October 16, 2019

Aasif Bade
Ambrose Property Group
c/o Jonathan Bunge
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Via Electronic Mail

Re: ***GM Stamping Plant Site***
Subject to Indiana Evidence Rule 408, FRCP 408

Mr. Bade:

I write to respond to several of Ambrose's claims in Jonathan Bunge's October 10 letter.

Before I do that, let me first repeat the invitation from my October 2 letter, which I reiterated to Mr. Bunge in an October 11 email asking for Ambrose's availability to meet and again during an October 14 phone call. Public statements attributed to you suggest that Ambrose prefers to avoid litigation and to find an amicable resolution. We share that goal and want to again invite you to join a meeting among Ambrose principals and city officials to explore a negotiated resolution. We take you at your word when we read in the newspaper that you would prefer to avoid litigation, but it's hard for us to make progress on that front if Ambrose refuses to sit down and talk with us.

Given Mr. Bunge's suggestion during our October 14 phone call that Ambrose believes time is of the essence, we believe that meeting as soon as possible is the best next step. Please let us know when Ambrose's principals are available to meet with city officials. We are happy to discuss a set of ground rules for any such meeting, including confidentiality considerations. As you know, our preferred resolution would be a negotiated acquisition of what remains of the former stamping-plant site. That said, if Ambrose believes it has another solution that will satisfy the city's concerns about the future of that site, we are open to discussing that too.

Although we take the time here to respond to several legal issues raised in Mr. Bunge's October 10 letter, we do not believe a legal fight should be the preferred path forward for

Ambrose or the city. But we do think it's important that you understand how we have reached the conclusions we have reached, how those conclusions impact the path forward, and why we feel confident defending those conclusions in court if it comes to that.

I. The city has not breached the project agreement.

The October 10 letter quotes a portion of the Project Agreement's Section 4.3(a), but it leaves out the critical language. The covenant Ambrose bargained for does limit certain uses of eminent domain, but only "to the extent permitted by law." That qualification of the covenant comes as little surprise, as Indiana law severely limits a political subdivision's ability to contract away its power of eminent domain.

As I expect Mr. Bunge has explained to you, the Indiana Supreme Court explained long ago that a political subdivision's sovereign prerogative of eminent domain may, if contracted away, be resumed at will because every contract governed by Indiana law is subordinate to the power to exercise eminent domain:

> The power of eminent domain is an attribute of sovereignty and inures in every independent state. ***It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will.*** It is superior to all property rights, and extends to all property within the jurisdiction of the state. ***Every contract, whether made between the state and an individual, or between individuals only, must yield to it whenever necessity for its exercise shall occur. Every contract is made in subordination to it.*** The existence of this power must be presumed to be known and recognized by all, and need never be carried into express stipulations, for this would add nothing to its force.

S. Ind. Gas & Elec. Co. v. City of Boonville ("Boonville I"), 20 N.E.2d 648, 651-52 (Ind. 1939) (emphases added). That principle has been settled law in Indiana for eighty years. It is why Section 4.3(a) is explicitly qualified to account for the legal limits on a city's ability to contract away its power of eminent domain. So while the city's agreement that it will not pursue eminent domain is useful as far as it goes, binding precedent confirms that the city may resume its power of eminent domain "at will."

There is one exception to the *Boonville I* rule, but it does not apply here. The exception applies when a political subdivision acts not as a government with sovereign prerogative but in a proprietary business capacity. *See S. Ind. Gas & Elec. Co. v. City of Boonville ("Boonville II")*, 248 N.E.2d 343, 344-46 (Ind. 1969). Indiana cases have applied that exception in a single context—when a government operates a utility. When a government acts as a utility business rather than as a sovereign government, it may make a contract

that limits the government utility from taking property through eminent domain. But even in that context, our Supreme Court makes clear that the government "has not lost the right to exercise the power of eminent domain." *Id.* at 345. At most, it gives the landowner a contract-based defense it may raise "if [the government] should bring an action of eminent domain." *See id.*

In other words, the covenant in Section 4.3(a) is limited by the city's right to resume its power of eminent domain at will. Neither the 2018 project agreement nor the city's current interest in acquiring the property has anything to do with the city's efforts to operate a utility or otherwise function in a business capacity. Rather, both the project agreement and the city's current interest in acquiring the property arise from a quintessential exercise of government powers—deciding how to allocate taxpayer-funded incentives like TIF excess and public infrastructure to spur the redevelopment of a blighted area in a manner compatible with the surrounding neighborhood. At least one Indiana case has already recognized that a redevelopment commission pursuing the redevelopment of blighted areas implicates the general rule from *Booneville I*, not the government-as-utility-operator exception from *Boonville II*. *See Mounts v. Evansville Redev. Comm'n*, 831 N.E.2d 784, 789-90 (Ind. Ct. App. 2005).

Importantly, though, Ambrose would not have a viable breach-of-contract claim even if the exception did apply. *Boonville II* says explicitly that, when a government acting in a proprietary capacity makes a contract preventing it from taking a property through eminent domain, the government "has not lost the right to exercise the power of eminent domain." *Boonville II*, 248 N.E.2d at 345. At most, it allows the landowner a defense to assert in the eminent-domain action. That is one of the limitations in Indiana law that limits the covenant in Section 4.3(a)—and that Ambrose agreed must limit it.

And all of this assumes that the city would pursue eminent domain for the sort of private development implicated by Section 4.3(a) in the first instance. As you know, nothing in the project agreement places *any limitations whatsoever* on the city's acquisition of all or a part of the remaining stamping-plant property for one or more *public facilities* that could serve to spur redevelopment of the area.

II. Even if Ambrose were right about Section 4.3, it ignores other provisions that undermine or severely limit its claims.

For the reasons explained above, we think Ambrose is wrong about Section 4.3. But even if it were right, it cannot seriously contend that there has been a breach at this point. The covenant at issue is one not to "seek to involuntarily acquire any portion of the Property for an economic development project on the Property that will ultimately be privately owned or largely occupied for private activities." Thus far, the city has not sought to appropriate the property through eminent domain—much less to do so in a way that implicates this language. What the city began doing is ordering appraisals, which is a step it is legally

required to take *before* it could commence an eminent-domain action of any sort. We do not believe Ambrose can seriously contend that ordering appraisals or stating that we intend as a last resort to exercise a power that the Indiana Supreme Court says we still have amounts to a breach of the project agreement.

But even if we are wrong about that, Ambrose has no remedy for a breach of the project agreement unless (i) it puts the city on notice of an alleged Event of Default under Section 7.2 and (ii) the city fails to remedy the breach within 30 days (or, depending on the circumstances, a longer period). As you know, the city does not believe it has breached the project agreement. But even if it had, Ambrose is not entitled to a remedy if the city cures the alleged breach between now and November 9.

Ambrose's breach-of-contract claim—and Mr. Bunge's suggestion during our October 14 call that Ambrose will seek to recover exorbitant contract damages—also gloss over other concrete problems. For instance, Ambrose explicitly "waive[d] the right to seek any consequential or punitive damages resulting from an Event of Default" in Section 7.3. As I suspect you know, Indiana law places categories of damages like lost profits or lost opportunities within the realm of consequential damages, damages that Ambrose has agreed it may not recover. *E.g.*, *Indianapolis City Mkt. Corp. v. MAV, Inc.*, 915 N.E.2d 1013, 1024 (Ind. Ct. App. 2009) (noting that consequential damages include lost profits); *Brownsburg Mun. Bldg. Corp. v. R.L. Turner Corp.*, 933 N.E.2d 905, 909 (Ind. Ct. App. 2010) ("It appears that some of these damage claims, especially the overhead costs and opportunities lost, may be waived as consequential damages under the contract.").

In the unlikely event that Ambrose could prove a breach of the project agreement, its remedy would be far more limited than it seems to think.[1]

III. Ambrose does not have a viable slander-of-title claim.

To succeed on a slander-of-title claim under Indiana law, Ambrose must prove four elements. It must show that the city made (1) false, (2) malicious statements (3) regarding Ambrose's ownership of the land in question and that (4) those statements caused Ambrose pecuniary loss. *See Walsh & Kelly, Inc. v. Int'l Contractors, Inc.*, 943 N.E.2d 394, 398 (Ind. Ct. App. 2011). The statement presumably at issue here is the city's statement that it intends to take ownership of what's left of the former stamping-plant site through eminent domain if it cannot negotiate a purchase. Even if we assume for the sake of argument that Ambrose can establish that this statement satisfies the fourth element, it cannot establish the first three.

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[1] To be sure, we do not believe that we have breached the contract. But Ambrose is certainly free to try and convince us otherwise. If it were able to do that, we would be entitled to cure during the cure period commenced by Mr. Bunge's October 10 letter.

First, the city's statement is not false. It was a true statement of the city's intent when it was made, and it remains a true statement of the city's intent.

Second, the city's statement is not malicious. A malicious statement is one that is made knowing it is false or with reckless disregard for its truth or falsity. As noted above, the city's statement is not false. Nor can Ambrose transform the city's statement into a reckless one simply by disagreeing with the city's legal analysis. The city has undertaken significant investigation, and it has a good-faith belief based on decisions from the Indiana Supreme Court that it has authority to pursue an eminent-domain action. And even if Ambrose's position were ultimately to carry the day, a good-faith disagreement about what the law requires does not amount to malice.

Third, and perhaps most fundamentally, Ambrose cannot point to any city statement questioning Ambrose's ownership of what is left of the stamping-plant site. The city has simply stated that it intends to pursue eminent domain if we reach impasse. It has not (and does not) question Ambrose's ownership. We have simply stated that, although we view eminent domain as a last resort, we believe it is an option we may pursue should all else fail. That says nothing about Ambrose's ownership of the property.[2]

Finally, even if Ambrose could prove a slander-of-title claim, its recovery would be limited by the various limitations on government liability under Title 34, Article 13 of the Indiana Code. Among several other limitations, the city would benefit from a $700,000 cap on its combined aggregate liability and a prohibition on the recovery of punitive damages. *See* Ind. Code § 34-13-3-4.

IV. Ambrose's arguments invite review of its own potential breaches of the project agreement.

Should this dispute proceed to litigation, the city believes discovery will show that it was Ambrose that breached the project agreement, not the city. Indeed, it was Ambrose's actions that precipitated the city's October 2 letter.

In the project agreement, Ambrose acknowledged that its purchase agreement with the Racer Trust required it to enter into a project agreement concerning the development of that property. Ambrose also made several warranties and representations. In Section 4.1(c), Ambrose warranted that it has "the requisite capacity and capability to effectively administer and complete the project." In Section 4.3(a), Ambrose warranted that it secured the property from the Racer Trust "because of certain commitments made by Developer to Racer Trust to develop the Property as an economic development project." Ambrose also explicitly covenanted in Section 5.9 that it would continue working with the Valley

[2] That claim would have other problems too. It amounts to a claim for tortious breach of contract—a claim not recognized under Indiana law.

Neighborhood Association to address neighborhood concerns and to ensure that the development was compatible with the residential character of the neighborhood. Under Section 7.2, any material inaccuracy in those representations and warranties is an event of default.

Despite having the dramatic advantage of controlling 103 downtown-adjacent, riverfront acres in an Opportunity Zone—and the City's commitment to significant public-infrastructure improvements—the eighteen months since the execution of the project agreement haven't seen any development at the site. During that time, Ambrose has twice asked the City to halt public-infrastructure improvements at the property (in late 2018 and again in August 2019). And from April 2019 through September 2019, any progress largely ground to a halt as Ambrose changed its mind about the deal structure and whether a new project agreement was necessary and repeatedly requested that the city delay necessary legislative approvals that would have been consistent with the existing project agreement.

Instead, Ambrose sent city officials an email on September 19, 2019 stating that it was not willing to complete the project it agreed to complete. It "cut to the chase" and declared that "without more material support from the City, this project will not occur." At that time, Ambrose was demanding *at least* another $10 million in taxpayer money before it would proceed with the project it was already contractually obligated to complete.

Ambrose's public and private statements in September—and the general course of this project to date—call into question whether Ambrose ever intended to live up to the warranties it gave in Sections 4.1 and 4.3 or whether Ambrose instead induced the project agreement and concomitant public-infrastructure improvements while always intending either to flip the property or leverage some sort of pressure to obtain more taxpayer money than the project agreement affords it. And we had further concerns about Ambrose's ability or intent to develop the property after reading news reports that Ambrose either donated or sold approximately ten percent of the entire stamping-plant property to a non-profit where an Ambrose principal serves as a board member. That move appears to guarantee that ten percent of the property Ambrose agreed to develop as an economic-development project will instead be a parking lot generating no property-tax revenue and, as best as we can tell, spurring no economic development on the site.

V. A few more practical points.

Putting aside the legal arguments, there are also a host of practical considerations that Ambrose should keep in mind as it considers its next steps. For instance, Section 8.1 provides that the city must approve the assignment of Ambrose's obligations under the project agreement to a successor owner before Ambrose will be relieved of those obligations. It would not be unreasonable for the city to withhold approval should Ambrose seek to flip the property to an investment fund without significant development experience

commensurate with a project of this scale or without an understanding of the Indianapolis market and the adjacent neighborhood.

Moreover, your public request that any future owner "be afforded consideration for necessary incentives from the city and state—as we have—that align with a project of this size and scope" hints at what we all know to be true as a practical matter. A new owner almost certainly would not proceed with the development outlined in Ambrose's project agreement and on Ambrose's timeline. Ambrose itself was telling city officials just last month that the project it agreed to complete cannot happen without millions more than the public incentives agreed to in the project agreement. If we're being honest, I think we all know that a new owner would need a new project agreement that corresponds to its planned development and its planned timeline. The city is under absolutely no obligation to commit further public funds or staff time to this development. Any prospective purchaser should understand that.

VI. Conclusion

As I noted at the outset, we still think a swift and cooperative effort to find an amicable resolution remains the best path forward. We have outlined our view of the legal arguments in the October 10 letter because we think Ambrose needs to give that analysis fair consideration as it considers the path forward. It is not intended to suggest that we view a long-term dispute as the preferred path forward. We want what is best for the neighborhood surrounding the stamping-plant site and the broader city, and we would like to explore whether we can accomplish that goal in a way that addresses both Ambrose's and the city's concerns.

We think there is a realistic opportunity to negotiate a purchase of what remains of the stamping-plant property at a fair market value. If Ambrose wishes the city to consider other options regarding disposition of the property, those are best discussed by the principals in person.

But we cannot make progress if Ambrose continues to rebuff our requests to meet.

Best regards,

Donald E. Morgan
Corporation Counsel