you ask whether the “property sold” would revert to Metro and would Metro receive additional compensation if “the stadium is not built or the team is sold or dissolved prior to the end of the 20 year agreement.”

This scenario is governed by the terms in Section 1.04(B) of the Development Agreement, which states one of two results will occur in the event of termination: either (1) LFCF Parties elect to purchase the Redevelopment Property from Metro or the Authority and then compensate the Metro Parties based on the amount of Metro Contributions and out-of-

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3 Commercial property is defined in Section 3.01 as “the area of the Redevelopment Property remaining after the subdivision of the Stadium Parcel therefrom and less the dedication of the portions thereof necessary for rights-of-ways and/or easements for the construction/relocation of roadways, sidewalks, drainage facilities and other improvements appropriate for the Project and in accordance with the Project Development Plan...”

4 Metro Parties is defined as Louisville Metro Government and Metro Development Authority, Inc.
pocket and financing costs; or (2) the property reverts to the Metro Parties without additional compensation to Metro Parties. If parcels of the Commercial Property are sold during the term of the Development Agreement and the title has been conveyed to BBN, its designee, or a third-party purchaser pursuant to Section 3.02(A), the property will not revert to Metro Parties.

E. Response to Questions 10 and 12

The questions contained in numbers 10 and 12 seem to address the same basic inquiry of whether the LFCF parties may seek or require additional funding from Metro beyond the amounts detailed in the Development Agreement; and if so, would approval from Metro Council be required for the funding. Metro is only obligated to provide funding in the amount of $30,000,000 as stated in Section 1.01(A) of the Development Agreement. If additional funding is sought from Metro, approval would be required from Metro Council.

F. Response to Question 13

I believe your question asks why there is a difference between the $30 million proposed in the Development Agreement and their approval of an issuance up to $35 million.

Section 1.01 of the Development Agreement caps Metro’s contribution at $30 million. While Metro’s contribution is capped at $30 million, the bond ordinance authorizes an issuance of up to $35 million. The $5 million gap contemplates two arrangements. First, in Section 3.1 of the bond ordinance, Metro Council authorizes Metro to issue a bond anticipation note (“BAN”). A BAN is a form of short-term financing that allows for Metro to purchase the property and wait to see if it is developed as required by the Development Agreement. This gives Metro flexibility in determining what to do with the property in the event that the developers are unable to complete the Project. In issuing the BAN, there will be issuance costs and financing costs. Therefore, when Metro issues the bonds, there may be costs associated with paying off the BAN. Lastly, in a typical bond issuance authorized by Metro Council, a 10% buffer is added to the total amount needed to address possible additional costs associated with the issuance. This buffer takes into account the possibility that the underwriter may purchase the bonds on a discount or premium and require a higher or lower amount than the principal amount, respectively, to get a certain interest rate. For example, an issue with a $65 million principal amount may require the issuance of $70 million to pay the underwriter’s discount. By paying the discount, Metro lowers its true interest cost and saves money.

As for using the bond money for a different use, the Project is defined in Section 1.2 of the bond ordinance as “the Butchertown Stadium District Redevelopment Project which includes without limitation the acquisition and redevelopment of brownfields and adjacent properties located in the Development Area near and the construction of a soccer stadium and public infrastructure and amenities for the Project as set forth in the Development Agreement.” Sections 2.2 and 3.1 of the bond ordinance require the proceeds of the BANs or bonds to be used for the financing of the Project. Since the funds are earmarked for the Project, they cannot be used for anything else unless Metro Council amends the bond ordinance to allow such.
G. Response to Question 14

This question asks whether Louisville Metro may purchase the property and then declare the property surplus in the same Metro Council Meeting. There isn’t any legal authority which creates a concern with an acquisition of property followed closely in time by a declaration that said property is surplus. The term “surplus” is defined differently in various laws applicable to various government entities. Sometimes the term is defined as property which is not needed or is unsuitable for governmental use, or that the public purpose for which the property is acquired has been abandoned. But, there are other, more positive, definitions, the most useful of which seem to be the idea that surplus property is that which is not needed for a governmental purpose (i.e., it is better suited for a purpose which benefits the public, like the creation of a soccer stadium and grounds for the community to enjoy) or property which is “more suitable consistent with the public interest for some other use, as determined” by the government. It therefore seems no legal concern to acquire a property for the purpose of transferring it for some use deemed by the government to be more suited to better benefit the public. After all, the transfer of public property, including monetary incentives, for economic development is a valid public purpose under Kentucky law. Hayes v. State Property and Buildings Commission, 731 S.W.2d 797, 801 (Ky. 1987). With this idea that “surplus” property is property to be acquired specifically so it can be transferred for a use beneficial to the community at large in mind, there doesn’t appear to be a viable legal argument that authorizing the transfer of that property prior to taking the deed is contrary to law.

H. Response to Question 15

Your final question asks whether Metro may enter into an agreement without an appraisal or with only one appraisal. The response to this question is simple: Yes. There no law which requires that Metro obtain an appraisal.

Sincerely,

Sarah J. Martin
October 10, 2017

Assistant Jefferson County Attorney Golden,

The Louisville Metro Council will be voting on a number of resolutions/ordinances regarding the purchase/sale/bonding and development of a new soccer stadium for Louisville FC as well as a development area adjacent to that stadium. Members of the Metro Council have attempted to ask as many questions as possible during Labor and Budget Committee meetings held last week, but weren't able to get them all asked prior to the vote being called and passed onward to the full Metro Council.

In an attempt to get as many answers prior to the final vote on these resolutions/ordinances, we submit for your response the following questions related to the Bond, Development Agreement, as well as the purchase and surplus of property. These are likely not our only questions on this matter, but do represent some of the ones we have compiled following our last public meeting. We appreciate your review of these matters and a response as soon as possible so that we can understand the ramifications of these votes.

Your assistance is appreciated,

Kevin J. Kramer
Budget Committee Vice-Chair
Louisville Metro Council, District 11

Angela Leet
Budget Committee Member
Louisville Metro Council, District 7

Robin Engel
Minority Caucus Chair
Louisville Metro Council, District 22

Marilyn Parker
Minority Caucus Vice-Chair, Budget Committee Member
Louisville Metro Council, District 18
Questions for Jefferson County Attorney’s Office Review:

1. What ability does the Mayor have to adjust an aspect or terms of the proposed Development Agreement between Louisville Metro and Butchertown Development District LLC, Louisville City Stadium, LLC and the Metro Development Authority, Inc? Are there specific types of changes that do require Council review? Are there some actions that are allowed that wouldn’t require review by Metro Council? If so please give a few examples.

2. Does the Mayor or any other group/board/authority have the ability to adjust the terms, payments or requirements as outlined within either the Development Agreement or the Development Plan for the Butchertown Stadium District?

3. Can the Mayor or Metro Development Authority or any other person/entity make adjustments to either the Development Agreement or Butchertown Stadium District Development Area without the approval of the Louisville Metro Council?

4. Does the Metro Development Authority, Inc. have the authority to adjust, amend or waive any aspects of the Development Plan for the Butchertown Stadium District Development Area as submitted for approval at next week’s meeting of the Louisville Metro Council?

5. The Development Agreement between Louisville and Butchertown Development District, Louisville City Stadium, LLC etc... states in Section 1.02 “It is anticipated that upon satisfaction of the applicable Conditions Precedent (as hereafter defined), Louisville City Stadium will expend at least $45,000,000.00 and likely in excess of $50,000,000.00, in financing and capital to fund the construction of the Stadium and the development of the Stadium Parcel beyond the work to be performed or funded by the Metro Parties from the Metro Contribution”. Does this statement adequately REQUIRE the investment of $45,000,000 towards the construction of the stadium? Does the use of the word, “anticipated” give those involved in this agreement the ability to build a stadium in a manner that is less than $45,000,000?

6. Under the same provisions located in the above question (Section 1.2) could the Louisville City Stadium group spend $20,000,000 if its funds on infrastructure improvements in and around the entire 35 acre site or even just on the footprint of the stadium and use those enhancements to reduce their total amount contributed to the actual stadium seating at $25,000,000 while still meeting the “anticipated” goals established in this section.

7. Is there any other place within the resolutions or ordinances that make the $45,000,000.00 investment in the stadium a requirement or offers more strict language to ensure that the promised investment is delivered?

8. Does the Metro Council have the ability to amend or adjust any of the terms of any of the five resolutions/ordinances related to the construction of the Louisville FC Soccer Stadium?

9. Page 13-15 of the Development Agreement outlines the terms for repayment to Louisville Metro Government of approximately $450,000 per acre. This price and the price associated with leasing the property is to be paid no matter the sale price. Metro is paying approximately $725,000 per acre not counting the financing aspects of the sale. The sale of each lot, equals a loss of value for Louisville Metro of $275,000 plus financing costs if parcels of the 35 Acre, district are sold and the stadium is not built or the team is sold or dissolved prior to the end of the 20 year agreement, will the property sold revert back to Louisville Metro? Will Louisville Metro receive additional payment for costs associated with the purchase and bonding of that property from the Stadium Group or other LLCs?
10. Article IV of the Development Agreement calls for Louisville to “be responsible for all (1) clearing and grubbing (2) demolition of all structures, foundations and parking areas, and (3) grading, cut, fill and compaction with the clean fill, and other related site and development work, determined necessary and appropriate by LCFC Parties in order to bring the Stadium Parcel and the other buildable areas of the Redevelopment Property, including any areas thereof that are located within the 100-year floodplain which can and are approved by all necessary governmental authorities to be filled and elevated above the 100 year flood-plain as determined necessary by the LCFC parties, to a finished, level and compacted condition suitable for construction of improvements thereon as contemplated by this agreement and as otherwise approved by all applicable agencies, utility providers and governmental authorities and as acceptable to the LCFC parties, as appropriate (collectively “the site work”). Does this language place on Louisville Metro any expectation or requirement that we would do any work beyond the $5,000,000 in infrastructure Improvements and the $800,000 in mitigation that has been stated to both the Budget and Labor Committees of the Metro Council? Does this language allow for the developer/ownership group to seek additional Metro work on the property if costs exceed those itemized within the various documents that make up this proposal?

11. Is there binding language anywhere within the ordinances/development agreements/plan that requires the expenditure of a minimum of $100,000,000 within the property? Does the language allow for the construction costs associated because of the stadium to be included within the $100,000,000 requirement? This question is similar to question #5 as it focuses on the word “anticipated” and how binding such a word is within a development or other type of agreement.

12. Can Louisville FC and associated groups seek or require payment from Metro beyond the payment of $800,000 for demolition/environmental cleanup, $5,000,000 for infrastructure improvements and $24.2 million for the purchase of property associated with this project? If additional funds beyond those listed above are requested, would approval need to be given by the Metro Council?

13. The provisions of the Bond Ordinance under consideration allows for Metro to bond $35,000,000, while the project only assigns Metro $30,000,000 of obligations. Can the additional funds be given to this project? If so, would such allocation require the approval of the Metro Council or any other board/group/etc...? Could the additional funds be used for other project not contained within this project? Example: Could funding for this project go towards work at Charlie Vettiner Park? If so, is Council or other entity approval required for such action?

14. Is there any concern or issue regarding the validity of both purchasing a property then declaring it surplus in a single meeting of the Metro Council? Is it possible to declare property surplus when Metro Government will not officially own the property until after it is already declared surplus?

15. Under Metro Government / State Procurement Code, is Metro Government allowed to enter into an agreement to purchase property without an appraisal? Is Metro Government allowed to purchase government with only 1 appraisal?

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