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Scott Martinez, Esq.
Denver City Attorney
1437 Bannock St #353
Denver, CO 80202
Via email at scott.martinez@denvergov.org with hardcopy to follow

Re: City Park Golf Course Detention Proposal

Dear Mr. Martinez:

I hope this correspondence finds you well. Thank you for your continued public service to the City.

I am writing on behalf of former Colorado Attorney General and my client JD MacFarlane concerning the proposed Denver Department of Public Works ("DPW") project regarding the engineered detention of water in City Park Golf Course. As you know, that project—if completed—will result in water detention that exceeds the natural detention and filtration which occurs currently in the City Park Golf Course.

Not only will this proposed action entail the destruction of many mature trees, put Bogey's employees out of work (and possibly require the demolition of the City's recently-constructed building), and alter the character of a site that was designed by a renowned landscape architect and is listed on the National Register of Historic Places, it will render the City Park Golf Course unfit for use on a not-infrequent basis as the Course fills with untreated storm water. As you may know, there has been significant public outcry concerning the City's approach to this project, and many have questioned its need and connection to either the planned Interstate 70 development, planned development in the RiNo area, or both.

This letter does not address these issues—which are substantial—but rather focuses on the fact that the proposed detention facilities would remove city park land from current uses and would appear to violate applicable law.

I am writing to help Mr. MacFarlane understand the City's position in an attempt to avoid litigation over this issue. Below, I describe certain background facts and legal authorities which support Mr. MacFarlane's position that the proposed water detention facility would be in contravention of current law, and invite your response to this analysis.

I. Relevant Facts

The City Park Golf Course is dedicated to public park purposes.

The Golf Course is zoned "OS-A," and such zoning is "intended to protect and preserve public parks owned, operated or leased by the City and managed by the City's Department of Parks and Recreation ('DPR') for park purposes." Denver Zoning Code, § 9.3.2.1.A. (emphasis added).

DPR is charged with "[m]anagement, operation and control of all facilities, either within or without the territorial limits of the City and County, owned by the City and County **for park and recreational purposes**…." Denver Charter § 2.4.4(A) (emphasis added). DPR is not charged with operating storm water detention facilities or leasing land for such detention facilities or otherwise granting permission for itself or to any other agency to operate such detention facilities.

DPR and DPW signed a Memorandum of Understanding ("MOU," attached hereto as **Exhibit 1**) in 2014. The MOU, while purporting to recognize the inadvertent role City Park has played in storm detention and discharge, also provides for "allowing new or changed uses within City Park." The MOU proposed development of a new master plan and mentions potential changes to water detention. While the MOU purports to be between DPW and DPR, the document reflects work by the Colorado Department of Transportation ("CDOT"), apparently in connection with its contemplated Interstate 70 construction.

In 2015, ("CDOT") and the City signed an Inter Governmental Agreement ("IGA," attached hereto as **Exhibit 2**). Pursuant to this IGA, CDOT is obligated to transfer money to the City to assist in the reduction of water flow to I-70.

The City's plans to create a water detention project in the City Park Golf Course, and the connection of that plan to the proposed Interstate 70 construction project, have been widely reported. *See* Jon Murray, I-70 link, other concerns complicate Denver drainage projects, The Denver Post, March 20, 2016; Alan Prendergast, Is Denver's Stormwater Fix an Engineer's Dream—or a Neighborhood Nightmare?, Westword, March 15, 2016.

II. Applicable Law

Denver's Charter provides the following:

> No franchise, license or permit for the construction or maintenance of any railway shall ever be granted within the limits of any park or lengthwise upon any parkway nor shall any franchise for the maintenance of any other special privilege within any park be granted….

Denver Charter § 2.4.6 (emphasis added).

The Charter likewise prohibits the "sale or leasing" of Denver's parks except by approval of voters. *Id.* at § 2.4.5.

"[A] resident taxpayer of a municipality has the right to maintain a suit to prevent the unlawful disposition by the municipal authorities of the money or property of the town, and to restrain the diversion of property in his town from any public use, in which he shares, to which it has been dedicated." *McIntyre v. Bd. of Comm'rs of El Paso Cty.*, 61 P. 237, 241 (Colo. App. 1900). In *McIntyre*, the Colorado Court of appeals held that a complaint which alleged the "appropriation of a portion of [the parkland] for a use inconsistent with the purpose of the dedication, and of an entire alienation and abdication by the city—the trustee of the people—of its right to control the possession and regulate the use of the square[,]" did in fact state a claim for relief. *Id.* As such, the city could neither "alienate the ground, nor relieve itself from the authority and duty to regulate its use." *Id.* at 239.

Construction in and around City Park has been litigated previously. As noted in Disctrict Court Judge Clifton Flowers' order dated August 7, 1990, in the *McRae v. Etter* matter (attached hereto as **Exhibit 3**) which enjoined the City from converting the City Park Pavillion into office space, City Park "is held by the governmental authority in trust for the benefit of the members of the general public, and …the City cannot impose upon such dedicated property any servitude or burden inconsistent with the dedication of the property for public park purposes."

III. Analysis

The proposed water detention facility in the City Park Golf Course runs afoul of present law for several reasons.

First, such construction would constitute a violation of the Park's OS-A zoning. Water detention, whether in support of other construction projects or not, is <u>not</u> "for park purposes."

Second, DPR's execution of the MOU with DPW to support the water detention project plainly does not advance DPR's mission of managing and operating park land "for park and recreational purposes." As such, DPR's entrance into the MOU would appear to be an *ultra vires* act in excess of DPR's mission. While the City is of course free to execute an intergovernmental agreement, it cannot leverage an unlawful act of DPR to meet its obligations thereunder. Moreover, given the connection to the I-70 construction project, in no way can the proposed water detention facility constitute a "park and recreational purpose."

Third, the proposed water detention facility constitutes a grant of a "franchise" or "other special privilege" to DPW and/or CDOT for use of the City Park Golf Course for stormwater detention. Such an action is prohibited by Denver Charter § 2.4.6. Alternatively, the proposed

water detention facility constitutes a "lease" to DPW of parkland, which is prohibited by Denver Charter § 2.4.5.

Fourth, the proposed water detention facility constitutes an appropriation of the City Park Golf Course for a use inconsistent with the purpose of its dedication, an alienation by the City of its intended use, and the imposition of a servitude or burden inconsistent with the dedication of the property for public park purposes. In sum, the project is not consistent with the City's role as trustee for the people with respect to park land. As such, the project's construction would be contrary to common law. *See McIntyre* and *McRae*, *supra*.

IV. Conclusion

It is an exciting time for Denver. The City is growing, and this growth presents no shortage of challenges. However, in meeting these challenges, the City must respect the plain letter of the Denver Charter and well-established legal principles. The proposed water detention facility fails to do so.

Mr. MacFarlane welcomes your response to this letter. Should the City see the law differently, please provide authority for the City's interpretation. Please confirm receipt of this correspondence and let me know when Mr. MacFarlane can expect a substantive response to this letter.

Should the City proceed with the proposed water detention facility, the nature of the injuries complained-of above are most likely to be resolved by injunctive—rather than monetary—relief. However, to the extent that any of the City's actions sound in tort, please consider this letter as advance notice pursuant to C.R.S. § 24-10-109.

Thank you for your time and your continued public service.

Very truly yours,

JONES & KELLER, P.C.

Aaron D. Goldhamer

Encl: Exhibits 1-3

cc, via email only:

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