

September 13, 2019

FOR YOUR INFORMATION

To: Mayor and Members of City Council

From: Patrick A. Duhaney, City Manager 

Subject: Hilltop Property Swap and Banks Transactions

The following memorandum summarizes the issues the City and other interested parties must address in order to carry through a proposed property swap between the City and Hilltop Basic Resources, Inc. (“Hilltop”). The proposed property swap is to swap the City-owned parcel on the eastern bank of the Mill Creek south of W. Mehring Way (the “East Mill Creek Parcel”) with the property currently owned by River Container Concepts, LLC located at 1801 W. Sixth Street (the “West Mill Creek Parcel”).

This summary reflects the analysis the Administration would ordinarily undertake when considering the acquisition and/or disposition of property for City of Cincinnati economic development purposes. As such, this document includes information that is needed for that analysis, actions that will need to be taken by the City or other parties, and possible implications, costs, and/or risks to the City of various decisions.

For ease of explanation, the summary is presented through the following categories: (1) the necessary due diligence and open financial questions regarding the proposed Hilltop-City property swap and relocation, (2) the open questions and necessary actions related to the Music Venue, Smale Park extension, and Bengals-County MOU related parking requirements that the Hilltop relocation will facilitate, and (3) the open financial questions regarding the future Price Landing Park.

It is important to note at the outset that most if not all of this analysis has not yet taken place because this proposal is being advanced through City Council legislation rather than through the Administration.

I. Proposed Hilltop-City Property Swap and Hilltop Relocation

In the ordinary course of examining a potential property swap transaction, the Administration would conduct diligence on the property to be conveyed to the City, the property to be conveyed from the City and the project such conveyance will facilitate. Included in this diligence at its core is an assessment of whether the proposed relocation project is both feasible and – from the perspective of the City as a whole and the immediately surrounding neighborhood – desirable. Additionally, and unique to this transaction, (i) the City and its tenant CBT would need to amend their existing lease to allow the transaction, and (ii) the relocation of Hilltop from its current location will leave open the important question of whether and where the asphalt plant on that property will be relocated. Finally, and critically, the Administration will then also assess any financial implications to the City of the entirety of the transaction.

A. Necessary property due diligence

Ordinarily, the Administration requires the following due diligence before negotiating a property swap transaction like this and bringing such transaction to Council for approval: appraisals of the two properties, a coordinated report for the City property, description of any proposed improvements to the property and the budget for those projects, the results of Hilltop’s Phase I (and Phase II if available) environmental report on the West Mill Creek Parcel, information regarding the corporation acquiring the City property (capacity to execute the project, any previous defaults with the City, etc.), a site plan, and confirmation of necessary

access easements to the West Mill Creek Parcel that will be transferred to the City in the event of the swap. These are all items the Administration typically requires when evaluating potential development transactions in the course of negotiating terms.

After signing an agreement, which can only be done with Council approval, the parties would continue collecting the diligence items that both confirm the condition of the property the City is to acquire and to convey and the ability of Hilltop to complete the relocation. This diligence will include items like: title reports, geotechnical reports, traffic studies, feasibility studies, possible environmental reviews, and any other studies related to the properties, any other encumbrances, proof that the purchaser has sufficient financial resources to complete the improvements contemplated in the agreement, conceptual drawings for any improvements built pursuant to the agreement, and then any necessary permits and zoning approvals. The agreement for this transaction will contemplate a diligence period in which the parties can review such diligence and the ability for either party to terminate the transaction in the event that such party determines the transaction is no longer desirable or feasible. This contingency is standard in all City property sale contracts. Further, the City's standard practice is to hold any property closing or formal property transfer until all necessary due diligence items have been satisfactorily completed, submitted to the Administration, and deemed compliant with the terms of the agreement.

Perhaps the biggest – but not only – unknown with this proposed transaction is the environmental condition of the West Mill Creek Parcel, given its current use as a barge offloading facility. Without this information, it is unclear what the cost of remediation will be for this parcel to be used as a public park and which party, if anyone other than the City, will pay the cost of that remediation.

B. Feasibility and desirability of the proposed relocation

In addition to the above diligence items, and with specific respect to this project, the City will need to gather the information necessary to determine that Hilltop can complete the relocation as proposed. This information will include: (i) review of the plans and proposed financing of the project, (ii) identifying the type and timing of zoning and other regulatory approvals that will be required to operate pursuant to the proposed development plan/end use (such as State, Federal – US EPA, OEPA, and Corps of Engineers), and (iii) identifying the type and timing of the permits and any easements necessary for Hilltop to relocate as described.

The City will also need to gather and assess as much information as possible on the impacts of the relocation on the immediate neighborhood. This will include transportation/traffic studies that illustrate any impacts on the area, including the amount and location of heavy truck traffic and any impacts on or adjustments for emergency vehicles or evacuation routes.

(1) Lower Price Hill community group requests

In this instance, the Administration and Council are both aware of several specific requests from a collection of community groups operating in Lower Price Hill that seem contingent for their support. These requests, which in the ordinary course the Administration would assess and, when appropriate, include in a development agreement, include

- Rezoning the West Mill Creek Parcel to RF-R
- City consideration, with planning, of access into Price Landing Park, connection to Ohio River Trail West, and access to Mill Creek Blueway.
- Zoning study results for all parcels in IDC and practical access route to Price Landing Park
- Relocation of Noramco in a timely manner
- Confirmation of relocation of the asphalt plant
- Hilltop operations impacts studied and detailed
- Drawings showing piles of materials and materials handling equipment as seen from 6th Street highway and Lower Price Hill.
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The many specific questions related to Price Landing Park are discussed in detail in Section III of this memo.

C. Necessary agreement between City and CBT/POC

The City and Port of Cincinnati, LLC (“POC” which is an affiliate of Cincinnati Bulk Terminals, LLC (“CBT”)) are parties to an *Agreement of Lease* executed as of March 28, 2007 (the “POC Lease”), which lease includes the property proposed to be transferred to Hilltop. This lease grants certain rights to POC/CBT. CBT’s, through POC, consent is therefore necessary to any amendment to that lease to remove the East Mill Creek Parcel. The City and CBT have previously made several joint proposals to Hilltop that have not been accepted. To move forward with the proposed transaction, the City and Hilltop would need to re-engage CBT in negotiation.

Additionally, and procedurally, Section 17 of the POC Lease grants CBT/POC a right of first refusal. Under that Section, if the City receives a bona fide offer to purchase all or a portion of the property that the City intends to accept, the City is required to give notice to POC of the purchase price and the proposed terms of such sale. POC has 15 days from receipt of that notice to determine if it wants to accept the offer. If POC refuses that offer, the City has 6 months to sell the portion of the property contained in the notice to the identified purchaser. As of the date of this memo, the City has not given notice in accordance with this Section and needs to do so if it intends on accepting Hilltop’s offer.

The necessity of amending the POC Lease leaves open the question of whether CBT/POC would consider, under any terms, releasing their rights under the POC Lease and, if so, what compensation CBT/POC will require to agree to do so and which party, if anyone other than the City, will pay that compensation.

D. Potential Closure of Valley Asphalt

Asphalt is a major resource utilized by a variety of City of Cincinnati departments for their respective projects, especially road paving and maintenance. The City lacks the necessary facilities to manufacture asphalt. As such, it relies on vendors to provide asphalt on an as-needed basis. The Asphalt Plant #19 on Mehring Way, owned by Valley Asphalt, provides a substantial amount of the asphalt used on City contracts; roughly 25,000 tons every year. Presently this is the only asphalt plant within city limits and the riverfront location provides easy and reliable access to City of Cincinnati departments. It is also the only local asphalt plant open during the winter months.

It is not yet clear what impact the proposed plan for the redevelopment and relocation of Hilltop would have on this facility. The relocation or elimination of the Mehring Way site would have considerable financial, operational and efficiency impacts on various City of Cincinnati departments and projects. There is likely capacity to cover the City’s asphalt needs using plants located outside the city limits. However, the distance of these plants outside of the city would add time and cost to each project. Estimates show this would lead to an increase in trucking costs from \$3 a ton to \$5 or \$6 a ton. If the City’s asphalt needs remain the same, the net increase in \$3 per ton is estimated to cost the City an additional \$75,000 a year. The increased travel time and additional heavy loads will also increase fuel consumption of the City trucks and add additional wear and tear on the vehicles.

In addition to direct costs, there will also be indirect and nonfinancial costs incurred by the City if crews must travel farther distances for asphalt. While it is very difficult to estimate the direct financial impact related to wait time, it stands to reason that construction projects will be delayed at certain times until the necessary materials are received at the site. This will negatively affect productivity and efficiency and may add time onto scheduled work timelines for City crews and contractors.

Additionally, because of the increased time to deliver materials to the site, the amount of trucks and staff to man the trucks needed daily for each project will increase. For example, if a project needed five trucks to haul from the Mehring Way plant, it may now need 10 trucks to haul from a plant located 15 miles outside of the city. Even today there are capacity issues with the amount of trucks available on a daily basis. If trucks are

not available to haul material to the site when needed, then the production of the crews is greatly decreased and thus cost would increase.

Given this reality, the Administration will request under all circumstances that any agreement related to relocation and redevelopment of Hilltop require the Valley Asphalt plant to remain open until a suitable replacement is rebuilt or that the City is made whole financially by some other means for the direct and indirect costs to be incurred by shuttering the Valley Asphalt plant. Both the possible location and the lead time (including permitting) necessary for a new asphalt plant are unknown at this time.

E. Additional possible financial impacts

Separate from the to-be-determined costs associated with remediating the West Mill Creek Parcel, terminating CBT/POC's leasehold rights under the POC Lease, and the uncertainty regarding the future of Valley Asphalt, the City faces possible financial impacts from the loss of that POC lease revenue, the relocation of Noramco from the property Hilltop would be relocating to, and any possible incentive requests from Hilltop.

The annual lease payment for the remaining five years (including renewals) of the POC Lease is \$95,330 and the City can adjust this amount upon renewal by appraisal. These lease revenues are split between the City's Law Department Fund 209 and Community & Economic Development's Fund 317 related to oversight of leases and property holding expenses. The rent under the POC Lease attributable to the East Mill Creek Parcel is approximately \$36,000-\$41,000. Reductions in this revenue source may require appropriation of General Fund resources to continue paying expenses currently funded by this revenue stream.

Noramco currently operates a barge loading and offloading facility on the property Hilltop will acquire to facilitate its relocation (namely, the West Mill Creek Parcel and the Sixth Street Yards). The Administration's understanding is that Noramco will be forced to vacate that property for the Hilltop relocation to take place. Noramco reports that continued barge access is an absolutely critical element of their operation; without access to a barge terminal, the company would no longer be able to provide bulk materials and steel handling in volumes and prices demanded of their current customers. Losing access, even temporarily, would severely disrupt this company's normal operations which impacts its ability to fulfill current and future customer orders for an unidentified period of time. The potential financial implications (hardship) to Noramco requires further examination.

The Administration seeks additional examination of potential losses to be borne by the City in the event Noramco simply shuts down its operations. Initial information suggests the City is at risk of losing dozens of relocated Noramco employees, any related earnings taxes, and possibly real estate taxes associated with Noramco-owned properties associated with their broader supply chain operations.

Discussions recently commenced between the Administration and Noramco to evaluate possibilities that retain Noramco's business in the City. Noramco has identified two riverfront sites that could accommodate their barge terminal needs, yet both present unique and significant challenges for possible relocation. The first is a land site Noramco owns in Saylor Park, but which there has previously been significant community concern regarding the creation of a barge facility. There are also unquantified costs and timeframes associated with preparing this site for such operation. The second site is privately-owned land elsewhere on the river, but among other industrial uses, and for which Noramco will have to buy or lease the land. There is also a risk that Noramco would leave the city altogether. The cost of relocating Noramco to either location is unknown, as is whether Noramco would ask the City, or any other party, to help pay that cost.

Finally, the Administration does not know whether Hilltop itself will seek any City incentives to support its relocation.

The additional potential financial impacts of the County-Bengals MOU, the expansion of Smale Riverfront Park, and the Price Landing Park are addressed in sections II and III below.

II. The Music Venue, Smale Park extension, and Bengals-County MOU-related parking requirements that the Hilltop relocation will allow

The proposed property swap and Hilltop relocation project are being advanced by the County for the purposes of facilitating the construction of a music venue by CSO/MEMI on Lot 27 of The Banks. In addition, the City and County have been in discussion for an extended period of time (see Council approval of Banks Phase IIIB Term Sheet) regarding the construction of parking garage and road infrastructure on Lots 23, 27, and 28, which will also allow an intermediate version of the next phase of the Smale Riverfront Park to be built on Lot 23. In order to obtain the consent of the Bengals to construct the music venue on Lot 27, the County has made various commitments to the Bengals as reflected in a series of MOUs (collectively referred to as the "County-Bengals MOU"). These County commitments, as well as the overall Banks Phase IIIB as currently planned, have a variety of implications for the City that must be considered.

A. Music Venue

City staff has been working with MEMI and the County on finalizing a term sheet with respect to the music venue and related base park at The Banks. Among the important areas of continued negotiation are whether the music venue will pay the Common Area Maintenance (CAM) fees that other private owners on The Banks pay to support the maintenance of Smale Riverfront Park and offset the City's direct maintenance costs. Currently, it is the Administration's understanding that the music venue will seek a property tax exemption under the non-profit status of CSO/MEMI. If the parties are able to come to terms, the next step will be to memorialize those terms in contracts. Additional legislative action, in some instances including approval by Planning Commission and the Park Board, is needed to approve the PD amendment for the music venue, all real estate transactions with respect to the music venue and base park, and the appropriation of funds.

B. Extension of Smale Riverfront Park on Lot 23

The City is responsible for constructing the Smale Riverfront Park extension on Lot 23 as part of Phase IIIB of The Banks project. The Administration, including Parks and the Park Board (each as defined below), has been working with the County and CSO/MEMI for some time to identify the design and costs of this park, with the intent to build a "base park" during the initial Phase IIIB construction that would finished at the level of the remainder of Smale later when funding allowed. The most recent estimate of the cost of developing the base park is approximately \$4,641,029 (exclusive of design costs). As part of the negotiations around the music venue, CSO/MEMI has committed to contributing \$1.45MM. The City, Park Board, and other interested parties will need to identify the remaining \$3,191,029 of funding to complete the base park. It is not presently known where these monies would come from. An additional \$6,774,641 (exclusive of design costs) on top of that figure will then be needed at some point in the future to complete the Lot 23 park at the level of the rest of Smale.

C. Concern regarding Army Corps of Engineers funding for Smale Riverfront Park

The federal government has authorized (but not yet appropriated) funding for the next phases of Smale Riverfront Park. A similar previous appropriation contributed to the current park. This funding comes in the form of a match to the local public spending on the park and related infrastructure (including the parking structures on which the Lot 23 park will sit). In order for the value of the Lot 23 infrastructure to be captured and used as credit toward the \$15 million local match of this \$30 million authorization, the City, County, Parks and the U.S. Army Corps of Engineers must execute an MOU prior to the beginning of construction and the issuance of a notice to proceed. Although the City, County, Parks, and Army Corps have been working to execute the MOU for some time, it has not yet been approved by the Army Corps. The City Administration is working with our Federal representatives to complete this task.

In order to protect the City's eligibility for this \$15 million of federal support, the City expressly asked the County not to execute any construction contracts or in fact begin construction until the MOU is executed. The County agreed in writing to do so. Despite this commitment, there are recent indications that the County has executed construction contracts and independently begun construction on the Lot 23 infrastructure. The possibility of this action raises serious concerns that the City's eligibility for this funding may be jeopardized. Regardless of whether the Hilltop property swap goes forward and what impact that has on the timing of the construction of Phase IIIB of The Banks, the Administration will work diligently to ensure that construction schedule does not prevent City access to that \$15 million of federal matching funds.

D. Effect of County parking commitments in Bengals-County MOU

The County-Bengals MOU commits the County to providing 3,200 surface parking lots beginning with the 2021 NFL season and continuing through the duration of the County-Bengals Lease, which currently runs through June 30, 2026 and includes five two-year extensions which allow the Bengals to extend through June 30, 2036. The County made this commitment to the Bengals without any prior consultation with the City. There are important questions, with significant implications for the City and The Banks project, regarding how the County intends to honor this new commitment to maintaining surface parking on the riverfront.

The County-Bengals MOU references the ultimate creation of 1,750-1,950 surface parking spaces at the current Hilltop site. Public information indicates the capacity of the remaining county-controlled surface parking facilities on or near The Banks as follows: Lot A (under Fort Washington Way – 239 spaces), Lot B (future Banks development lots 1 & 13 – 350 spaces), and Lot E (394 spaces). In addition, an undetermined number of spaces will remain in Lot 25 if Lots 23, 27, and 28 are developed in connection with the music venue (these lots collectively provide 1,276 spaces currently under the name Lot D).

Based on public information, the County will need to provide, somewhere between 1,250 and 1,450 surface spaces, in addition to the new Hilltop surface spaces, beginning in the 2021 NFL season. Lots A and E could provide roughly 633 of those spots, leaving 617 to 817 remaining that would need to be filled by all of Lot B (future development lots 1 and 13) and whatever remained of Lot D in the form of the undeveloped Lot 25.

While the Administration cannot confirm whether this combination of surface spaces would meet the County's new obligations under the County-Bengals MOU, it does appear relatively clear – based on the publicly accessible information – that doing so would require the County to hold Lots 1, 13, and 25 back from development during the remainder of the Bengals lease term.

The County-Bengals MOU indicates quite clearly, however, that the County intends to use the City's Crosset Lot to meet a significant portion of this obligation. Section 5 of the November 2018 MOU states "County agrees with Team that the Central [Crosset] Lot (upper and lower sections) is and should be available and will use its best efforts to assure it will remain available, with revenue to Team, for all Bengals Game Days during Term..." The County's lease with the Bengals runs, with extensions, through June 2036.

E. Effect on Crosset Lot, including city revenues

The City owns the Crosset Lot and expects to regain control of the Bengals game day revenues for that upon completion of the Race Street roundabout, which will occur with the phase currently being considered for development. The Bengals currently receive roughly \$393,750 of annual gross revenues from the team's use of the lot for 10 game days. Currently, the Bengals have access to the lot for up to 15 days per season but on average the team only uses the lot for 10 days per season¹. Assuming for the sake of argument that the City

¹ The Administration's position is that the City is entitled to the Crosset lot revenues now and first advanced this position to the County in 2015. At that time, in the interest of the ongoing partnership with the County on The Banks project, the City agreed to delay assertion of its rights until the completion of the street grid during this next phase of the project. As noted, the County did not consult with the City before making its surface parking lot commitment to the Bengals.

began collecting that same amount of revenue in FY 2022 (beginning with the 2021-22 NFL season), the remaining fifteen years of the Bengals lease (with extensions) would deliver \$5,906,250 of gross game day parking revenue (in today's dollars) to the City. That money will instead go the Bengals if the County is somehow able to use its commitments to the Bengals to keep control of that lot as asserted in the County-Bengals MOU.

The County-Bengals MOU also increases the number of Bengals Team Use Days from fifteen to twenty. Although the Administration cannot predict with certainty the impact of these additional Team Use Days, if one assumes the City would charge the same rate the Bengals currently do on game days and that the team would use all twenty days in the other County-controlled lots under the new terms of the County-Bengals MOU, the City would realize an additional \$393,750 annually and \$5,906,250 cumulatively over the remainder of the Bengals lease, thereby doubling the amount to be received by the City. Similarly, these funds would go to the Bengals if the County is able to achieve the goal it lays out in the County-Bengals MOU.

F. Effect of County commitment to possible new design guidelines

The current County-Bengals Lease, as amended, and the 1998 Agreement between the City and County establish development guidelines to which the Bengals have agreed. The County-Bengals MOU re-visits these guidelines and commits the County and Bengals (and City and JBSC) to an "urban planning review" of all undeveloped parts of The Banks, with the condition that any changes to the existing guidelines must be approved by both the team and the County. One effect of this change is to give a private party – the Bengals – a new decision-making veto over future height and design requirements governing the public Banks project.

G. Effect of approving property swap

The Administration has a significant concern that approving the proposed Hilltop property swap and therefore the Hilltop relocation - without first addressing the impacts of the County surface parking commitments on the City's Crossett lot and whether or not the commitments will preclude future development at The Banks – will function as City consent to the County's commitments and prevent the City from protecting its interests on The Banks. Including, of course, the very premise of The Banks as a contiguous riverfront mixed-use development rather than, in any part, a collection of surface parking lots. As such, the Administration will in all circumstances seek as a condition of the proposed property swap that the County remove the surface parking and potential design requirements of the County-Bengals MOU.

Alternatively, the Administration would expect that if the Council does not approve the proposed property swap (or long-term lease as also proposed), with the result that Hilltop will not be able to relocate, the terms of the County-Bengals MOU will not then actually come to pass.

It should be noted that many of the impacts of the County-Bengals MOU are still unclear and only now coming into the light because, while the County executed the relevant MOUs with the Bengals in November and June, the Administration assumed – wrongly it appears – that the County would not make commitments that implicated the City's interests, in both its property and The Banks project, without first consulting with the City. The Administration wrongly assumed the agreement between the County and the Bengals was merely that – an agreement between those two parties - and would not have such potentially direct material implications for the City.

III. Open Financial Questions regarding the Future Price Landing Park

At the September 3rd Economic Growth & Zoning Committee meeting, held at the Price Hill Recreation Center, representatives of the County and Hilltop presented a variety of images and descriptions of a future Price Landing park that would be facilitated by the proposed City acquisition of the West Mill Creek Parcel. In addition, several Lower Price Hill community groups, in a letter to the Mayor, City Council, and the Administration, requested the City take certain steps to advance the Price Landing park project. In the ordinary

course of considering the proposed property swap, the Administration would also consider these community expectations and address various possible responses that may be sought.

While the City is aware of the community effort to plan and develop a park along the river in Lower Price Hill, the Cincinnati Board of Park Commissioners (the "Park Board") has not been asked to look at, nor discussed what would be necessary to build and maintain a park at this location. Prior to the City's Parks Department ("Parks") even considering to move forward with any plans for the future Price Landing park, (i) Parks will consider whether or not the site is suitable for a park based on community need and input and (ii) Parks needs to review the due diligence items listed in Section I(A) of this memo and determine whether or not a park is even feasible on the site. Additionally, funding sources would need to be identified to develop design plans, construction costs and on-going resources to staff and maintain the park (operations and capital), and do so in a way that current Parks resources are not diminished as a result. Parks would need to identify a funding source for those costs and receive community support and Park Board approval prior to developing the future Price Landing park.

The City does not have any estimates as to the construction of this park, nor has the County shared the basis for the estimates provided in its presentation on September 3. As noted above, there are no funding sources identified for this park and it is unclear whether the County, Bengals or Hilltop will make any contributions to the future Price Landing park project.

IV. Conclusion

The preceding sections present the issues that currently need to be addressed as it relates to the Hilltop property swap and The Banks transactions. In its current form, there still remain significant unknowns and uncertainties surrounding this proposal, as it relates to the property condition, financial feasibility, project impacts, and policy implications. Of particular note are the possible financial costs to the City, including (1) the cost of terminating the CBT/POC lease, (2) the loss of current CBT/POC lease revenue, (3) the cost of remediating the West Mill Creek Parcel, (4) the significant financial and operational impacts of the closure of Valley Asphalt, (4) the possible loss of Noramco-generated tax revenues or costs associated with a Noramco relocation, (5) the \$3.19MM City contribution to the Lot 23 base park, (6) the remaining \$6.7MM needed to complete the Lot 23 park, (7) the possible loss of roughly \$6-12MM of Crosset lot parking revenue over the life of the Bengals lease, and (8) the unknown costs associated with developing Price Landing Park.

This does not strike us as a simple transaction at this time or one that should be rushed. Faced with such a situation, normally, the Administration would still be at the stage of gathering and vetting the necessary information to determine whether it is feasible and prudent to move forward with the project. We do not today seem yet to be in a place where it would be appropriate to move forward with asking the Council for their approval to execute on this proposal. We do look forward to determining the best path forward in consultation and with the direction of the City's policymakers.