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June 15, 2011

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

Mayor Bryan K. Barnett  
City of Rochester Hills  
1000 Rochester Hills Drive  
Rochester Hills, MI 48309

Re: ***Proposed Charter Amendment Concerning Use and Disposition of City Parks and Open Spaces***

Dear Mayor and City Council:

I have been asked to review and comment on the proposed charter amendment presented by City residents to require voter approval of any lease, sale, exchange or nonauthorized use of City-owned parks and open spaces. Although not identical, the proposed charter amendment is closely modeled after a city charter amendment adopted by West Linn, Oregon, in 2001.

If adopted and approved in its current form, the charter amendment would require voter approval prior to the lease, sale, exchange or nonauthorized use of City-owned property designated by the City Council, or in the City's Master Plan, as park or open space. The proposed charter amendment defines "nonauthorized use" as the siting or construction of facilities that are not "directly required" for the use of the park or open space, and then specifies various uses that are considered to be nonauthorized uses, including water reservoirs, telecommunication towers, houses, City offices, etc.

Existing uses of park property are grandfathered and considered to be authorized. I construe this to mean that the Bloomer Park Velodrome and Pine Trace Golf Course, for example, will not be affected by this charter amendment. However, similar future park uses may require voter approval.

The proposed charter amendment will require City Council to designate City-owned properties that are intended to be parks or opens spaces consistent with the City's Parks and Recreation Master Plan. Thereafter, voter approval will be required in order to change the designation of a City park or open space.

Also, the proposed charter amendment reaffirms the stated purpose of the 2005 green space special millage to permanently preserve lands acquired with green space millage funds.

### **Comments About Proposed Charter Amendment**

The movement to amend the city charter and the concept behind it is undoubtedly well intended. However, I do not think the West Linn, Oregon charter provision – which the proposed Rochester Hills charter amendment is closely modeled after – is well written. I think it is in places confusing and awkward, and if the City Council desires to proceed to amend the city charter, the text can and should be revised to be clearer. That is because once the charter is amended, it becomes “the law” in the City. Overly-narrow, overly-inclusive, and indefinite or vague verbiage can result in inflexibility or unintended consequences.

#### **A. General Comments.**

Whether to proceed with charter amendment is a policy question for the City Council to deliberate and decide. In my role as City Attorney I offer no opinion on that. But, I have examined the proposal with a critical eye to try to identify questions and issues that may arise from a legal interpretation and implementation standpoint. As a result, I have the following general comments and “food for thought” about the charter amendment:

- First and foremost, this proposed charter amendment would be a new limitation on the current authority of the Mayor and City Council to manage and make decisions concerning the use and improvement of City parks. Council must consider whether and how this may possibly complicate, delay, politicize or make more expensive projects, plans or transactions that are currently left to the discretion of the elected City Council and Mayor.
- West Linn has undergone several elections to approve park uses or facilities since amending their charter. It has been reported that the proposed uses were approved at these elections, although purportedly other proposals have been abandoned in lieu of submitting to an election. Also, West Linn has experienced at least one reported lawsuit relating to their charter amendment. In *Dodds v West Linn*, 193 P3d 24 (2008), the Oregon Court of Appeals denied a resident’s claim that the City Council’s undesignation of a property previously designated as open space required voter approval. The Oregon Court disagreed and held under West Linn’s charter, voter approval is required only for “lease, sale, exchange or nonauthorized use” of City parks or open space, but did not apply to re-designation decisions by the city council.
- Council should consider whether delay attendant to, or concerns regarding, gaining voter approval may complicate or inhibit some public improvement projects, potential revenue sources or public-private partnerships (e.g. a velodrome or Pine Trace type of use) from proceeding or occurring in the City. For instance, some communities benefit from revenues resulting from permitting telecommunication towers to locate in their parks. Recall that the City was approached several years ago about extracting oil and gas on City property. If faced with an election requirement, however, will the

telecom providers or natural resources extractors may opt to locate on school or private property instead?

- Consideration should also be given to whether and how the proposed charter amendment will affect or complicate the process for applying for and obtaining grants for parks and recreation and land acquisitions. The grant programs are typically competitive and have rigid timelines and procedural steps.
- Council must weigh the potential issues and complexities that may be attendant to proposed road, drainage, telecommunications, public utility, alternative energy, or other public infrastructure improvements on, through or adjacent to parks or open space land.
- We have previously opined that lands and interests in land acquired with green space millage funds are permanently protected and preserved in their natural state and may not be improved for active recreation or converted to a different use, so the proposed charter amendment has little bearing on those green space lands.
- When I was asked to advise the Green Space Advisory Board, at their March 22, 2011 meeting about methods for consideration to protect parks and green space properties, I explained and discussed six different options with the GSAB:
  1. *Designate properties as parks.* Incorporate properties into the City's Parks and Recreation Master Plan. This, by state law, would disallow sale of park property without a vote of the people (However, the parcels could subsequently be removed from the plan without a vote of the people).
  2. *Deed restrict properties.* When acquiring lands, the City could require the seller to deed restrict the property to limit its use. However, this could involve paying full market value for property that is use restricted.
  3. *Conservation easement.* A variation of the preceding option would be for the City to record a use restriction or conservation easement after acquiring the property. However, to be effective, the conservation easement or deed restriction must empower another party who has the ways and means to enforce the easement or restriction. This approach also raises the appropriateness of voluntarily restricting the use of property the City has paid full value for.
  4. *Resolution affirming intent.* The Council may adopt a resolution or policy affirming and expressing the Council's intent not to change the use of parks or open space. Council, in theory, could repeal or modify such a resolution or policy later, but that may be politically difficult to do.

5. *Ordinance.* Instead of resolution or policy, Council could make a stronger statement by adopting an ordinance restricting or limiting the use and improvement of parks and open space. Again, ordinances can be repealed or amended, but it may be politically difficult to do so, and ordinances are subject to referendum and initiative.
6. *Charter amendment.* A charter amendment similar to what is currently proposed could be adopted. Keep in mind that charter amendment and deed restriction/conservation easement are the most irrevocable options (although a charter amendment could later be repealed through a similar charter amendment process).

B. Specific Comments.

The following comments are directed to specific provisions of the proposed charter amendment:

- The proposed charter amendment, if approved, should be inserted in current charter section 11.7-Disposal of plants and property.
- In paragraph (a) [paragraph .1 in my version], I think “regularly scheduled election” is unnecessarily restrictive, somewhat unclear, and could result in needless delay, so I have changed that to “primary, general or special election.”
- In paragraph (a) [paragraph .1 in my version], I have added “transfer” to “lease, sale, exchange or nonauthorized use” as it is a more inclusive term and will cover possible conveyances that don’t involve monetary consideration or land swaps.
- In paragraph (b) [paragraph .2 in my version], I think the phrase “directly required for” may be overly-restrictive. That is because it can be contended that nothing actually is “required for” a park’s use, since a park or open space can be left in a natural, passive condition. Strict construction of the proposed charter language could require *any* active use or improvement of a park or open space to be voter-approved. This could stifle plans to utilize City parks for active recreation and to make park improvements. Consequently, I recommend the wording be changed to “directly related and incidental” to the park’s use. That way any uses or improvements not directly related to the use of the park will require voter approval, but uses and improvements that are directly related and incidental to the use of the park will be determined by City Council and the City administration as they are now.
- Also in paragraph (b), I note that “wind turbines” have been added to the listing of “nonauthorized uses.” This differs from West Linn’s charter. It would also appear to require voter approval of wind turbines, communication towers, offices and facilities that may be directly related to a park’s operation.

- The current proposed language leaves a possibility for different interpretation and disagreement over whether voter approval of park concession stands in parks, privatization of park operations or concessions, and park offices and maintenance facilities require voter approval.
- Also in paragraph (b), I note that parking and roads are specified nonauthorized uses in parks, but not open space. It seems that the reverse should be true.
- In (c) [paragraph .3 in my version], I have revised the language to exclude drains, ditches and swales from being considered “open space.”
- In (d) [paragraph .4 in my version], it is provided that after a city property is designated as park or open space, that designation may not be changed without voter approval. This provision is not found in the West Linn charter, and I assume it has been inserted in the proposed Rochester Hills charter amendment in reaction to the *Dodds* case referred to above, where the Oregon court held under the West Linn charter, redesignation decisions do not require voter approval. It must be considered whether and how this may affect not only the initial designation process, but also the master planning process as well, since currently the approval and modification of the master land use plan and its various components is currently, by law and ordinance, the duty of the Planning Commission. However, since the proposed charter language says the Council must designate existing property “consistent with the inventory of City-owned parks and opens spaces contained in the ... Master Plan,” and since the proposed charter language also says voter approval is required before any designation can be changed, does it follow that voter approval will be required before the Planning Commission may change the Master Plan affecting a park or open space?
- I struck paragraph (f) regarding effective date because it is contrary to Michigan law. The Home Rule Cities Act requires the City Clerk to file the charter amendment with the state and county within 30 days after voter approval. The Act states the charter amendment will become effective upon such filing by the Clerk.

Without changing the intended purpose and meaning of the proposed charter amendment, I have redrafted and attach a revised version of it. Most of the changes should be self-explanatory and consist of different word choices and phraseology and reordering some provisions – again without changing the original purpose or meaning. If Council desires to proceed with the proposed charter amendment, I recommend the Council adopt the changes I have made.

### **Charter Amendment Procedure**

A charter amendment may proceed in two ways: either by resolution of 3/5 of the members of City Council (i.e., 5 votes) or by initiatory petition. MCL 117.21, 117.25. The proposed charter amendment must be published in full. The election must be held at least 60

days after the Council resolution approving the charter amendment. MCL 117.21. Also, the charter amendment must be submitted to the Governor for approval. MCL 117.22. This should be done immediately after the council resolution to submit the amendment to the voters. According to the City Clerk, the City Council will need to, by August 30, approve the proposed charter amendment for submission to the voters at the November general election. The Governor will approve the amendment if it is not objectionable. It is recommended that at least 30 days be allowed for the Governor's review.

If, instead, the charter amendment proceeds by initiatory petition, petitions must be filed with the City Clerk containing the signatures of at least 5% of the qualified electors of the City. MCL 117.25. According to the City Clerk, the City has approximately 51,000 qualified electors, which means that approximately 2,550 initiatory petition signatures are required. The City Clerk has 45 days to investigate and certify the validity of the petitions. MCL 117.25(4). The Clerk shall cause the proposed charter amendment to be submitted to the voters at the next regular municipal or general state election held not less than 90 days following the filing of the initiatory petition. MCL 117.25(4). The requirement for publication and submission to the Governor for approval apply, although a charter amendment proposed by initiatory petition must still be submitted to the voters notwithstanding any objection by the Governor. MCL 117.22.

If a charter amendment is approved by the voters, two copies must be filed, within 30 days of the election, with the Secretary of State and the County Clerk. Upon such filing, the charter amendment becomes effective. MCL 117.24.

I will be present for the City Council's discussion of the proposed charter amendment on June 20 to explain or answer your questions relating to these comments and the proposed charter amendment.

Very truly yours,

John D. Staran

JDS/ijd