HAFELI
STARAN
HALLAHAN
& CHRIST, P.C.
Attorneys at Law
4190 Telegraph Road, Suite 3000
Bloomfield Hills, Michigan 48302-2082

Main (248) 731-3080
Fax (248) 731-3081

John D. Staran
Direct (248) 731-3088
jstaran@hshclaw.com

January 25, 2011

City Council
City of Rochester Hills
1000 Rochester Hills Drive
Rochester Hills, MI 48309

Re: ***Proposed Use of Tienken/Adams Property for Water Storage Reservoir Facility***

Dear City Council:

We have been asked to provide our written legal opinion concerning the proposed use of a portion of the unnamed, 10-acre parcel of City-owned property located on the north side of Tienken Road west of Adams Road for a water storage reservoir facility. In preparing this opinion, we have researched the law and examined property title records. We have revisited our prior opinion, dated April 8, 2010, concerning the proposed use of Nowicki Park (Copy of letter enclosed). We have considered the December 15, 1997 letter written by the City's bond counsel, Terence M. Donnelly, concerning the proposed sale of the subject property, and we have discussed the proposed reservoir project with bond counsel Donnelly as well.

We have also received and considered the letter, dated January 19, 2011, addressed to the Mayor and City Council by residents Boyd and Nancy Farnam who are attorneys, and we have considered public comments made at recent City Council meetings. The Farnams' letter disagrees with our opinion concerning use of Nowicki Park, but it is devoid of citation to any legal authority that would compel a different conclusion.[1] We take very seriously our responsibility to provide the City with an objective, unbiased legal opinion to assist the City Council to make a thoughtful, informed decision, and we believe we have done so.

There are no recorded deed restrictions or covenants that would prohibit or restrict the use of the subject property for the proposed water reservoir project. The extent to which the use of public park property may be changed is governed to some extent by the manner in which the property was acquired whether by dedication by the owner or purchase or condemnation by the municipality. *Baldwin Manor, Inc v Birmingham*, 341 Mich 423, 429-430 (1954). When a municipality purchases land and establishes a park thereon, the uses to which the land may be put are much broader than where is it dedicated by individuals for park purposes. 60 ALR 3rd 581, 585. In this case, the City purchased the subject property from the prior owner unconditionally and without restriction.

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[1] The Farnams raise and comment on a number of issues including challenging the sensibility of the project location, expressing concern over establishing an undesirable precedent, and questioning the openness of the process and "business case." We do not offer an opinion on such policy questions, as those are for the elected City Council to deliberate and decide.

Not having found any restrictions imposed or reserved by the prior owner or in any covenants running with the land, we next considered whether the use of bond funds or the voter-authorization of the issuance of the bonds in the first place restricts the City's use of a portion of the subject property for another public purpose such as the proposed water reservoir? We believe the answer is no. We stated in our prior opinion concerning Nowicki Park that the law requires the proceeds from the sale of municipal bonds to be used for the purpose for which the bonds were authorized, and the proceeds may not be diverted to a different purpose. *McArthur v Cheboygan,* 156 Mich 152 (1909); City Charter Sec. 5.3. Here, the subject property was purchased by the City with bond proceeds in 1991 and has remained vacant and undeveloped. One can perhaps say the property has been "used" for "passive" recreation consistent with the intended purpose for which the 1990 bond was authorized. There is no question that the use of bond proceeds to purchase the subject property was consistent with the purpose for which the bonds were authorized. The subject property is also identified as an unnamed park in the City's recreation plan. Meanwhile, the municipal bonds that provided the source of funding for the purchase as well as the subsequent refunding bonds that refinanced the City's debt obligation have been paid off and retired. We have not identified any other legal limitation associated with the authorization, issuance or sale of those bonds that would restrict the use of a portion of the subject property for another public purpose. Hence, in our opinion the City may lawfully use a portion of the subject property for a water reservoir. We believe our opinion is also consistent with the opinion of bond counsel Donnelly who advised the City, in 1997, that the City could sell the subject property to the school district and use the sale proceeds for any other public purpose (after paying down the outstanding bonds).

As we indicated in our prior letter concerning Nowicki Park, law regarding the long-term use of bond financed property is scarce. The legal authorities we found mostly deal with the use of the bond proceeds and do not address situations as this where bond proceeds were expended to purchase property in accordance with the authorized purpose, but the municipality, years later, decides to use a portion of the property purchased with the bond proceeds for another public purpose. A dearth of contrary legal authority leads us to conclude the City may lawfully construct and operate a water storage reservoir facility on the subject property. Whether the City should do so is a policy question the City Council must weigh and decide.

Very truly yours,

John D. Staran

JDS/ijd
Enclosure

cc: Mayor Bryan K. Barnett
Terence M. Donnelly, Esq.

HAFELI
STARAN
HALLAHAN
& CHRIST, P.C.
Attorneys at Law
4190 Telegraph Road, Suite 3000
Bloomfield Hills, Michigan 48302-2082

Main (248) 731-3080
Fax (248) 731-3081

John D. Staran
Direct (248) 731-3088
jstaran@hshclaw.com

April 8, 2010

COPY

City Council
City of Rochester Hills
1000 Rochester Hills Drive
Rochester Hills, MI 48309

Re: ***Proposed Use of Nowicki Park for Water Storage Reservoir Facility***

Dear City Council:

I was asked for my legal opinion concerning the proposed location of a water storage reservoir at Nowicki Park, the land for which was purchased, in part, with proceeds from a voter-approved recreation bond. As proposed, the reservoir will be a large partially-above ground tank with associated pump station, fencing and access road* within Nowicki Park. The City purchased the underlying land where the reservoir facility is proposed to be located from the Roses, in 1991, with money from general fund and from a $9 million dollar recreation bond issued in 1990 following voter approval in 1988. The 1990 bond issue was for the stated purpose of "providing funds to purchase lands for, to develop parks for, and to improve existing park and recreational facilities in the City of Rochester Hills." Consistent with that stated purpose of the recreation bond, the City purchased the Rose property for park purposes and assembled it with adjacent parcels acquired by the City to create Nowicki Park. The property has ever since remained unimproved as part of Nowicki Park. As for the 1990 recreation bonds, the City expended the proceeds to purchase various other properties, and the 1990 bonds were refunded through refunding bonds issued in 1998, which are due to be paid off this year according to City Finance Director Sawdon.

The threshold question is whether this land within Nowicki Park is forever restricted to park use because the property was purchased, in part, with funds derived from the special purpose recreation bond proceeds. A somewhat similar question was posed to the City's Bond Counsel, Terence Donnelly, in 1997, in connection with a proposed sale to the Rochester School District of City park land on Tienken Road that was also purchased with the 1990 recreation bond proceeds. In short, Attorney Donnelly advised the City that it could sell the property and use the sale proceeds for any other public purpose after paying any outstanding portion of the bonds allocated to the cost of acquiring the land. I believe Attorney Donnelly's analysis remains sound, and is consistent with the conclusion I reach that the City may lawfully use the subject

*The proposed reservoir facility will add some amenities to the park such as an access road and restroom facilities, but the reservoir facility will not, for the most part, be a recreational use or facility.

land in Nowicki Park for another public purpose, and specifically the proposed water storage reservoir facility, provided that the City has paid off any outstanding portion of the 1990 and 1998 bonds allocated to the cost of acquiring the land.

There is scant legal authority governing the long-term or future uses of bond finance property. As Attorney Donnelly found back in 1997, most of the legal authorities deal with the use of bond proceeds and do not address situations where bond proceeds were used for the intended purpose but the bond issuer later decides to sell or change the use of the bond-financed property. As a general rule, proceeds received from the sale of municipal bonds must be used for the purpose for which the issuance of the bonds was authorized and, unless provided by statute, may not be diverted to any other purposes. *McArthur v City of Cheboygan*, 156 Mich 152 (1909). Here, the proceeds of the 1990 recreation bond were unquestionably spent for the park purpose for which they were authorized, and the subject property has continuously remained park property ever since. Consequently, after considering existing legal authority (and the lack of contrary legal authority) and after consulting with Bond Counsel Donnelly, I do believe that because the subject land was purchased and used (continuously for nearly two decades) for the intended purpose for which the 1990 recreation bond was approved and issued, and because the 1990 bond has been fully refunded and the 1998 refunding bond will soon be paid off, the City may lawfully use the land for a different public purpose, specifically to construct the proposed water storage reservoir facility.

This opinion is limited to the specific facts and circumstances involved and issue presented and is not intended to be a sweeping opinion concerning the use of park property, as different circumstances may result in a different opinion.

Also, although not asked by Council, I have also considered whether the Home Rule Cities Act – specifically MCL 117.5(e) – or deed restrictions affect the proposed water storage reservoir project at this location, and I do not believe they do. MCL 117.5(e) requires voter approval before a city may sell a park required under the official master plan of the City. MCL 117.5(e) only applies to sale of such park property. Since no sale of Nowicki Park is proposed, MCL 117.5(e) does not bear on this issue.[†]

Regarding deed restrictions, the City purchased the Rose property subject to deed restrictions stating that the property shall be used only for farming and residence purposes. Prior to purchasing the property the City received a legal opinion advising the City that the proposed park use may violate the restriction. However, the opinion also questioned the validity of the restriction and whether and by whom it may be enforced. The opinion concluded that the possibility of someone attempting to enforce the restriction was slight. Being advised, the City decided to proceed with acquisition of the property. In view of that prior opinion and the lack of any challenge to the City's park use of the property for the last 19 years, statute of limitations, and other equitable defenses, I do not think deed restrictions are an obstacle.

[†] Moreover, case law allows a city to release a park from the master plan before selling it in order to avoid the voter approval requirement. *Nash v Grand Rapids*, 170 Mich App 725 (1988).

In summary, I believe the City may lawfully locate the proposed water storage reservoir project at the proposed location in Nowicki Park if the City Council decides to do so.

Very truly yours,

John D. Staran

JDS/ijd

cc: Mayor Bryan K. Barnett