



**Response to Material Points Asserted in the Following City Documents: (1) "GOLF COURSE USE RESTRICTIONS; Conservation Easement on the Park Hill Golf Course; October 1, 2019" ("Use Restriction Memorandum") and (2) "PARK HILL GOLF COURSE FAQ; Updated and Revised November 4, 2019" ("PHGC FAQ")**

November 11, 2019 [as modified November 25, 2019]

**I. What Is the Language of the Conservation Easement Covering the Park Hill Golf Course Land?**

- a. The "Conservation Easement" granted July 11, 2019 by the George W. Clayton Trust to the City of Denver and recorded at Reception No. 2019090259 ("the 2019 Conservation Easement") is clearly labeled "Conservation Easement" in the heading. The 2019 Conservation Easement preserves the entire 155 acres of the Park Hill Golf Course land ("PHGC Land") as open space.
- b. The fourth Whereas Clause of the 2019 Conservation Easement states that that Denver "desires to acquire a conservation easement" and that the conservation easement is granted "pursuant to Title 38, Article 30.5 of the Colorado Revised Statutes", commonly referred to as the Colorado Conservation Easement Statute (the "Act"). The Act provides the statutory rules governing all Colorado "conservation easements in gross." See C.R.S § 38-30.5-101.
- c. Paragraph 2 (Grant of Easement) of the 2019 Conservation Easement grants to the City "a perpetual, non-exclusive conservation easement in gross."

**II. What Is a Conservation Easement?**

- a. In its Use Restriction Memorandum and PHGC FAQ, the City frequently refers to the 2019 Conservation Easement merely as "use restrictions." In fact, the 2019 Conservation Easement is a statutory conservation easement in gross defined in the Act as follows in relevant part:

[A] right in the owner of the easement to prohibit or require limitation upon...a land...area...owned by the grantor appropriate to the **retaining or maintaining of such land...predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for...recreational...or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity....** C.R.S. § 38-30.5-102 [emphasis added]

- b. A conservation easement is a real property interest. C.R.S. § 38-30.5-103 (2).
- c. The duration of a conservation easement is perpetual unless otherwise stated in the creating document. C.R.S. § 38-30.5-103 (3).
- d. A conservation easement is intended to convey a public benefit to the community at large by preserving valuable open space by only allowing uses compatible with the "conservation purposes."

### III. What Are the Requirements for Terminating the 2019 Conservation Easement Under the Act?

- a. As amended effective June 30, 2019 by HB 19-1264, conservation easements can only be terminated, released, extinguished or abandoned in accordance with the following provisions of C.R.S. § 38-30.5-107:

**If it is determined that conditions on or surrounding a property encumbered by a conservation easement in gross change so that it becomes impossible to fulfill its conservation purposes that are defined in the deed of conservation easement, a court with jurisdiction may, at the joint request of both the owner of the property encumbered by a conservation easement and the holder of the conservation easement, terminate, release, extinguish, or abandon the conservation easement. [emphasis added]**

- b. As applied specifically to the 2019 Conservation Easement, a court would need to determine that **“conditions on or surrounding”** the PHGC Land **have changed since July 11, 2019 when the conservation easement was created so that it has become “impossible to fulfill” the “conservation purposes”** that are defined in the deed of conservation easement.

### IV. What Are the “Conservation Purposes” of the 2019 Conservation Easement?

- a. The City takes the narrow view that the **“conservation purposes”** of the 2019 Conservation Easement are limited to the operation of a regulation-length 18-hole public golf course. Real estate developer Westside Investment Partners, Inc. (“Westside”) shares this view.
- b. Since the 2019 Conservation Easement was granted pursuant to the Act, the “conservation easement in gross” definition in the Act applies to the Conservation Easement. The provisions of that definition relevant to the 2019 Conservation Easement are:

**“Conservation easement in gross”...means a right in the owner of the easement to prohibit or require a limitation upon...a land...area...owned by the grantor appropriate to the retaining or maintaining of such land...predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for...recreational... or other use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity.... C.R.S. § 38-30.5-102 [emphasis added].**

- c. Consistent with the Act, the overarching **“conservation purposes”** of the 2019 Conservation Easement are **“for the conservation of the Golf Course Land as open space” (Paragraph 1) and “to maintain the Golf Course Land’s scenic and open condition and to preserve the Golf Course Land for recreational use.” (Paragraph 2).**
- d. The language in the 2019 Conservation Easement regarding use of the PHGC Land for a “regulation-length 18-hole daily fee public golf course” with related uses and activities and for “unrelated recreational uses such as ball fields, tennis courts, etc.” are permitted uses of the land consistent and compatible with the **“conservation purposes”** of the deed of conservation easement.

### V. Could the City and Westside Terminate the 2019 Conservation Easement Based on its Overarching “Conservation Purposes”?

No. There is no credible evidence that would permit a court to determine that conditions on or surrounding the PHGC Land have changed since July 11, 2019 so that it has become **“impossible” to fulfill the overarching “conservation purposes” of conserving the land as open space, maintaining the land’s scenic and open condition, and preserving the land for recreational purposes.**

## **VI. Even if the “Conservation Purposes” Were Interpreted as Limited Solely to the Operation of a Regulation-Length 18-Hole Public Golf Course, Could the City and Westside Terminate the 2019 Conservation Easement?**

- a. No. There is no credible evidence that would permit a court to determine that conditions on or surrounding the PHGC Land have changed since July 11, 2019 so that it has become **“impossible” for Westside to operate a regulation-length 18-hole public golf course on the land.**
- b. Prior to July 11, 2019, the golf course had been temporarily closed due to the City’s installation of the Platte to Park Hill stormwater detention project in the northeast corner of the land. The City has consistently asserted that the design of the stormwater drainage project would permit the land to be restored to a regulation-length 18-hole public golf course upon completion of the project. This is exactly what the City is doing with the City Park Golf Course. **Furthermore, Westside chose to buyout and terminate the viable Arcis golf course lease that continued through December 31, 2023 with an option for another five-year renewal through December 31, 2028.**

## **VII. What Are Westside’s Options if it Decides not to Continue Operating a Golf Course on the PHGC Land?**

- a. If Westside wants to add another public open space recreational use for the PHGC Land and amend or remove references to golf course use in the 2019 Conservation Easement, it and the City could agree to modify the 2019 Conservation Easement regarding permitted uses so long as the new use is consistent with the **“conservation purposes”** of the 2019 Conservation Easement. **In no event would such changes permit residential or commercial development on the land.**
- b. Westside could sell the PHGC Land to the City for the City to designate as a regional park. The sale price in such a transaction would be based upon the appraised current fair market value of the land as restricted by the 2019 Conservation Easement

## **VIII. In Addition to Securing a Court Order of Impossibility Pursuant to C.R.S. § 38-30.5-107, What Else Would Need to Happen before Westside Could Construct a Residential or Commercial Development on the PHGC Land?**

First, at least seven City Council members would need to vote to terminate the 2019 Conservation Easement. Second, City Council would need to vote to amend the Park Hill Neighborhood Plan that identifies the PHGC Land as a major facility of open space. Third, at least seven and possibly as many as ten City Council members would need to vote to change the current OS-B (Open Space-Recreation) zoning.