Larus Park, Release of Legal Opinion

The Southampton Citizens Association (SCA) conveys our gratitude to Councilwoman Kristen Larson for releasing the City Attorney's legal opinion pertinent to Larus Park. It should be noted that as recently as Tuesday evening, SCA held a conversation pertinent to the attorney's findings and if upheld the ramifications thereto. For the legal opinion, see below.

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Members of the Council

This ordinance is scheduled to be reviewed by the Land Use Committee on June 20 and to have a public hearing before City Council on June 26. It proposes an amendment to the City's 1994 contract with Chesterfield County by which the City would agree to sell additional treated water to the County for resale to its customers. It contemplates eventual construction of new facilities at Chesterfield's expense on approximately 1.5 acres of undeveloped land currently included in Larus Park just off Huguenot Road. The proposed amendment to the contract calls for the project site, which adjoins the site of an existing DPU water storage tank and a City fire station, to be ground leased to Chesterfield, subject to Council approval through an ordinance to be introduced in the future and adopted pursuant to section 15.2-2100 of the Code of Virginia.

I have been asked a number of questions involving land use issues indirectly presented by the proposed amended contract. They fall into three subject matter categories: 1) restrictions on the use of Larus Park imposed by section 8-2 of the City Code (2015); 2) zoning regulations, and 3) restrictions imposed under the deeds by which the City acquired the property that comprises Larus Park. The analysis has been confined to the legal principles involved in these issues; it has not undertaken to consider anticipated or projected costs and benefits of the project in general.

1) City Code

In an ordinance adopted on February 12, 2001, City Council formally placed certain property into the City's park system and designated it as Lewis G. Larus Park. Ordinance No. 2001-24-38 (Feb. 12, 2001) http://eservices.ci.richmond.va.us/applications/clerkstracking/getPDF.asp?NO=2001-24-38. In a second ordinance adopted the same day, the Council added to the City Code what now appears as Section 8-2(c) of the City Code (2015). It provides, "Notwithstanding any other provision of law to the contrary, Bandy Field Park, Lewis G. Larus Park, Crooked Branch Ravine Park and city-owned real estate that has been designated as part of the James River Park System shall not be leased for any purpose that would result in or involve any development of any part of these public parklands." Ordinance No. 2001-25-39 (Feb. 12, 2001) http://eservices.ci.richmond.va.us/applications/clerkstracking/getPDF.asp?NO=2001-25-39.

According to the O&R accompanying the ordinances, the City was desirous of preserving certain properties in a natural state. After considering the creation of

conservation easements, the Council instead elected to adopt these ordinances in order to maintain flexibility in the City's control of its property. Subsequently, of course, the City granted conservation easements over the James River Park System, Ordinance No. 2009-10-30 (Feb. 23, 2009), and Bandy Field Park, Ordinance No. 2014-28-35 (Mar. 24, 2014).

In contrast, however, to the legal effect of creating a conservation easement, where a party is granted or retains legally enforceable rights, section 8-2 is a self-imposed restriction. Its enactment was not required by any federal or state law. Under section 2.03(g) of the City Charter, the City Council still has complete discretion "[t]o sell, lease or dispose of, except as otherwise provided in this charter and in the Constitution and laws of the Commonwealth, land, buildings and other property of the city, real and personal." Should it choose to do so, the City Council may freely "undo" the restrictions imposed on Larus Park by section 8-2 either by repealing it or by adopting an ordinance authorizing a lease to the County "notwithstanding the provisions of" that section.

In any case, section 8-2 merely proscribes a lease "that would result in or involve any development of any part of these public parklands." As relevant here, Merriam-Webster defines the word "development" as "to make suitable for commercial or residential purposes - develop land." (italics in original) One might reasonably distinguish construction of a storage tank and pumping station to enable a public water utility to supply water to consumers outside the park property from "commercial or residential" uses of the property itself. Thus, it does not necessarily follow that the proposed use would be inconsistent with the restrictions in section 8-2.

Nevertheless, given the ambiguity, if the City Council approves the proposed amendment to the contract with Chesterfield, any ordinance proposing a ground lease should use the "notwithstanding" language suggested above and include an explicit finding that the use of the property for public utility purposes does not conflict with section 8-2.

2) Zoning Regulations

Prior to the City's acquisition of the Larus Park property, its owners obtained approval of a community unit plan (CUP) covering a 527 acre tract of land (including the park property) known as Stony Point Estates. A copy of the ordinance, No. 75-309-302, is attached. As relevant here, the original CUP in section 1(B)(9) at page 909 provided that the portion of the development labeled "park" on the Plan "shall be made available to the City for purposes of public use, or shall be retained in private ownership for open space and/or recreation use." Since 1975, the CUP has been amended no fewer than 24 times. Following the City's acquisition of the Larus Park property, the owner of Stony Point Estates obtained approval to amend the CUP to delete from its coverage the 106.8 acres comprising the park. Ordinance No. 88-264-239 (Nov. 14, 1988) is attached. As a consequence of an exchange of land in 1989 and of the use of parts of the property for roadways, principally the extension of Chippenham Parkway to connect with Parham Road in Henrico County, the park now consists of approximately 86.7 acres, the bulk of which (approximately 71 acres) lies in the southwest corner of

Chippenham Parkway and Huguenot Road.

According to Parcel Mapper, the parcel on which the project would be located is zoned R-2 Single Family Residential. Under section 30-404.1 of the City Code (2015), which incorporates principal uses permitted in the R-1 District, a facility such as this one would not be permitted by right. However, sections 17.20(c) and 17.20 (d)(1) of the City Charter authorize and direct the BZA to permit governmental and public utility uses provided certain conditions are satisfied. https://library.municode.com/va/richmond/codes/code_of_ordinances?nodeId=PTICH_CH17PLZOSUCO_S17.20POBOZOAP In a recent case, the BZA exercised its authority under subsection (d)(1) to permit DPU to replace an existing water tank on North 30th Street that would not otherwise have been allowed. Minutes of the relevant meeting of the BZA are attached, and your attention is directed to Case No. 12-13 beginning at page 7.

Thus, while the City through DPU would be required to seek a special exception for this project from the BZA, given the language used by the Charter it does not seem unreasonable to anticipate that the BZA would grant it.

3) Deed Restrictions

The City acquired the property that comprises present-day Larus Park principally by way of two deeds, both recorded in 1978 and attached to this email. Schedule A of each deed contains the same provision as follows, in relevant part: that the property is conveyed to the City "for use as a passive park" in accordance with the 1975 ordinance creating the CUP "and shall be left principally in its natural state. However, this does not preclude use for other public purposes so long as they meet sound planning principles."

Thus, while the grantors of the properties (Stony Point Estates, a partnership, and the Estate of Lewis G. Larus) plainly expected that the property would be maintained as a park, they expressly allowed for "other public purposes." It is not clear whether the grantors were sanctioning public uses other than park uses or merely park uses other than passive park uses. Because the deeds do not expressly state a forfeiture in the event of non-compliance, it is likely that the grantors' sole remedy if they object to the City's use as proposed would be to seek enforcement of the language through the court system. However, the law does not favor conditions that impose restraints on the free use of property and construes the language used in deeds against a grantor. Thus, should the City choose to construe the language as permitting public uses other than park uses and be challenged, it would be able to present a substantial legal justification for its action.

Note also that any public use other than a park use must satisfy "sound planning principles." DPU has previously presented the project for its conceptual location, character and extent review to the Urban Design Committee and the Planning Commission, UDC No. 2016-02. https://richmondva.legistar.com/LegislationDetail.aspx?ID=2554872&GUID=F48CFAA0-F9E5-44CF-88A7-3B59EE77DA07&Options=ID|Text|&Search=udc+2016-02 The UDC

approved with conditions on February 4, 2016, and the Planning Commission approved with conditions on February 16, 2016.

The Council is always free to follow its own views of what constitutes “sound planning principles,” subject to the risk of litigation as described above. Nevertheless, it may wish to consider these approvals as persuasive evidence on the issue.

4) Conclusions

If approved, the proposed agreement would constitute legally permissible action by the City. However, the agreement represents only one step in a project that requires further approvals. DPU would be required to ask the City Council to approve the ground lease called for by the proposed agreement, which would require the Council to take into account, and to neutralize, the self-imposed restrictions intended to preserve natural space contained in section 8-2 of the City Code. DPU would also be required to ask the BZA to approve a special exception to permit the use in an R-2 district and would be required to ask the UDC and Planning Commission for final location, character and extent approval. Moreover, should the Council choose to construe the deed restriction as permitting a public use other than a park and conclude that the use is consistent with sound planning principles, it would incur some risk that a grantor or its successors in interest would disagree and seek to enforce a different view through legal action. How significant that risk might be is unknown; however, I note that the 1989 exchange did not impose the “park purposes” restriction on the property received by the City, thus suggesting indifference on the part of the grantor. If such an action were to be filed, like most litigation its outcome cannot be predicted with certainty, but given that doubts as to the meaning of language used in the deeds would be resolved in favor of the City it is my opinion that the City could reasonably expect to prevail.

In short, while the project as a whole will require that additional legal steps be taken, there appear to be no insurmountable legal barriers. Whether Council chooses to approve the project presents a policy decision that lies squarely within its discretion. Please let me know if you have further questions.

Allen

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