

TO: Morris County Board of County Commissioners
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FROM: Mayor Schwerdtfeger and Councilmembers, City of Council Grove

DATE: November __, 2019

RE: **Annexation of Council Grove Lake Park by the City of Council Grove**

Introduction

This memo accompanies the City’s Resolution No. ___19-01 requesting BOCC approval of the annexation of Council Grove Lake Park (CGLP) pursuant to K.S.A. 12-520c. The City owns Council Grove Lake and the immediate area surrounding the Lake. There are presently over 300 leased residential lots around the Lake, each lessee having a ground lease with the City.

Although K.S.A. 12-520c does not require the City to submit to the BOCC a plan for the extension of services such as would be required in an annexation via K.S.A. 12-521, state law does require the BOCC to make a finding whether our proposed annexation will “hinder or prevent the proper growth and development of the area”. The City submits this memo to assist the BOCC in reaching its finding on that question.

The information in this memo, along with other information the City will provide at any BOCC meeting where the Resolution is considered, and in response to any other request by the BOCC, will show that annexation of the City-owned land at the CGLP will not only not hinder the proper growth and development of the area, it will:

- a. lead to improved infrastructure, and development opportunities, at CGLP;
- b. provide better protection of water quality at Council Grove Lake, the public water supply source for the citizens of Council Grove and persons served by RWDs; and
- c. provide better protection for those residing on City-owned land surrounding CGLP from potential health concerns relating to the many existing domestic water wells and septic tanks and lateral fields.

The consequences which are expected to follow from annexation will improve the quality of life for CGLP residents, protect the City’s public water supply source, and enable the continuation of new residential development and redevelopment on land owned by the City and leased to CGLP residents.

The City offers its explanation for these expected results in the following sections.

I. Annexation of CGLP will enable the City to better protect its public water supply source

A. CGL is the City's water supply source serving all the citizens of Council Grove and also those residents of the County receiving water from any RWD which gets its water from the City. Protecting the quality of that water is of paramount importance to the City, today and in the future.

1. While the water at CGL is tested for contaminants such as e-coli, and is treated at the City's plant to keep it within quality standards, there is legitimate concern for water quality at CGL due to the domestic water wells and the septic systems at CGLP.

2. Several trends underway at CGLP increase the level of concern the City has:

a. The popularity of lakefront property, and the limited number of lots, has led to teardowns of smaller, older houses and replacement with larger houses with more residents and greater demands on those houses' septic systems and domestic water wells.

b. The CGLP neighborhood is transitioning from one of weekend and vacation homes to residences occupied year-round. This also results in greater demands on septic and water systems.

3. There is no reason to believe these trends will change in ways which might lessen the impact on the land around the lake. At some point the capacity of the soil will be compromised and laterals and tanks and wells will fail, contaminating the lake water. The best case in such event is additional costs to the public for water treatment. The worst case is a public health threat.

B. How can annexation lessen or remove this threat? Once CGLP is annexed the City will have public improvement and financing tools available to undertake infrastructure improvements. Private water wells can be replaced with City water and septic systems replaced with mains and laterals extending from the current city limits out to CGLP. The City has water and sewer treatment capacity to handle the CGLP demand.

Financing of such improvements can be achieved via state and federal grant and loan programs, by city property taxes and by general obligation and/or utility revenue bonds paid off by connection fees and user charges.

While the City cannot commit at this time to a firm timetable for the complete extension of public water and sewer service, the Governing Body is by this memo stating its intent, in good faith, to extend those services to CGLP following annexation.

II. Annexation of CGLP will enable the City to better protect the health of lakefront residents

A. A number of domestic water wells appear to be in close proximity to septic tanks and lateral fields.

1. The City maintains records of the location of well heads, lift stations and septic tanks. Lateral fields are not identified on maps but some are known to be located on leased premises and others on other property owned by the City but not leased to CGLP lessees, known as “common areas”.
2. While some septic tanks are located on City-owned common areas, most appear to be between frontage roads and the lakefront, *i.e.*, on the leased lots. Likewise some well heads are located on common areas but it appears that most are on leased lots.
3. Aerial photos of CGLP raise questions as to whether wells and septic tanks comply with separation distances set by KDHE and by the Morris County Sanitary Code.
 - Water wells are to be at least 50’ from septic tanks under both state administrative regulations and the County’s Code.
 - Water wells are to be at least 50’ from property lines and 50’ from lakes, per both State and County regulations.
 - State regulations require wells to be at least 100’ from a public water supply source.
4. These separation distances are not numbers pulled from a hat. They exist to protect public health. In fact KDHE has “recommended” separation distances greater than what administrative regulations require. *E.g.*, 400’ separation between domestic well heads and septic laterals.

B. A number of septic tanks and laterals appear to be in close proximity to Council Grove Lake, the public water supply source for both Council Grove and a rural water district.

1. Aerial photos of CGLP show some septic tanks located in common areas at a distance from the lakefront, but most are between the lake and the frontage roads, *i.e.*, on the leased lots.

2. As noted above, both KDHE and the County Sanitary Code set separation distances between septic tanks and laterals and public water supply sources.
 3. These separation distances exist in order to reduce the potential for fecal and other contamination of surface water that is used for human consumption. While CGL water is tested and treated, the close proximity of septic systems to CGL is a potential public health threat.
- C. How will annexation enable the City to better protect the health of its Lessees?
1. By CGLP becoming part of the incorporated City, zoning and subdivision regulations, and building codes, will govern the use and development of the land. Further the City can adopt and enforce ordinances regarding contamination of land and water resulting from discharges from septic tanks or laterals, including dumping wastewater on common areas (which is known to have occurred in the past) or on any leased property.
 2. At the present time the City's Lessees are under a duty not to "do ... anything upon the leased premises that will jeopardize the water supply of the City." Also Lessees have a duty to "... not use the premises so as to constitute a nuisance." Unfortunately those lease provisions do not appear to cover Lessee actions occurring on common areas, *e.g.*, a failed septic system, contamination of a well, dumping of wastewater, etc. Further the lease does not address conduct by a Lessee on that Lessee's leased premises which harms the leased premises of another Lessee, *e.g.*, a septic system which contaminates another Lessee's water well by discharging wastewater directly over a neighbor's well head.
 3. The City has all the rights any landlord has to protect its property against acts of lessees, subject to the terms of a lease. By annexation the City acquires the authority to enact and enforce laws, to protect public health, safety and welfare, applicable to CGLP just like the authority it now has over property already within its corporate limits.

III. Without annexation of CGLP the City is limited in its ability to provide public water, sewer and streets

- A. Any attempt to extend city services to unincorporated land – even land owned by a city – raises a number of legal questions, including:
1. Expenditure of public funds to support what might be determined to be a proprietary function.

Extending public water lines, sewer lines and constructing and improving streets requires the expenditure of public funds. If a city's construction project is determined

to be the performance of a proprietary function, rather than the advancement of a governmental function, compliance with the Public Purpose Doctrine becomes an issue. Such a city might then be open to an argument that it was spending public funds to make improvements to land which its leases for residential purposes. While such an undertaking does comply with the Public Purpose Doctrine when the land to be so improved is part of the incorporated city, there is a question when the land is unincorporated.

2. Even if the legality of spending public funds to improve unincorporated land is not an obstacle, the legal authority to extend water and sewer lines may itself be an obstacle.

Extending water and sewer lines will very likely require the exercise of eminent domain in order to obtain temporary construction easements and utility easements. State law authorizes cities to exercise eminent domain extraterritorially only when specifically authorized to do so.

For example, K.S.A. 12-694 authorizes any city to establish or improve “watercourses” and exercise eminent domain up to five miles outside a city’s limits. Watercourses does not appear to be a term that is broad enough to cover laying water and sewer lines to the CGLP.

K.S.A. 12-693 authorizes any city to create a K.S.A. 12-6a general improvement and assessment district (benefit district) to construct streets, water or sewer to unincorporated areas within three miles of the city’s limits, and exercise eminent domain to do so. Not all of CGLP lies within three miles of the City so water and sewer lines could not extend to all residents.

3. The ability to use traditional public financing tools to construct water, sewer and street improvements raises a related question.

Cities typically finance infrastructure projects by taking on public debt in the form of either general obligation bonds or utility revenue bonds.

Bond counsel would need to be consulted by the City to determine whether (a) bonds could be legally used for infrastructure to be located at unincorporated CGLP and (b) if so, would there be a market for such bonds.

B. Once CGLP is annexed the City can proceed to construct the necessary infrastructure.

1. Upon annexation the City can commence extension of water and sewer lines, with assurance that it can require, by ordinance, connection to those lines once they are in certain proximity of a leased lot, followed by disconnection

of septic lines and closing at least those private water wells which pose the greatest potential threat to CGL, and thereby the City and the residents of CGLP.

2. Upon annexation the City can commence improvement to the existing streets, bringing them to City standards wherever possible.

IV. Other positive effects of annexation

- A. Annexation of CGLP will make certain the City's ability to exercise its police power – to protect public health, safety and welfare – over land it owns and leases to CGLP residents.
1. Traffic laws, public offense and other municipal code violations would be enforced by City law enforcement and taken before the municipal court. Morris County Sheriff's Department would continue to enforce state laws at CGLP as it does now.
 2. City ordinances regarding public health, such as the improper discharge of wastewater, would be enforced at CGLP and no longer just be lease violations and County Sanitary Code violations.
 3. Zoning and subdivision regulations and City building codes – plumbing, electrical, etc. – would also apply to CGLP just as they do to any other land within the City's incorporated area.
- B. City Governing Body.
1. The City's electoral map, of wards and precincts, will need to be revised to take into account the new citizens. While state law governs, it seems likely that CGLP will be its own precinct, or at least the majority of a precinct. CGLP is clearly a defined neighborhood and should stay intact for purposes of city elections.
 2. Having the status of citizens/voters is more significant in our system than being a mere lessee.
- C. Other municipal services.
1. Fire and EMS service is not expected to change upon annexation. As would be the case in any other neighborhood the level of service provided will be determined by need and the availability of public funds.
 2. While CGLP residents currently use the City's library, recreational and other community facilities on the same terms as City residents do, upon annexation that use will be use the costs for which are commonly shared. This is expected to remove a long-held source of friction.
- V. **How annexation will promote the proper growth and development of the area**

- A. While K.S.A. 12-520c has the BOCC asking whether the proposed annexation will “hinder or prevent” the proper growth and development of the area, this annexation will not only not “hinder or prevent” it will promote quality development of CGLP.

Annexation followed by extension of City water and sewer service, and street improvements, will increase the value of existing houses on the leased lots. It will allow the continuation of the current trend of teardowns of smaller, less expensive houses and erection of larger, more expensive houses.

- B. Denial of this annexation would adversely affect future growth and development at CGLP.

1. Without annexation, and the ability to have cost-sharing for water, sewer and street improvements, it may not be possible to undertake those infrastructure improvements.
2. In that scenario the concerns for public health and safety continue, and the City will be pressed to take measures which will attempt to keep those concerns at no worse than status quo levels.
3. Among the interim measures the City could employ are:
 - Cap the number of building permits issued annually at CGLP.
 - Restrict the square footage for any new or remodeled residences.
 - Prohibit the placement of any new or replacement septic tanks or lateral fields upon the common areas.
 - Amortize septic tanks and lateral fields and water wells which are now located upon the common areas.
 - Prohibit any new or replacement septic tanks or lateral fields, allowing only vaults in the future.
 - Ensure all private water wells and septic systems comply with separation distances set by the County and the State.
 - Require more frequent testing and inspection of private water wells and septic systems to enable quick detection of leaks, failures and contamination.

NOTE: These measures will, if implemented, reduce demand for lots acquired for teardowns, but for the most part these measures will not affect existing lessees who intend to keep their leases and their current improvements, and who are able to maintain their water wells without contamination and septic systems without failures, and located on leased premises rather than on common areas.

VI. Closing

1. Extending City water and sewer service to CGLP is expected to better protect the health of the residents of Council Grove and the City's lessees at CGLP.
2. Improving the streets at CGLP is a matter of public safety, primarily for the lessees at CGLP and their guests.
3. Water, sewer, street and other benefits of annexation will increase the value of properties at CGLP and accommodate new development and redevelopment around the lakeshore.
4. As the owner of the lots at CGLP the City has the rights and legal tools that any landlord has. However the City does not have all the legal tools to construct and finance improvements to land at CGLP that it has when it undertakes similar public improvements on land within its corporate limits.
5. Without annexation, even if the City wanted to undertake and finance these CGLP improvements, it may not have the ability to use city property tax funds, or to issue general obligation or revenue bonds. If the land remains unannexed the City's only means of financing water and sewer improvements could be limited to connection fees and user fees, meaning the lessees at CGLP would pay 100% of the costs, with a likely much longer timeframe.
6. Likewise, without annexation, the only means the City may have to finance street improvements would be user impact fees and/or driveway connection fees, plus some funds from annual lease payments per existing lease agreements. This means that CGLP lessees would bear 100% of the cost, and again with a longer timeframe.
7. Upon annexation of CGLP a number of statutory tools become available by which there can be a sharing of costs. Street, water, sewer and other improvements can be borne in part by connection and user fees paid by lessees, and in part by City-levied property taxes – generated City at-large, which would include new tax revenue from CGLP improvements.
8. The need for this annexation is not only the City's important interest in protecting its public water supply source from contamination via septic systems and private water wells. The City has a second interest in protecting the health and safety of the residents at CGLP. The City has a third interest as well: because it owns the land upon which those septic systems and water wells are located, the violation of County, State or Federal environmental and sanitation standards creates liability not only for the lessees who violate those standards, but potentially for the City as well.
9. The City's intent, made in good faith by this Mayor and Council, is that improvements will be made to CGLP if the land is annexed. Annexation will allow the costs of improvements to be shared between the lessees and the City at-large. If

annexation does not occur the City will identify and implement measures available to it, as the owner of CGLP, to minimize the potential public health and safety concerns noted above.