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Justyna Carlson, Chairwoman  
North Adams Historical Commission  
City Hall  
North Adams, MA 01247

Re: *Use of School Funds for Colgrove Park*

Dear Chairwoman Carlson:

You have asked for our opinion whether funds borrowed for the Conte Middle School renovation project for Conte (the "Project") may be used for improvements to the area known as Colgrove Park, which sits downhill and to the west of Conte.

After having reviewed the pertinent statutes, acts, and case law, it is our opinion that because the Project envisions no changes to Colgrove Park (the "Park Parcel") that are in any way inconsistent with its ongoing use as a public park, then Project funds may be used for improvements and changes to the Parcel.

## I. A Brief History of Colgrove Park

In June 1900, the Legislature passed an Act entitled "An Act to Authorize the City of North Adams to Take Land for a Public Park." See 1900 Mass. Acts 402. This Act gave permission to the Deacons of the First Baptist Church of North Adams to convey to the City of North Adams the land then known as the North Church Street Cemetery. On December 15, 1902, the Deacons officially transferred the Cemetery parcel to the City of North Adams. That Deed was recorded on January 13, 1903, and is located in the Northern Berkshire District Registry of Deeds in Book 259, Page 603. The City is the legal owner of Colgrove Park, and is the legal owner of the parcels that contain Conte Middle School.

Soon thereafter, the City relocated the graves from the Cemetery parcel to Southview Cemetery, and began construction of Colgrove Park. The City dedicated

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Colgrove Park circa 1904. Several years later, the City converted the Parcel into the main entrance for Drury High School. The Park Parcel and the Drury and Conte School parcels have long been inexorably linked.

As an aside, we did locate one challenge to the City acquiring the Park Parcel and relocating graves to Southview Cemetery. In 1905, Walter Parker, an heir, filed a certificate claiming he made peaceable entry onto the Park Parcel to document an alleged breach of conditions contained in the 1843 deed from Lydia Colgrove to the Deacons of the First Baptist Church. This Certificate was recorded on January 11, 1905, and is located in Book 257, Page 485.

But, nothing came of this filing. According to the Act, suits for damages had to be filed within two years from when City Council recorded its order of taking, which it recorded on December 16, 1902, and may be found in Book 239, Page 542. Because Mr. Parker recorded his Certificate more than two years after the City Council recorded its order of taking, Mr. Harper's claim was untimely. We see no clouds on the title to the Park Parcel.

A more detailed history of Colgrove Park may be found here: Paul W. Marino, [A Grave Situation](http://www.paulwmarino.org/a-grave-situation.html), (last accessed August 14, 2013) ([www.paulwmarino.org/a-grave-situation.html](http://www.paulwmarino.org/a-grave-situation.html)).

## II. Use of Colgrove Park & Applicable Law

Section 1 of the Act authorizes the City to "hold and maintain all such [park] land, and rights in land, and rights of way for a public park or common. . . ." And, Section 6 of the Act provides that the "City may raise and appropriate and expend such sums of money as may be deemed best for purposes of this Act and the improvement of the ... park ...." Accordingly, the City already has legislative approval to expend money to improve the Park. The issue whether Project funds may be used to pay for changes and improvements to the Park Parcel turns on how the Park Parcel will be used in connection with the Project.

The Commonwealth of Massachusetts has long regulated changes to the use of parkland in a tightly controlled manner. See, e.g., Gould v. Greylock Reservation Commission, 350 Mass. 410, 419 (1966). In Gould, which involved the proposed development of Mount Greylock into a ski resort, the Supreme Judicial Court explained that parkland cannot be "diverted to another inconsistent public use without plain and explicit legislation to that end." (Emphasis supplied). The focus of the inquiry here is not so much on the allocation of funds, but on whether the nature of the use of the park parcel will change in a fundamental way.

More specifically, the City has long owned both the Park Parcel and the Conte School parcels. Indeed, the Park parcel served as the main entrance to Drury High School for decades. Given that the City has long used the Park Parcel for Conte School, we see no impediment to the City using Project funds to improve the Park Parcel in conjunction with the Project. If the Project's architects wish to include the Park Parcel as part of the Project, then they are free to do so, and to use Project funds to make improvements to the Park Parcel, so long as those improvements are

consistent with the City's long standing use of the Parcel as a park and a part of the grounds of Conte School.

In addition, we understand that the applicability of Article 97 has arisen in conjunction with the Project, and we take this opportunity to address that issue here. The nature of changes in use to parkland is at the core of determining whether Article 97, which is an amendment to our State Constitution adopted six years after the Gould decision, applies to use of the Park Parcel.

Article 97 provides as follows:

"The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetical qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court."

MA Const. Art. 97 (adopted 1972). The last sentence of Article 97 is of most importance for our analysis. Does the expenditure of funds for improvement to the Park Parcel require a 2/3's vote of the Legislature? Our conclusion is that it does not.

First, there is the question whether the Park Parcel was taken for Article 97 purposes at all because the City acquired the Parcel some 70 years before adoption of Article 97. In 1981, the Justices of the Supreme Judicial Court declared that all lands taken or acquired for the purposes described in Article 97 include such lands taken or acquired before the effective date of Article 97. See Opinion of the Justices, 383 Mass. 895, 918 (1981). So, the Park Parcel may be considered "Article 97 land."

But, the issue is not simply whether the Park Parcel is Article 97 land, rather it is whether the proposed changes to it require legislative approval. Although there is an Opinion of the Attorney General which concludes that the voting mechanism of Article 97 applies to all proposed changes to use of parkland, the Supreme Judicial Court recently remarked that this opinion is not binding and should be afforded little weight. See Mahajan v. Dept. of Environmental Protection, 464 Mass. 604, 613 (2013) (commenting on Robert H. Quinn, Opinion of Attorney General Regarding Disposition of Public Lands, Rep. A.G., Pub. Doc. No. 12 at 139 (1973)). Article 97

matters require fact specific analysis, and are not predetermined by agency opinions the Court described as "hypothetical."

Second, in Mahajan, the Court held that Article 97 did not apply to the land at issue in that case because, among several reasons, the planned use of the land was consistent with Article 97 purposes, namely conservation of parkland. And, the Court explained that because Article 97 grew out of the judicial doctrine of "prior public use," then cases applying that doctrine should inform an Article 97 analysis.

As the Court noted in Gould, and reiterated in Mahajan, the "prior public use doctrine" means that "public lands devoted to one public use cannot be diverted to another inconsistent public use . . ." without legislative approval. Id. at 616 (internal citations omitted). Consequently, if there is no diversion to an inconsistent public use, then a 2/3 vote is not required. Here, there no planned changes to the Park Parcel that are in any way inconsistent with the longstanding public use of the Park Parcel. Accordingly, Article 97 is not implicated, and no vote is necessary.

### III. Conclusion

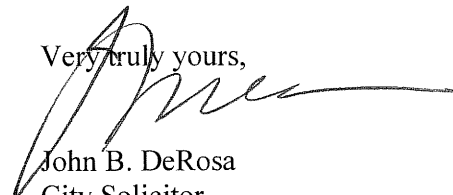
As we understand the current iteration of the Project, there are no plans to change the nature of the Park Parcel. Mere removal of stairs may trigger review by the Historical Commission, but because the character of the Park Parcel will remain unchanged, then the use of the park remains consistent with the uses for which the City acquired the Parcel, which was as a public park.

Indeed, if the Project included the installation of a playground, or a fountain, or a gazebo, on the Park Parcel, those improvements would be uses consistent with parkland uses. And, because the City has long enjoyed the right to expend money to improve the Park Parcel, we see no impediment to using Project funds to make improvements to the Park Parcel.

Should aspects of the Project change, however, such as granting easements in the Parcel, transferring ownership, or constructing school buildings on the Park Parcel, then the City would need to revisit the issue whether an Article 97 vote would be required.

Please contact me if you have any questions.

Very truly yours,



John B. DeRosa  
City Solicitor

cc: Mayor Richard Alcombright, Margo Jones