

ORDINANCE NO. 2016-07-(06-30)

AN ORDINANCE AMENDING ORDINANCE 2011-08

WHEREAS, on December 14, 2011, the Board of Commissioners of Henry County established a non-reverting fund entitled "The Henry County Memorial Park Golf Course Sale Proceeds Non-Reverting Fund" which contains the proceeds realized from the sale of the Henry County Memorial Park Golf Course; and,

WHEREAS, the Board of Commissioners wishes to clarify and better define the use of the sale proceeds based upon conflicting statements contained in the minutes of meetings when the creation of the fund was discussed.


NOW THEREFORE, BE IT ORDAINED by the Board of Commissioners of Henry County, that the funds contained in the Henry County Memorial Park Golf Course Sale Proceeds Non-Reverting Fund, including all principal and interest generated from monies held in the fund, may be appropriated by the Henry County Council for the purpose of improving Memorial Park, including without limitation, as matching funds for any grant received from revenue generated by the Henry County Food and Beverage Tax.

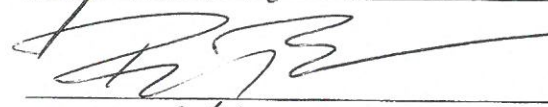
SEVERABILITY: Any provision contained in this ordinance, which is found by a court of competent jurisdiction to be unlawful or by operation of law, including subsequent legislative enactment, is rendered inapplicable, shall be omitted and the rest and remainder of this ordinance shall remain in full force and effect.


REPEALER: All ordinances that are in conflict with the terms of this Ordinance are hereby repealed.

Adopted by the Board of Commissioners of Henry County, Indiana this ____ day of _____, 2016.

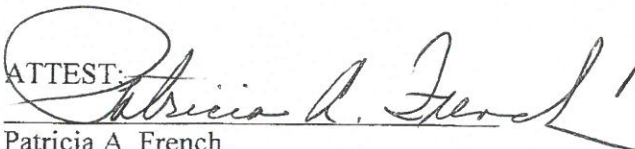
BOARD OF COMMISSIONERS
OF HENRY COUNTY







ATTEST:



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Henry County Auditor

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J.R. STANLEY 1910-1980

G.W. HAND 1919-1995

June 15, 2016

Board of Commissioners of Henry County
101 South Main Street
New Castle, IN 47362

Gentlemen:

At your request, our office has been asked to offer an opinion as to whether the funds generated from the sale of the Memorial Park Golf Course ("Golf Course") may be appropriated and utilized for improvements to Memorial Park.

In offering this opinion, we have reviewed and relied upon the following:

a) the minutes of the Board of Commissioners meeting of November 16, 2011;

b) the minutes of the meeting of the Board of Commissioners on December 14, 2011;

c) the minutes of the meeting of the Henry County Council on November 23, 2011; and,

d) the Purchase Agreement by and between the Board of Commissioners of Henry County and Integrity Land Management, LLC.

Background facts

On November 16, 2011, the Board of Commissioners approved a Purchase Agreement by and between Henry County and Integrity Land Management, LLC for the sale of the Golf Course.

The Purchase Agreement provides the County with an option to repurchase the Golf Course if, during the seven (7) years following the sale, the real estate was not utilized as a golf course. The relevant language in the Purchase Agreement provides,

"9.8. Buyer intends to operate the Golf Course as long as it remains profitable, however, Buyer shall maintain the Property as a Golf Course for a period of seven (7) years regardless of profitability. However, if the golf course is destroyed prior to the end of the 2018 playing season, the Buyer would be released from his obligation to maintain the course for the required seven (7) years subject to paragraph 9.10. It is the intention of Buyer that the Property would be operated indefinitely as a golf course.

9.10 Buyer shall agree to and include in the deed of conveyance any of those items contained in paragraph 9 and that Buyer shall own the property for at least seven (7) years prior to selling it to another party and that Seller shall have a right of first refusal to purchase the property should Buyer offer the property for sale and/or should said golf course be unsustainable as a golf course or should the golf course be destroyed and Buyer no longer intends to or can operate the Property as a Golf Course. Buyer shall provide written notice to Seller of its intention to either sell the Property, cease operating the property as a Golf Course, and/or that the property has been destroyed. Buyer shall provide this notice to Seller within thirty (30) days of an event listed heretofore indicating its intentions regarding the property. Thereafter, Seller shall have one-hundred twenty (120) days to exercise their right of first refusal. The parties agree that pursuant to IC 36-1-11-17 that the amount that Seller shall pay to exercise the right of first refusal shall be the average of two appraisals as identified in IC 36-1-11-4, but the amount shall not exceed \$750,000.00."

During the November 16 meeting, Commissioner Beckenbaugh made a motion that the proceeds from the sale of the Golf Course be placed in a "non-reverting fund, along with interest earned. The interest that is earned will be used for improvements at the

park and will be appropriated by the Henry County Council." The motion passed by a vote of three to zero (3-0).

On November 23, 2011, the Henry County Council unanimously approved a resolution authorizing the sale of the Golf Course. The resolution does not contain any restriction on the use of proceeds from the sale.

On December 14, 2011, Ordinance No. 2011-08 ("Ordinance") was introduced during the Board of Commissioner's meeting. The Ordinance provides in pertinent part, "That there is now established a Henry County Memorial Park Golf Course Sale Proceeds Non-Reverting Fund, and that the (sic) upon the closing of the sale of the Henry County Memorial Park Golf Course, the funds shall be placed in said non-reverting fund for the benefit of Memorial Park."

The minutes further indicate, "Mr. Kim Cronk stating the proceeds of the sale would be deposited into the non-reverting fund, with only the interest from the fund to be used for park improvements. A motion was made by Commissioner William Cronk and seconded by Commissioner Beckenbaugh to approve Ordinance No. 2011-08 as presented." The motion was carried by a vote of three to zero (3-0). It is unclear from the minutes as to whether the approval of the Ordinance "as presented" is intended to convey that the written version of the Ordinance was approved or whether Commissioner Kim Cronk's statement that the proceeds of the sale would be deposited into a "non-reverting fund with only the interest being utilized for improvements to Memorial Park" was a part of the approval.

Opinion

Indiana Code §36-2-4-8 provides that an ordinance is adopted when it "is signed by the presiding officer" of the body that adopts the ordinance. The Ordinance that was approved and signed conflicts with statements in the minutes regarding the intended use of the sale proceeds. It is clear from the minutes of the November 16 and December 14 meetings that there was some discussion (and likely agreement) regarding the use of interest from the sale proceeds for improvement of Memorial Park. This restriction is not reflected in the Ordinance. Given that an ordinance does not become effective until it is executed, it is our opinion that the written version of the Ordinance would be controlling. Further, it is not entirely clear from the December 14, 2011, minutes that the statement made by

Commissioner Kim Cronk was approved or whether the Ordinance in its written form was approved.

We have been informed that the intent behind restricting the use of the sale proceeds may have been to create a reserve to allow the County to exercise its option under Section 9.10 of the Purchase Agreement. There is nothing in the Ordinance or minutes that we have reviewed that expressly sets forth this intent. Based upon other comments in the minutes regarding the potential loss of the property as a golf course if it was converted to another use or sold, and our recollection of newspaper reports regarding the sale, it is likely that this may have been a factor in considering a potential restriction on the use of the sale proceeds.

It is our opinion that the sale proceeds may be appropriated for improvements to Memorial Park. As the discussion regarding the creation of the fund creates some potential ambiguity, it is our recommendation that the Commissioners adopt an ordinance amending Ordinance No. 2011-08 to clarify the Board's intent as to the use of the sale proceeds. From a legal standpoint we do not believe this is mandatory. We do, however, believe that it provides needed clarity.

Even assuming the Ordinance contained a restriction on the use of the sale proceeds, the Board could elect to amend the Ordinance to eliminate the restriction. We have considered the possibility that the oral motion created some type of endowment or trust. In this particular instance, however, the County is both the funding party and beneficiary of the sale proceeds. As the beneficiary, the County may elect to utilize the fund for improvements of the Park with the understanding that the principal from the sale in 2011 may not be available to exercise the option to repurchase under Section 9.10 of the Purchase Agreement.

Attached to this correspondence is a proposed Ordinance Amending 2011-08. The proposed amendment makes clear that the principal and interest of the sale proceeds may be utilized for improvements to Memorial Park. If the Board wishes to further clarify or otherwise limit the principal amount of the sale proceeds that may be utilized, please let us know.

Please note that the opinion expressed herein is based solely upon the information we have received and reviewed regarding the sale of the Golf Course. Our opinion is subject

to revision if additional documents related to the sale or Fund are received.

As always, feel free to contact me if you have questions.

Very truly yours,

HAYES COPENHAVER CRIDER HARVEY LLP

A handwritten signature in black ink, appearing to read 'JCH', with a large, sweeping flourish extending to the right.

Joel E. Harvey

JEH:bk

cc: R. Scott Hayes