

## Closing Memorandum

**To:** City of Miami Mayor Francis Suarez and City of Miami Manager Arthur Noriega

**Cc:** City of Miami Attorney Victoria Mendez

**From:** Shutts & Bowen LLP, O'Melveny & Myers LLP and Fowler White Burnett, P.A.

**Re:** Miami Freedom Park Lease Documents

**Date:** January 12, 2022

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We understand based on recent news reports that the four deal documents (two ground leases, non-relocation agreement and construction administration agreement) have been finalized and released to the public. We were not aware that any final agreement had been reached and we were not given any advance notice with respect to release of the documents.

The last internal version reviewed by us and others still contained open items previously raised by us or the City Attorney such as, among other things, location and requirements for easements, definition for gambling, requirement that subtenants comply with permitting, signage restriction with respect to illegal businesses and a final reading of the documents to correct any clerical or other errors or omissions.

We wanted to remind you of the continued existence of certain issues (non-comprehensive list) raised by counsel during negotiations:

1. Leasehold property interest is being granted for entire site to MFP prior to completion of SAP or evidence of financial capacity to complete project. In its place are conditions to commencement of construction.
2. There is no guarantor, sufficiently capitalized tenant or large security deposit. MFP has also rejected the proposal that there be a guarantor with sufficient capital to give the City reasonable assurances that there will be funding for the construction of the project.
3. The cash security deposit was reduced from \$8,000,000 to \$3,577,000 and may be in the form of a letter of credit. The construction escrow deposit was \$12,000,000 but was eliminated entirely.
4. The rental amount is based on the lower of the two appraisals.
5. Full rent does not begin until stadium is completed and the per annum rent increases do not begin until the year after the stadium is completed. This, combined with the limited security deposit in the form of a letter of credit means no money is due to the City at signing. Based on the time periods allotted to MFP and the possibility of excused delays and extension options, there may be a 10.5 year period without full rent and with no rent

adjustments. There are also no periodic adjustments to base rent based on market conditions (i.e., re-appraisal every 10-15 years and prior to exercising option to renew).

6. Annual rent increases are capped at 4%.
7. No fees for late payments.
8. Percentage rent will not be received unless annual sublease rents payable to MFP by its subtenants rise from approximately \$3,500,000 per year to \$75,000,000 per year.
9. The City is hoping for major tax revenue; however, it is important to note that MFP is not obligated to build the commercial development.
10. MFP has the free right to sell its interest during the start-up period (which depending on the date the SAP is obtained and the occurrence of unavoidable delays or extension options could be approximately 12 years from lease execution). City does not participate in a capital transaction during the period between lease execution and commencement of construction of commercial development. MFP could flip/sell for a profit during that period and City does not get its 1%.
11. Non-specific completion dates/deadlines and low extension option amounts. The clock does not begin to run until the SAP approval is obtained which is an unknown date and the outside date for SAP approval is 42 months from lease execution. Then, after it is obtained, all deadlines can be extended due to unavoidable delays for up to 2 years and by virtue of the exercise of any of the 6 extension options (5 on commercial and 1 on stadium) available to MFP each of which extends a deadline by 12 months. Moreover, on the commercial parcel, the extension options extend not only the immediately upcoming deadline but all future deadlines by 12 months. The amount required to extend under the stadium lease is \$500,000. Each subsequent extension will cost \$1,000,000 (\$500,000 for the first if MFP does not extend under the stadium lease).
12. No City termination rights with respect to commercial development if deadlines not met. Instead, MFP gives back anything it has not started work on. In addition, there is no order of development. MFP (or its subtenants) can build wherever it wants and whatever is left unbuilt is what City gets if MFP fails to complete. Thus, in a breach/default, the City may be forced to take back a patchwork, partially-built site, excavated sites and sites without a No Further Action letter (full environmental) having been obtained.
13. The performance bond is tied to statutory minimum amount which does not require 100% bonding for projects that exceed \$250,000,000. With the total cost of this project expected to exceed \$450,000,000, City may have less than 100% bond coverage.
14. City is subject to lawsuit for damages (as opposed to specific performance) if it defaults. Based on the size of this project, this could be a significant number.
15. MFP may sublease the entire commercial site to a subtenant or multiple subtenants (which subtenants will have the benefit of non-disturbance agreements) prior to completion of the

stadium. This leaves open the possibility that City could have direct leases with subtenants for up to 99 years and no stadium.

16. MFP has the free right to sublease without City approval and City must agree to respect and not disturb a subtenant once the "Initial Threshold" (i.e., bond and commencement of construction for Stadium, bond for environmental work and \$20,000,000 in hard costs inclusive of profit) has been met. This could result in the City being stuck with potentially below market deals with subtenants in the event City terminated the lease due to MFP's defaults.
17. MFP is not required to put any equity in deal.
18. MFP can renew lease for up to 99 years even if it doesn't complete the project contemplated by the referendum within the first 39 years.
19. There is no franchise appreciation clause in the non-relocation agreement (i.e., if the team is sold following the execution of the enclosed agreements at a significant profit, the City has no profit-sharing interest).
20. If the team leaves, City will inherit MFP's obligations under the shared facilities agreement with subtenants, including, parking, maintenance and security. (Because the stadium lease has been negotiated with MFP's counsel and not team-specific counsel, there is no guarantee that the team/stadium parcel will not be burdened with disproportionate obligations under the shared facilities agreement).
21. Generally speaking, throughout the 99-year term, a default (such as failure to pay rent) under the stadium lease is not a default under the commercial lease and vice versa. (Limited exception: failure to complete construction of the stadium or certain other public benefits would be a default under commercial lease). As a result, MFP will be able to keep the stadium lease even if it doesn't build anything on the commercial parcel.
22. After execution/approval of the enclosed agreements, MFP and the team have the ability to essentially look away from this deal and negotiate for a stadium with other cities until completion of stadium.
23. On the stadium lease, MFP's position is that if gambling becomes legal within the City and the Marlins or Heat have that right, MFP shall also be afforded those rights with no renegotiation/adjustment of rent to reflect this additional revenue stream. This remains open.
24. Several generally prohibited uses such as extra-hazardous uses and items that affect the City's reputation have been removed and individuals that have been debarred or filed bankruptcy may be affiliated with MFP.
25. City has no approval over naming rights at the stadium.

26. Many of the deliverables (such as transportation related improvements and parking) are being deferred to the SAP approval process (which may be amended from time to time). Thus, there are no minimum contractual standards with respect to those items.
27. MFP can derive revenue from on-site gambling sponsorships and any such revenue will not be included in any percentage rent calculation.
28. The documents do not expressly provide that MFP must comply with the No Net Loss policy.