

**City of Westwood, Kansas
City Council Meeting
February 13, 2025 – 7:00 p.m.**

Council Present: David E. Waters, Mayor
Jeff Harris, Council President
Andrew Buckman, Councilmember
Jason Hannaman, Councilmember
Laura Steele, Councilmember
Holly Wimer, Councilmember

Council Absent: None

Staff Present: Leslie Herring, City Administrator
Curtis Mansell, Police Chief
John Sullivan, Public Works Director
Ryan Denk, City Attorney
Abby Schneweis, City Clerk

Call to Order

Mayor Waters called the meeting to order at 7:00 p.m. on February 13, 2025. Ms. Schneweis called the roll. A quorum was present. The evening's meeting was held in a hybrid manner, with attendees joining both in person and via Zoom.

Approval of the Agenda

Motion by Councilmember Harris to approve the February 13, 2025 agenda as submitted. Second by Councilmember Wimer. Motion carried by a 5-0 voice vote.

Public Comment

Steve Platt, 4910 Glendale, Westwood Hills, read a written statement he prepared and submitted for the record. The document is included in these minutes document.

Ben Hobert, 2208 W 49th Street, Westwood Hills, read a written statement he prepared and submitted for the record. The document is included in these minutes document.

Bernard Brown, 2805 W 51st Terrace, asked the Governing Body if the City is bound to convey the park if the Spring 2025 Special Election question fails. Mr. Brown asked if the residents should be trusting the Governing Body. Mr. Brown asked the Governing Body to state if they have conflicts of interest with regard to the Karbank proposal.

Mayor Waters asked the City Council to state if they have a conflict of interest with regard to the Karbank proposal. All members of the City Council and Mayor Waters stated they do not.

Presentations and Proclamations

No presentations or proclamations were made during the meeting.

Consent Agenda

All items listed below are considered to be routine by the Governing Body and will be enacted in one motion. There will be no separate discussion of these items unless a member of the Governing Body so requests, in which event the item will be removed from the consent agenda and considered separately following approval of the consent agenda.

- A. Consider January 9, 2025 Meeting Minutes
- B. Consider Appropriations Ordinance 771

Motion by Councilmember Hannaman to approve the Consent Agenda as submitted. Second by Councilmember Buckman. Ms. Schneeweis conducted a roll call vote. Motion carried by a 5-0 vote.

Mayor's Report

Mayor Waters provided an overview of events he attended and plans to attend as Mayor.

Mayor Waters thanked the Public Works and Police departments for their work during the recent snowstorm.

Mayor Waters provided an overview of the Spring 2025 election and encouraged the community to vote.

Mayor Waters shared that a joint work session of the City Council and Planning Commission would be held on February 24th.

Councilmember Reports

No reports were made.

Staff Reports**Administrative Report**

Ms. Herring provided an overview of the February 2025 Administrative Report included in the agenda packet and offered to answer questions.

Public Works Report

Mr. Sullivan provided an overview of the January and February 2025 Public Works Reports included in the agenda packet and offered to answer questions.

Public Safety Report

Chief Mansell provided an overview of the January 2025 Public Safety Report included in the agenda packet and offered to answer questions.

Treasurer's Report

The January 2025 Treasurer's Report was included in the agenda packet, no questions or comments were made about the report.

City Attorney's Report

Mr. Denk did not have any items to report.

Old Business

No old business items were considered during the meeting.

New Business

Consider acceptance of the low bid from Amino Brothers Co. for the Mission Road Reconstruction Project, W. 53rd Street to W. 47th Street

The City of Westwood has entered into an interlocal agreement with the City of Roeland Park and the City of Fairway for the reconstruction and improvement of Mission Road from W. 53rd Street to W. 47th Street. Bids were received and opened on January 24, 2025 by the City of Roeland Park as the contracting agency for this project. Five bids were received. Below is a breakdown of the bids.

- Kansas Heavy Construction - \$1,805,866.25
- McConnell & Associates - \$1,705,324.65
- Amino Brothers Co. - \$1,603,302.45 (Low Bidder)
- McAnany Construction - \$1,888,888.88
- JM Fahey Construction - \$1,721,590.40

The low bidder, Amino Brothers Co., has been recommended for the award of the project by the engineer and has been accepted by the City of Roeland Park as the administering jurisdiction for the project. Attached is the recommendation letter and completed bid tabulation from the Engineer of Record, Greg Van Patten, P.E., as well as the allocated costs per City based on the bid.

The total project cost (i.e. construction cost plus design, engineering, construction administration, and testing) based on the bid for the City of Westwood is \$408,819.24 and the adopted budget for this project is \$571,524. (The City of Westwood total construction cost is \$750,203, with total CARS reimbursement for Westwood approved in the amount of \$341,383.52.) Westwood is responsible for 39.2% of the Amino Brothers contract amount. Staff Recommendation:

Motion by Councilmember Hannaman to accept the low bid in the amount of \$1,603,302.45 from Amino Brothers Co. with the expected portion of the total project cost for the City of Westwood to be \$408,819 and authorize the Public Works Director to send a letter stating such to the City of Roeland Park and the City of Fairway. Second by Councilmember Steele. Motion carried by a 5-0 voice vote.

Discuss 2025 Strategic Priorities Work Plan

Following the City Council's adoption of the Governing Body Strategic Plan in December 2024, this work plan is presented to create an opportunity for the Mayor and City Council to provide direction, ask questions, and to share ideas with City staff on upcoming planned areas of focus for the 2025 calendar year. Several projects and priorities are well underway and already committed; however, should Council have additional ideas or want to exchange one priority for another, this is the perfect time to provide such direction to staff.

Context for the priorities is provided in the adopted Governing Body Strategic Plan, which is available on [the City's website](#).

To complement this annual work plan, if there are certain presenters or partnering agencies from whom the City Council would like to hear, this is a great opportunity for the Governing Body to discuss those ideas and direct City staff to issue those invitations and schedule such presentations or reports.

Further, in anticipation of the upcoming City Council and Planning Commission joint work session, ideas of common interest and overlap should be identified for discussion at that public meeting.

Ms. Herring and Mayor Waters led a general discussion of strategic priorities in 2025. No formal action was taken by the Governing Body.

Announcements/Governing Body Comments

No announcements were made.

Executive Session

No Executive Session was held during this meeting.

Adjournment

Motion by Councilmember Harris to adjourn the meeting. Second by Councilmember Hannaman. Motion carried by a 5-0 voice vote. The meeting was adjourned at 7:53 p.m.

APPROVED: _____
David E. Waters, Mayor

ATTEST: _____
Abby Schneweis, City Clerk

**City of Westwood, Kansas
City Council Meeting
February 13, 2025 – 7:00 p.m.**

**Appendix A
Documents Submitted for Public Comment**

My name is Stephen Platt. I live at 4910 Glendale in Westwood Hills. I am a neighbor and have repeatedly appeared before the council meetings to share concerns and facts. I have received no feedback or comment.

The calculation of a TIF Bond was long overdue. Columbia Capital is well known to provide this type of work; however, they acknowledge the assumption may have a material impact on the bond sizing.

In accounting, the principal being Independent and at arm's length is a vital role. Whether it is a vendor, real estate agent, real estate lawyer, or employee; any gifts, tickets, payments, or business dealings need to be scrutinized.

I would like to offer this independent review of the analysis.

Assessed value Assessment Increase assumption –

Although the 1% inflation assumption may seem conservative, the reality is the tax revenue for office buildings has not grown in the past 5 years. The tax revenue for the sum of the 5 large office buildings in Westwood and Mission Woods, all class A buildings, totaling 178,695 square feet of leasable space decreased (1.3 %) last year and decreased (1 .7%) for 5 years from 2020. Just last year, the tax revenue for the 1900 Building in Mission Woods decreased (1.6%) and decreased (2.6%) over the past 5 years.

Removing the increase of the 1% assessed value assumption reduces the TIF revenue by \$600,000.

Assessment Value per square foot base value assumption -

Property taxes are calculated by the County Assessor's office for office space by multiplying an estimated lease rate by the leasable square footage less estimated expenses. A capitalization rate is used to calculate a Total Value Capitalization. This value is then assessed at a 25% rate to arrive at the assessed value (AV).

The Total Value Calculation is stated as price per square foot (PSF) For example, the office building at 1901 W. 47th Place in Westwood has a PSF value of \$124.58. The average for the 5 buildings in Westwood and Mission Woods, all class A buildings, is \$134.23 PSF. The value calculation for the planned development of six commercial buildings modeled in the Columbia Capital memo is \$172.18 PSF. This is 28% higher than the average. Stated otherwise, the assessed value PSF average is only 74% of the estimated assumption.

The calculation is based on leasable space of 1 10,000 square feet for the planned development. The final number could be lower after subtracting space such as corridors, restrooms, and elevators from the calculation. The leasable space of 1900 Building in Mission Woods is 62,556 square feet of the total 87,834 square feet of the building. That's only 71 % of the building square

footage. The average amount of leasable space percentage is consistent for the 5 Westwood and Mission Woods buildings at 70%. Applying this average to the 115,156 gross square footage of the planned development means the assumed leasable space is 342% greater than the average. Stated otherwise, the leasable space average is only 78% of the estimated planned development assumption.

What can be expected?

The PSF value and the leasable space have a multiplying effect. The lower averages of 74% PSF value and 78% of leasable space would mean the bond modeling is only 58% of the projected amount.

Adding this shortfall from the estimated assumptions with the questionable growth in tax revenue, means the actual bond revenue may be only half of what is anticipated. That's millions of dollars.

Other considerations -

The land swap gives the developer commercial zoned land at residential land value prices, netting a wonderful gift to the developer from the City for the donation. It is a donation and gift that the City has to sign off, saying no goods or services were received for the donation.

There is another bond involved in this planned development centered on the credit worthiness of the developer. The City is to assist the developer in obtaining an industrial revenue bond (ORB).

Little has been discussed about the details of this transaction but the real savings to the builder is the materials and labor for the planned development are sales tax free. Don't we all pay sales tax?

It's a favor not all homeowners and builders in Westwood get.

It is a mistake to build a large office complex over the existing park. I ask the Westwood residents to vote NO on the sale of Joe D. Dennis park.

OPEN LETTER TO WESTWOOD, CITY COUNCIL
FEBRUARY 13, 2025
COMMENTS OF BEN W. HOBERT

Mayor Waters and Council members, I have been observing your public relations campaign on the proposed office complex and what you have called a feature park. I think the real feature is the 6 building office complex with 306 parking spaces with only 10 licensed to the city for the park if this plan comes into force and effect.

I have been disturbed by the half truths which the City has distributed. For example, in your Frequently Asked Questions section with respect to the question: "Could Karbank sell the property to someone else?" the answer only addresses the term of the tax increment financing plan of 20 years. There is no discussion of what happens after that period. In fact, after 20 years Karbank can sell all or any portion of the office complex to anyone, without the City's consent. So, KU Med which is always in the market for suitable properties up and down the Rainbow Corridor could buy the entire office complex as its south campus less than 1,000 feet from the former Sprint office complex which it now occupies.

With that event all of the property taxes from the project would go up in smoke for future years. This is quite a gamble on the part of this Council. You have previously bemoaned the fact that there is a disproportionate amount of tax exempt property in the City and now you want to create a realistic risk of more such tax exempt property. And this would be with the added detriment of increased police, fire and ambulance load for the office complex with no tax revenue to support such services from the now tax exempt property. This is a significant risk.

I now provide to your clerk, a Kansas Open Records Act request related to the application of proceeds from the proposed TIF General Obligation Bonds, Series 2026. It should be self explanatory. I request that a full copy of it be included in your record of this meeting.

CITY OF WESTWOOD,

REQUEST FOR RECORD INSPECTION OR COPY
PURSUANT TO OPEN RECORDS ACT K.S.A. 45-215 - 230

ACKNOWLEDGEMENT OF OPEN RECORDS ACT PROVISIONS
(TO BE COMPLETED BY REQUESTOR. PRINT CLEARLY OR TYPE.)

NAME: BEN W. HOBERT

BUSINESS ORGANIZATION: _____

ADDRESS: Z Zep D. PHONE: 49TH ST PHONE: (913) 437-8804

Cc.)éSTtDooD MtccS KS 66 ZOS

I hereby acknowledge that I am aware that K.S.A. 45-220 provides: "The requester does not intend to, and will not... use any list of names or addresses contained in. ..the records or information for the purpose of selling or offering for sale any property or service to any person listed or who resides at any address listed; or ..sell, give, or otherwise make available to any person any list of names or addresses.. .derived from the records.. .for the purpose of allowing that person to sell or offer for sale any property or service to any person listed.. ." and that exceptions to open records are stated in K.S.A. 45-221.

Signature

Date

Requested: ____/____/____
Provided: ____/____/____

Received by: _____
Provided by: _____

CHARGES: (TO BE COMPLETED BY RECORDS CUSTODIAN - CHECK ALL THAT APPLY)

____ Pre-authorized staff research time @ \$15.00 pr hr _____
____ Copies @ \$.50 per page (first 10 pages no charge) _____
____ Certified @ \$1.00 per document _____
____ Postage @ 1st class rate (C.O.D.) _____
____ City of Westwood Zoning Code \$5.00 per copy _____
____ City of Westwood Code Book - Actual cost of copying entire book at commercial
copying establishment plus 1 hour (\$15.00) fee for _____ employee
time. \$ _____

TOTAL COSTS

RECORDS REQUESTED

(TO BE COMPLETED BY REQUESTOR. USE A SEPARATE REQUEST FOR EACH RECORD.)

Name of Document SEE ATTACHED EXHIBIT A

Z0 23

____ Archived (through 12/31/98) & Current: (1/1/99 forward)

Certified ____ Yes ☒ No

of paper copies: _____

E-Mailed *Yes No

Electronic copy (if

available): ☒

@ email. b kobzra- 232-08CO

Rev. 05/07/07 km

Exhibi

t A to

CITY OF WESTWOOD,

REQUEST FOR RECORD INSPECTION OR COPY
PURSUANT TO OPEN RECORDS ACT K.S.A. 45-215-230

Please provide a copy of all emails, documents, spreadsheets, memoranda or other documentation of any kind whatsoever constituting a "public record" within the meaning of K.S.A. 45-217 generated after January 1, 2023, concerning, in any manner whatsoever, the specific uses and applications of proceeds from the proposed bond issuance of the City of Westwood, Kansas, TIF General Obligation Bonds, Series 2026, with an approximate bond par amount of \$4,890,000 as set forth in a Memorandum dated January 15, 2025 from Columbia Capital to Leslie Herring, City of Westwood, including, without limitation, the detail as to the amount from such proceeds to be paid to Karbank Holdings, LLC, any entity controlled by any member or members of the Karbank family or any third party engaged either by any Karbank affiliate, any member or members of the Karbank family or the City of Westwood, Kansas which would be a reimbursement, directly or indirectly, pursuant to either or both of the Funding and Exclusive Rights Agreement dated in March, 2023 between Westwood, Kansas and Karbank Holdings, LLC, Sections 7 and 3B and the Westwood, Kansas Ordinance No. 1037 adopted September 14, 2023.

OPEN LETTER TO WESTWOOD CITY COUNCIL

February 13, 2025

(sent by email to all addressees before 1:00 P.M. this date)

From: Bernard Brown, Westwood
resident Office: 4800 Rainbow
Boulevard

RE: Critical information needed by voters *now* relating to the upcoming vote on the sale of Joe D. Dennis Park

TO: Mayor Waters, Council members Buckman, Hannaman, Harris, Steele, and Wimer, and City Attorney Denk

1) In the City's letter of November 8, 2023 (copy attached), in which the City threatened to sue anyone who publicly stated that Joe D. Dennis Park is a park under Kansas law, the City stated that "the City is under contract to convey" the Park (see page 9).

Is the City bound by contract to convey the Park to Karbank regardless of the outcome of the vote?

If not, the City should show us whatever written agreement with Karbank has changed the contract to provide that the City will not be bound to convey the park if the sale is voted down, and show the date of the agreement.

And the City should show us that it will have no liability at all to Karbank if the sale does not pass.

2) The City now admits that the public statute, K.S.A. 12-1301 (copy attached), applies here, and that law gave Westwood citizens the right to protest and obtain a vote on any "*proposal*" to sell the Park "*before*" the City sold the park. Yet the City's November 8, 2023 letter focused on how the City was already bound by then, "under contract", to convey the Park to Karbank. Assuming that was true, it certainly appears to my eyes that the contract violated K.S.A. 12-1301 by binding the City to convey the Park to Karbank, without even including any "escape clause" or other provision allowing the citizens to protest and obtain a vote that could prevent the sale.

Does the City agree that its contract with Karbank to sell the Park violated K.S.A. 12-1301? If not, please explain how it did not.

3) Parks are like a city's "family jewels", and K.S.A. 12-1301 protects them from quick sales by passing city administrations by requiring that citizens can obtain a city-wide vote before a park can be sold. In addition, this City Council has said that this Park sale proposal will shape Westwood for the next 50 years. And Mayor Waters is a real estate and

development attorney, and Karbank is surely expert on the law on real estate and development matters.

Why did the Mayor, Council, and Karbank *not* include provisions in the contract from the beginning that would allow citizens to protest and obtain a vote *before* any proposal for sale of the Park would be final and binding?

Why did the City fight -- with threats to sue citizens to silence them, claims that the Park was not a park under Kansas law, claims that it "could not" hold an election, and with an expensive lawsuit -- to prevent any public vote on the Park sale?

OPEN LETTER TO WESTWOOD CITY COUNCIL

February 13, 2025

Page 2

4) The City's threat in its letter of November 8, 2023, to sue any citizen who publicly stated that Joe D. Dennis Park is a park under Kansas law, fairly smashed citizens' First Amendment rights, as was set out in detail in the letter of December 7, 2023 to the City by the Kansas Justice Institute (copy attached). The City's threat scared citizens who opposed the Park sale into silence, as shown in the Kansas City Star article of December 6, 2023 (copy attached). I am an experienced attorney, and neither I nor any other attorney I have spoken with has ever heard of a city daring to threaten to sue its citizens for publicly questioning the city's conduct. It was all the worse here that the City threatened citizens for *truthfully* stating that the Park is a park under Kansas law, and that the City was violating that law. In the United States citizens are *free* to criticize – they are *encouraged* to criticize – the conduct of government entities, without fear of any consequences or being sued. The KJI demanded that the City immediately and publicly withdraw the threat, and end the practice of making such threats. I repeatedly stood in front of this Council at Council meetings voicing my outrage at this threat – which obviously applied to me, too, for my own public statements – and demanding that the City publicly withdraw the threat, clearly apologize, and state that it would make any such threats in the future.

Yet the City never responded to the KJI letter or to me. It kept the threat out there, and then *also* threatened my sister, Rebecca Brown, with potential damages it calculated of over \$8 million, for “malicious prosecution”, just because she dared to (very successfully) challenge the City's lawsuit that sought to avoid any vote.

Only long after the damage was done, and after finally admitting that the Park is indeed a park under the law (so that the threat was no longer needed), and admitting that it can indeed accept the citizens' protests, and that it can indeed hold a vote, and losing on appeal, did the City finally do one very quiet thing that almost no one would have noticed or understood: On December 12, 2024, on the last page of a City Resolution (copy attached), it inserted:

“**SECTION 6:** The Governing Body hereby retracts that certain letter dated November 8, 2023, from McAnany, Van Cleave & Phillips, P.A., to Mr. Todd Hauser of Bushyhead, LLC, regarding ‘Objection to sale of 5000 Rainbow’.”

Will the City publicly respond to the KJI letter?

Will the City publicly apologize for having made this threat?

Will the City promise not to make similar threats in the future?

5) The Council has treated the issue of disclosure of any possible conflicts of interest of Mayor Waters or other Council members or Planning Commission members as having been resolved. It certainly is not, in my view.

After repeated evasions and refusals to answer by Mayor Waters, here is where things stand:

Bernard Brown asked in an email to Waters 9-15-23: “I am asking if your law firm, Spencer Fane, represents or does any work for Karbank or any of its principals, or has any other financial or business ties with Karbank or its principals. . . . I would ask also if you or your family members have any financial or business ties with Karbank or its principals.”

OPEN LETTER TO WESTWOOD CITY COUNCIL

February 13, 2025

Page 3

Waters' second email back to Brown, on October 12, 2023, finally responded only in part to those questions, saying: "I am not employed by Karbank. My law firm does not and has not represented the Karbank family of businesses, whether in regard to matters in Westwood or any other matters. I have not received any compensation or gifts from Karbank, nor do I have any financial interests in Karbank."

That does *not* fully answer those questions, or clear up whether Mayor Waters may have possible conflicts.

By stark contrast, Vice-Chair of the Planning Commission, Kevin Breer, stated publicly at the 9-11-23 meeting that he is a real estate and development attorney like the Mayor, and that he (Breer) emphatically has no ties with Karbank whatsoever. *That* is a forthright statement about possible conflicts.

Likewise, Councilmember Andrew Buckman forthrightly stated in an email to me on 10-12-23: "I do not have any affiliation currently, in the past, or in the future with Karbank . . . I don't even work in an industry that would suggest any conflict of interest or mutual business interest. I have no personal ties, no family ties to anyone affiliated with Karbank."

Will Mayor Waters, and Council members Hannaman, Harris, Steele, and Wimer, give simple, clear public statements about whether they have any business, professional, or personal ties with Karbank whatsoever that could raise any question of a possible conflict of interest – and spell out any ties that may raise a question?

Please respond publicly to each of these questions, one at a time if necessary, as soon as reasonably possible. With time of the essence before the upcoming vote, please respond to them verbally in this evening's City Council meeting. If you take the position that there are any of these questions to which you can't respond this evening, please say why, and when you will publicly respond. And please post public answers in writing as soon as possible.

The voters of Westwood have a strong need for, and a right to, this information, and well in advance of the beginning of the voting. If you do not provide prompt and full answers, you can understand that we will then believe that any answers that you would have to give would look bad for the City and for its position on this sale of the Park to Karbank.

Sincerely,



Bernard Brown



mvplaw.com

McAnany, Van Cleave & Phillips, P.A.
10 East Cambridge Circle Dr.
Suite 300
Kansas City, KS 66103
913.371.3838 Phone
913.371.4722 Fax

November 8, 2023

Mr. Todd Hauser
Bushyhead, LLC
315 SE Main Street
Lee's Summit, MO 64063

Re: Objection to sale of 5000 Rainbow
MVP File No. 4637.14

Mr. Hauser,

I believe that you are aware that I serve as the City Attorney for the City of Westwood, Kansas. This correspondence responds to your correspondence dated October 12 and 19, 2023 asserting an objection to the sale of City property located at 5000 Rainbow due to alleged non-compliance with K.S.A. 12-1301. Simply stated, your objection is without merit, and the City is prepared to take such legal action against you and/or your clients as may be necessary to protect its title and its contractual relationships.

I. Facts Relating to the 5000 Rainbow Property.

The four parcels upon which 5000 Rainbow is situated include Lots 1, 2 and 3, Block 1 of the Swatzell Addition, and an unplatted lot spanning the rear of these three lots to the South ("5000 Property" also includes 5010 Rainbow). The 5000 Property was conveyed in 1969 by Warranty Deed from Fred D. and Bessie Ellis to the City of Westwood. The Deed conveyed the property in fee simple absolute subject only to easements, reservations and covenants of record. There was no express dedication of the 5000 Property to any particular public purpose – i.e. park or other – within the Deed. The referenced consideration within the Deed for the conveyance was "ten dollars and other valuable consideration." As I'm sure you are aware, this is a common recitation and as discussed below does not represent the actual consideration paid for the property. As described below, this is not the actual purchase price for the property. The Deed does not purport to be a donation, nor is there any indication that the transaction was not an arms-length transaction.

The Swatzell Addition plat was filed with the Johnson County Register of Deeds on April 5, 1928 ("Swatzell Plat"). The only restrictions on the properties included within the Swatzell Plat, Block One are stated on the Plat itself. These restrictions only purported to restrict the property for a period of twenty years. None of the restrictions restricted the use of the 5000 Property to public or park use. The only dedication of public property on the Swatzell Plat is stated, "The undersigned . . . hereby dedicates the streets shown on this plat to the public use

forever.” The 5000 Property was not dedicated to any public use. The unplatted lot to the South of Lots 1-3 which currently forms part of 5000 Rainbow was excepted from the platted area.

A first title report was requested by the City in 2022 to determine whether there were any restrictions as to conveyance or use of 5000 Rainbow. This title report was at City expense with an effective date of September 18, 2022. The report concludes that the City holds fee simple title to the property. The only restrictions as to use noted in the report were the restrictions discussed above on the original plat which have expired.

A second title report was issued by First American Title with a commitment date of June 23, 2023, related to both 5000 Rainbow and 5050 Rainbow (former Christian Church site). The title report again reflects that the City holds both properties in fee simple. Relative to the acts required by the City for the issuance of title insurance the report only identifies, “Furnish a proper resolution authorizing the proposed transaction and identifying the parties authorized to execute instruments necessary to close this transaction.” Restrictions as to use of the property as noted on the title report identify the above referenced restrictions stated on the 1928 plat which have expired. The report additionally identifies covenants and restrictions filed in 1939, however, an examination of those restrictions reflect that they do not restrict the property located at 5000 Rainbow and only restricts use of property for 25 years. None of the covenants and restrictions purport to restrict 5000 Rainbow to any public use including park use. Nothing on the title report reflects that the 5000 Rainbow property was ever dedicated or restricted to park use. The only suggestion of a public use of the 5000 Property is the fact that the Property was purchased by the City in fee simple absolute, without restriction, in 1969.

I did attempt to track the conveyance history of the properties through deed searches on AIMS. The conveyance history of the platted lots within 5000 Rainbow reflects that the entirety of Swatzell Addition, Block One, including Lots 1-3 were conveyed as follows. In 1939 from Bertie Swatzell to John A. Swatzell (Bertie was John’s sister-in-law). In 1955 from Jack (presumably John A.) C. and Edna Ann Swatzell to Ruth Hutchings. In 1957 from Frank E. and Ruth Hutchings to T.M. Tank in fee simple. In 1961 from P.M. Tank to Frank E. and Ruth Hutchings in fee simple. In 1961 from Frank E. and Ruth Hutchings to Fred D. and Bessie Mae Ellis in 1961 in fee simple. In 1969 from the Ellis’ to the City in fee simple. In short, prior to the City’s purchase, these lots were subject to private use and development and in fact were platted for residential use.

The conveyance history of the unplatted lot is more difficult to track as AIMS seemingly groups deeds from numerous unplatted lots which are wholly unrelated to this parcel. That said, we at least know that it was conveyed from John and Bertie Swatzell in 1931 to Mike and Mary Pavlich for \$1,000 and that the property was subsequently conveyed by the Ellis’ in the same deed as conveyance of Lots 1-3 Swatzell Addition in 1969 to the City.

KORA requests submitted to the City in the last couple of weeks reveal the following information relative to the 5000 Rainbow property acquisition and use.

- Minutes from July 11, 1968, Meeting. Councilmember Keller presented the “possibility” of purchasing property at 50th and Rainbow. States “He introduced

representatives from Westwood Christian Church and Westwood View School. Discussion followed in view of cooperation with school and church on building a City Hall and swimming pool at this location.” Goes on to state “Mr. Keller instructed Mr. Glenn Myers to check with the following cities: Mission, Fairway, Merriam and Roeland Park on cost of building, size and maintenance of swimming pool.” City Attorney was directed to get an appraisal on land and property at 50th and Rainbow.

- Minutes from November 14, 1968, Meeting. Approved motion to have Mayor “sign contract when Mr. and Mrs. Fred Ellis execute the contract for sale of property located 50th and Rainbow and down payment of \$5,000.00 be held in escrow at the Johnson County National Bank until a complete abstract of title has been received.”
- Minutes from January 9, 1969, Meeting. Note that the City Attorney stated the abstract of title of property located at 5010 Rainbow was clear and recommended money being held in escrow be paid to Mr. and Mrs. Fred Ellis in the amount of \$4,000 be paid. Approved by Council. Discussion at the meeting centered around construction of city hall.

These minutes reflect several important facts relative to your challenge. First, there is clear evidence that the City paid fair market value for the property. The City obtained an appraisal prior to purchase. It appears that the City paid \$4,000 for acquisition of the Property, which inflation adjusted to today, is not an insignificant amount of money. Without question, the property was not donated or gifted to the City. There was a negotiated sale. Second, the use of 5000 Rainbow as contemplated at the time of sale did not include use of the property as an open space park. Discussion centered around construction of a city hall and possibly a pool, neither of which uses ever materialized. Finally, the motion on November 14, 1968 required the obtaining of an abstract of title for the Property. This clearly suggests that the City intended to receive – and did receive – fee simple, clear title to the property.

II. Discussion.

A. Objection.

The objection raised by you is that sale of the 5000 Rainbow property fails to comply with K.S.A. §12-1301 which provides as follows:

12-1301. Land for park purposes; sales or exchanges in connection with parks; use of moneys; notice; protest; election; validation of prior sales and conveyances. Any city may acquire by purchase, or lease or may take options upon, land within or without the limits of said city to be used as a public park for the use and benefit of the people of said city. Any city may trade or exchange any public park, public square or market square which it may own, or any portion thereof, for other land to be used for similar purposes, or may sell the same. Any such sale heretofore made is hereby confirmed, legalized and declared to be a valid sale and conveyance. Before making any such trade or exchange or sale, the city shall first

publish notice of such proposal in the official city paper once each week for two consecutive weeks upon the same day of the week and, if within thirty (30) days from the date of the last publication there has not been filed with the city clerk of such city a protest signed by qualified electors of such city equal in number to not less than ten percent (10%) of the electors who voted at the last preceding regular city election as shown by the poll books, such city may make such sale, trade or exchange.

In the event such a petition is filed with the city clerk within the time prescribed above no such sale, trade or exchange shall be made until the governing body shall be instructed so to do by a majority of all the votes cast on this proposition at a regular or special election. Any election required as herein provided shall be called and held as provided by law for bond elections.

It is worth noting that this statute was adopted within the same Act as K.S.A. §12-1302 which relates to the bonding of costs associated with the acquisition of land for park purposes. That statute requires a popular vote authorizing the land acquisition. This fact is relevant when reviewing the first sentence of K.S.A. § 12-1301 which provides that, “Any city may acquire by purchase, or lease or may take options upon, land within or without the limits of said city *to be used as a public park* for the use and benefit of the people of said city.” (Emphasis added).

The second sentence of K.S.A. §12-1301 is the operative sentence in your objection. It provides that, “Any city may trade or exchange any public park, public square or market square which it may own, or any portion thereof, for other land to be used for similar purposes, or may sell the same.” Note the difference of the verbiage in this sentence from the first sentence of the statute. The first sentence references “use” as a park. This second sentence references a “public park.” Your correspondence of October 19th simply ignores this variation in the language of the statute and argues that mere use alone restricts sale of the Property despite the fact that such argument is not borne out in the actual language of the statute.

Moreover, K.S.A. §12-1301 must be read together with K.S.A. §12-1303 and §12-1304. As to K.S.A. §12-1303, that allows cities to levy a “park tax” for the purpose of maintaining “such parks” as acquired under the auspices of K.S.A. 12-1301 et seq. K.S.A. 12-1304 continues:

City parks *so established* [that is, pursuant to K.S.A. 12-1301 et seq.] shall be under the control of the governing body of said cities, who shall provide for the establishing and care of the same *out of the funds raised as aforesaid* [that is, out of bond proceeds and/or a park tax], and shall make suitable regulations for the care and government of *such* parks. (Emphasis added).

In the present case, the factual record that we have from the time the 5000 Rainbow property was acquired reflects that: (1) bond proceeds weren’t utilized for the acquisition; (2) the land wasn’t purchased with the intent to commit it to its present use as a park; and (3) the City has never levied a “park tax” as to this property.

B. Requirement of Dedication for Park Purposes.

In order for real property to be deemed a “public park” for purposes of K.S.A. § 12-1301, such property must have either been acquired pursuant to the provisions of K.S.A. 12-1301 *et seq.* or, as provided in K.S.A. § 12-1301, the property must have otherwise been acquired by the City for “for the use and benefit of the people of said city.” This quoted language is of the utmost importance because it requires that the property have been legally “dedicated” as a park. Dedication is a term of art under Kansas law. “A dedication is an offer by the owner of land to devote the property to public use, manifesting an intention that the land shall be accepted and used presently or in the future. The owner’s intent to dedicate and the public’s acceptance thereof are essential elements of a complete dedication.” *Wagon Wheel Landowners Ass’n v. Wallace*, 17 Kan. App. 2d 395, 399 (1992). Note that this definition language for dedication essentially mirrors the language of K.S.A. § 12-1301.

Dedication may be by statute, deed or common law. *Id.* The party asserting that public land has been dedicated for public use bears the burden of proof and must show: (1) an intent by the property owner to dedicate the land for such use; and (2) acceptance by the public. *Carlson v. Burkhardt*, 271 Kan. 856, 862 (Kan. 2001). Failure to prove either of the elements is fatal to the party asserting implied dedication. *Id.*

1. Statutory Dedication.

The issue of such acts as are necessary for the dedication of land for park purposes was considered in *Cooper v. City of Great Bend*, 200 Kan. 590 (1968). In that case, the Kansas Supreme Court considered the issue of whether a park in Great Bend Kansas had been dedicated for public park purposes. The Court recognized that a public park may be dedicated in two ways. First is by formal dedication. The methodology of formal dedication includes dedication on the initial land grant or dedication via plat or recognition of dedication by subsequent plat. This methodology of dedication was recognized by citation to K.S.A. § 12-401. This statute provides as follows:

12-401. Cities of second and third classes and towns; abstracts; form and contents of plat; approval by county or city attorney. Before any proprietor or proprietors of any proposed city of the second or third class or of any town, or of any proposed addition to any such city or town shall record the plat of such proposed city, town or addition, he or she shall furnish to the county attorney of the county in which such proposed city or town is located, or the city attorney and governing body in case of a proposed addition, an abstract of title and the plat to the land which is to be incorporated into such city, town or addition. Such county attorney, in case of any proposed city or town, or such city attorney and governing body in case of a proposed addition, after examination duly made, shall approve or disapprove said plat. Such city attorney, and governing body in case of any proposed addition to any town or city may require the streets and alleys, therein shown, to be as wide as, and to be conterminous with, the streets and alleys, of that part of the city or town to which it adjoins.

The plat shall accurately and particularly set forth and describe: First, all the parcels of ground within such city or town or addition reserved for public purposes, by their boundaries, course and extent whether they be intended for avenues, streets, lanes, alleys, commons, parks or other uses; and, second, all lots intended for sale, by numbers, and their precise length and width. (Emphasis added).

In addition to the *Cooper* case's recognition of the procedure through dedication by plat to a particular purpose, this recognition was also made by the Attorney General in A.G. Op. 84-83, which found that a proper statutory dedication requires a plat to designate the public "uses therein named, expressed or intended, and for no other use or purpose."

The *Cooper* case then cites to K.S.A. § 12-406 for additional authority and support. This statute states as follows:

12-406. Maps and plats sufficient to vest title of lands conveyed for public use in city; effect of recordation. *Such maps and plats of such cities and towns, and additions, made, acknowledged, certified, filed and recorded with the register, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named or intended for public uses in the city, in trust and for the uses therein named, expressed or intended, and for no other use or purpose.* The recording of such map or plat shall not constitute a conveyance of any interest in the oil, gas and other minerals underlying the avenues, streets, lanes, alleys and other parcels therein named or intended for public uses. The provisions of this act shall apply to all maps or plats, heretofore or hereafter made, acknowledged, certified, filed and recorded with any such register. Nothing herein contained shall be construed as granting any right to enter upon the surface of such parcels of land for purposes of exploring for or the extraction of such minerals, or in any other manner to interfere with the public uses named in such maps, plats and additions. (Emphasis added).

Prior to the 1984 amendment, K.S.A. § 12-406 vested title in all statutorily dedicated land located within a city in the county while the control and use of the property rested with the city. *See* Kan. A.G. Op. 83-146. Once a public use was established by statutory dedication, the county "forever afterward" held the property in trust for the specified use. *Id.* Accordingly, a city didn't "own" public property acquired by statutory dedication and could not sell the same. *Id.*

In 1984, this construct was fundamentally altered by the passage of K.S.A. 12-406a which provides,

12-406a. Fees to certain land held by county transferred to city. On the effective date of this act, the fee to any parcel of land intended for public use in cities of the first, second and third classes *which is held in trust by the county* is hereby transferred and conveyed to the city in which such property is located. The city shall hold the fee to such parcels of land intended for public use in the city in trust

and for the uses therein named, expressed or intended and for no other use or purpose. (Emphasis added).

In the *Great Bend* case there was such a legal dedication of land. Therefore, the Court restricted the use of the property to park uses. In the case at bar, there was no statutory dedication on the original plat of the 5000 Rainbow property to any public use, much less the specific public use of a park. As no statutory dedication occurred, the City should be unbound by the aforementioned statutory requirements to hold the property in trust and to be used for the exclusive purpose of a park.

2. Dedication by Deed.

In addition to the statutory process for dedication, dedication can be effectuated by a deed of dedication to a local government. As you no doubt are aware, there was no such deed of dedication involving 5000 Rainbow. The deed of conveyance from the Ellis' to the City in 1969 fails to specify that the 5000 Rainbow property is to be committed to any public purpose much less restricted to the specific public purpose of a park. As expressed in A.G. Op. 84-83, the failure of a deed of conveyance to a City to express the "purpose or use for which the land is conveyed" results in the failure of the creation of a dedication by deed.

3. Common Law Dedication.

The third method of possible dedication is by common law. In evaluating whether a common law dedication occurred, it is first important to define what constitutes a dedication at common law. Although not specifically so defined in Kansas, the great weight of authority defines a common law dedication as an *uncompensated transfer of private property to public use*. See *Mikkelsen v. Hansen*, 31 Cal. App. 5th 170 (2019) (Defining a dedication as an uncompensated transfer of an interest in private property to the public); *McNaughton v. Chartier*, 977 N.W. 2d 1 (Iowa, 2022) (The very essence of a dedication of an interest in private property to the public is that there is no compensation to the dedicator); *Nelson v. Garber*, 960 N.W. 2d 340 (S.D. 2021) (By its very nature, "dedication" is to appropriate and set apart one's private property to some public use); *EPG Assoc. v. Cascadilla School*, 194 A.D. 3d 1158 (Sup. Ct. 3rd Dist. 2021) (Dedication is essentially a gift by a private owner of real property to the public); *Becker v. Burleigh County*, 924 N.W.2d 393 (N.D. 2019); *Zito Media, L.P. v. Haggerty*, 320 F. Supp. 3d 630 (M.D. Pa. 2018) (Same); *Haven Chapel UMC v. Leebron*, 496 S.W. 3d 893 (Tx. Ct. App. 2016); *Favre v. Jourdan River Estates*, 148 So. 3d 361 (Ga. 2014) (Same). By this definition, the acquisition of the 5000 Rainbow property was not a dedication for two reasons. First, the transfer was not uncompensated. The City paid \$4,000 for the property in 1969. Prior to acquisition of the property, the City obtained an appraisal. Second, the only transfer of the 5000 Property from private property to public use was in 1969. At that time, the property was not intended to be used, nor was it actually being used for open park space.

It should additionally be noted that the ownership of the 5000 Rainbow property does not have the hallmarks of a common law dedication. Statutory dedication as contrasted with common law dedication is distinguished by the fact that a statutory dedication is a conveyance of the fee title to the property whereas a common law dedication only bestows an easement to use the

property. Am. Jur. 2d, Dedication § 3. Here, there is no question that the City owns the fee simple title to the property.

4. Kansas Home Rules and Statutory Powers as to Property.

The City's ownership of fee title in the absence of a statutory dedication also establishes the City's right to freely assign the property under the Home Rule Amendment to the Kansas Constitution and the attendant enactment of K.S.A. § 12-101. This statute provides as follows:

12-101. Corporate powers; home rule of local affairs and government.

Article 12, section 5 of the constitution of Kansas empowers cities to determine their local affairs and government by ordinance and enables the legislature to enact laws governing cities. Each city being a body corporate and politic, may among other powers —

. . .

***Second.* Purchase or receive, by bequest or gift, and hold, real and personal property for the use of the city.**

***Third.* Sell and convey any real or personal estate owned by the city, and make such order respecting the same as may be deemed conducive to the interests of the city, and to provide for the improvement, regulation and government of the same.**

***Fourth.* Make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers.**

. . .

***Sixth.* Exercise such other and further powers as may be conferred by the constitution or statutes of this state. (Emphasis added).**

The right to freely buy and sell real property as provided above is inconsistent with a common law dedication. As cited above, common law dedication only grants an easement to use land for the specific public purpose to which the property is committed. As the City owns fee title to the property, it constitutes a proper exercise of Home Rule and K.S.A. § 12-101 for the City to sell the 5000 Rainbow property at its discretion. Additionally, K.S.A. § 12-101 flies in the face of your argument within your October 19, 2023 correspondence that it is "how the land is used, not how the land appears in a title report." If your argument was true, then a City could never acquire land, commit it to a use and then sell it. It would be dedicated and committed forever to such public use. Clearly, the express statutory right to "Sell and convey any real or personal estate owned by the city" makes clear that your "use" argument is wholly without merit.

5. Abandonment.

Finally, under the specific facts relating to the acquisition of 5000 Rainbow, the City can vacate any use to which the property is committed. Where an absolute fee interest has been dedicated, public use of the property may cease or the land may be devoted to a different use without any impairment of the title acquired, absent fraud or bad faith at the time of the original conveyance. Am. Jur. 2d Dedication §63. Here, the City holds absolute fee title to the property and is free to convey the Property.

III. Slander of Title and Legal Claims of the City.

The last subject of this correspondence relates to the cloud on title which you and your clients have placed upon the City's ability to convey the property. As I'm certain that you are aware, the mere assertion of your objection, no matter how meritless, creates the threat of a claim or legal proceeding which impairs the title of the City. As you are aware, the City is under contract to convey 5000 Rainbow. Your objection interferes with the City's ability to meet its contractual obligations. As such, please be advised, that should you or your clients proceed further in this matter, the City reserves its rights to pursue legal claims against you and your clients for slander of title and tortious interference with the contractual relationships of the City.

Notably, you have failed to identify any of your clients. My understanding is that you have continued to do so upon direct inquiry. To the extent you refuse to identify your clients, then the City's rights and remedies would necessarily have to be exercised against you.

Your clients may or may not be Westwood residents as you state. Obviously, those who are not Westwood residents would have no legal right to vote in any election held pursuant to K.S.A. §12-1301 and accordingly have no basis or cause to object to the proposed sale on the grounds of non-compliance with K.S.A. §12-1301. Therefore, clearly such non-resident's assertion of your present objection is not in fact motivated by a desire to force an exercise of their rights as qualified electors of the City of Westwood to vote on disposition of the 5000 Property. Rather, their motive can only be the improper and illegal motive of slandering the title of the City and tortiously interfering with the City's contractual relations, all in an attempt to prevent development of the site at any and all costs. You have utterly failed to demonstrate that your clients have any legal standing to assert the objection which you raise.

The City trusts that you understand, and have advised your clients, that their actions may also result in claims from the Karbank group of companies and/or the Shawnee Mission School District. However, we assert no claims here on their behalf.

Accordingly, the City hereby demands that you and your clients immediately and formally withdraw any claims or demands related to K.S.A. §12-1301, and furthermore cease in publishing your and their continued slandering of the City's title (whether through web sites, Facebook posts, door-to-door, or electioneering, as occurred in front of City Hall yesterday, during voting hours), and cease in further tortiously interfering with the City's contractual relationships. The City expects to receive such a response from you by no later than **Wednesday, November 15, 2023**.

November 8, 2023

Page 10

We hope that further action by the City will not be required in this matter, but your and your clients' refusal to comply with the terms of this letter will leave the City with no other choice. If upon receipt and review of this correspondence you have any questions or comments, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. B. Denk', with a stylized flourish at the end.

Ryan B. Denk,
City Attorney

Cc: David E. Waters, Mayor
Leslie Herring, City Administrator

K.S.A. 12-1301, below, can be seen online at the official Kansas revisor of statutes page:
https://www.ksrevisor.org/statutes/chapters/ch12/012_013_0001.html

12-1301. Land for park purposes; sales or exchanges in connection with parks; use of moneys; notice; protest; election; validation of prior sales and conveyances. Any city may acquire by purchase, or lease or may take options upon, land within or without the limits of said city to be used as a public park for the use and benefit of the people of said city. Any city may trade or exchange any public park, public square or market square which it may own, or any portion thereof, for other land to be used for similar purposes, or may sell the same. Any such sale heretofore made is hereby confirmed, legalized and declared to be a valid sale and conveyance. **Before** making any such trade or exchange or sale, the city shall **first** publish notice of **such proposal** in the official city paper once each week for two consecutive weeks upon the same day of the week and, if within thirty (30) days from the date of the last publication there has not been filed with the city clerk of such city a protest signed by qualified electors of such city equal in number to not less than ten percent (10%) of the electors who voted at the last preceding regular city election as shown by the poll books, such city may make such sale, trade or exchange.

In the event such a petition is filed with the city clerk within the time prescribed above **no such sale, trade or exchange shall be made until the governing body shall be instructed so to do by a majority of all the votes cast on this proposition at a regular or special election.** Any election required as herein provided shall be called and held as provided by law for bond elections.

(highlights and bold text font have been added to the statute language, above)



KANSAS JUSTICE INSTITUTE

December 7, 2023

Sent via Electronic Mail Only

Ryan B. Denk
City Attorney, City of Westwood, Kansas
10 East Cambridge Circle Dr., Suite 300
Kansas City, Kansas 66103

Dear Mr. Denk,

Kansas Justice Institute (KJI) is a nonprofit, *pro bono*, public-interest litigation firm committed to upholding constitutional freedoms, protecting individual liberty, and defending against government overreach and abuse.

It has recently come to our attention that the City of Westwood sent a cease-and-desist letter on November 8, 2023,¹ involving objections to the proposed development of a public park.²

In our view, the City of Westwood's letter is heavy-handed, unacceptable, and antithetical to the First Amendment. Accordingly, as to those portions of the letter that implicate the First Amendment, they should be immediately—and publicly—withdrawn.³ Further, to the extent this approach is Westwood's policy and practice, it should likewise end, immediately.

Under well-established First Amendment principles, the City of Westwood cannot credibly argue it has a valid claim for tortious interference or slander of title against those who object to the proposed development of the park.

To begin with, those individuals who object to the sale of the park are speaking on matters of public concern. After all, the speech involves a matter of "political, social, or other concern to the community," and it is "a subject of legitimate news interest." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up). *E.g.*, Eric Adler, *Johnson County city threatens to sue its own residents who are fighting office complex*, Kansas City Star (December 6, 2023);⁴ Juliana Garcia, *Westwood approves widely-criticized plan to demolish the city's largest park to build offices*, KCUR 89.3 (Oct. 14, 2023);⁵ Sydnie Savage, *Westwood advances plan to turn city park into office space*, Fox4 (Oct. 13,

¹ Attached here as Addendum A.

² If you feel anything in this letter is inaccurate, or we have misunderstood the situation, please advise immediately. Please set forth the accurate facts.

³ The First Amendment questions are a separate and distinct analysis.

⁴ Available here: <https://www.kansascity.com/news/politics-government/article282667853.html>

⁵ Available here: <https://www.kcur.org/housing-development-section/2023-10-14/westwood-approves-widely-criticized-plan-to-demolish-the-citys-largest-park-to-build-offices>

2023);⁶ Juliana Garcia, *Westwood neighbors push back on tall, colorful Rainbow Boulevard project*, Shawnee Mission Post (Aug. 16, 2023).⁷

Speaking on matters of public concern is, of course, “at the heart of the First Amendment’s protection” and “entitled to special protection.” *Snyder*, 562 U.S. at 451-52 (cleaned up). That is because the First Amendment “reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* at 451-52.

The First Amendment’s protections are *so* robust, they apply as a defense to the very types of torts claims you have threatened to bring. *E.g.*, *Snyder*, 562 U.S. at 450 (First Amendment defense to intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 891-92 (1982) (First Amendment defense to malicious interference with business, statutory prohibition on secondary boycotts, state anti-trust, and conspiracy); *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody’s Investor’s Servs., Inc.*, 175 F.3d 848, 852 (10th Cir. 1999) (First Amendment defense to intentional interference with business relations, intentional interference with contract, and publication of an injurious falsehood); *Cousins v. Goodier*, 283 A.3d 1140, 1144 (Del. 2022) (First Amendment defense to defamation and tortious interference with employment agreement); *City of Keene v. Cleaveland*, 167 N.H. 731, 741 (2015) (First Amendment defense to tortious interference with contractual relationship, negligence, and conspiracy); *King v. Levin*, 184 Ill. App. 3d 557, 568 (1989) (First Amendment defense to tortious interference with prospective economic advantage).

Moreover, the City of Westwood would need to prove “actual malice,” *Jefferson Cnty. Sch. Dist. No. R-1*, 175 F.3d at 852, “that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not,” *New York Times v. Sullivan*, 376 US 254, 280 (1964). The City of Westwood could not possibly meet that incredibly high burden, especially considering it is an open question of statutory interpretation whether K.S.A. § 12-1301 applies to the sale of all parkland or just to parkland purchased with a park bond or containing a deed restriction.

Furthermore, even without the “special protection” provided by the First Amendment, the City of Westwood could not possibly prove the elements of either slander of title or tortious interference. Both claims require a showing that the allegedly tortious statements lacked a reasonable justification. *See Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 168-69 (1994); *Saddlewood Downs, L.L.C. v. Holland Corp.*, 33 Kan. App. 2d 185, 196 (2004). Quite simply, asserting a good-faith argument about an open question of law (such as the interpretation of K.S.A. § 12-1301) is a sufficient justification and could not constitute slander of title or tortious interference.

Nor is the City’s threatened legal action justified by the warning that some residents might petition the Courts for a writ of mandamus compelling the City to comply with § 12-1301. The

⁶ Available here: <https://fox4kc.com/business/westwood-advances-plan-to-turn-city-park-into-office-space/>

⁷ Available here: <https://shawneemissionpost.com/2023/08/16/westwood-rainbow-development-209817/>

First Amendment right to petition the government for a redress of grievances guarantees the right to petition the City Council itself, (such as by sending letters demanding that the City follow § 12-1301) or to petition the Courts for a writ of mandamus. *See CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276 (10th Cir. 2020) (opponents of a rezoning and development plan who brought unsuccessful state-law challenges to the plan are immune from liability unless their court petition was a sham). The City of Westwood may not threaten legal action against those who have brought good-faith petitions to the City Council, or where the City is warned of future good-faith petitions to the Courts.

Put differently, it doesn't matter much at all who has the correct reading of the statute—what matters is the City of Westwood may not threaten to sue for disagreeing with its statutory analysis.

For substantially similar reasons, Westwood's letter also implicates the First Amendment Right to Free Association; Kansas Const. Bill of Rights Sections 1, 3, 11, 18, and 20; and Kansas' Anti-SLAPP statute, K.S.A. § 60-5320.

Please immediately advise whether the City of Westwood intends to pursue its purported claims for tortious interference and slander of title against opponents of the park redevelopment. We look forward to your response.



Kansas Justice Institute
By: Samuel G. MacRoberts
Jeffrey S. Shaw
12980 Metcalf Avenue, Suite 130
Overland Park, Kansas 66213
(913) 213-5018
Sam@KansasJusticeInstitute.org



Get 93% off your first month. Subscribe today for \$1.

GET ACCESS



LOG IN

SUBSCRIBE NOW

THE KANSAS CITY STAR.

Part of the McClatchy Media Network

Local News Restaurants Chiefs Politics Opinion • Personal Finance Betting Obituaries Entertainment Shopping

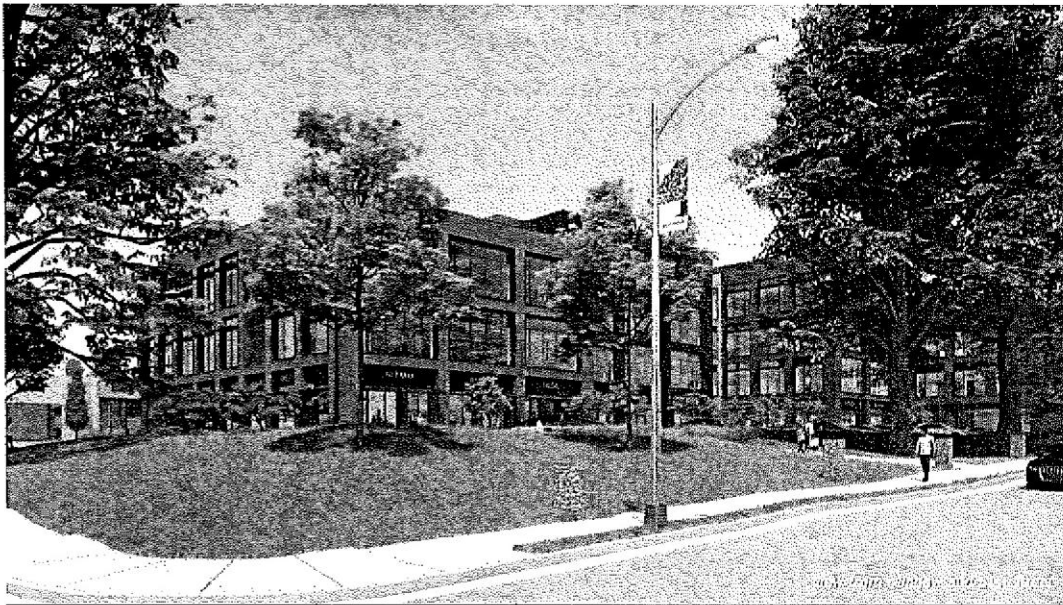
REALITY★CHECK

Johnson County city threatens to sue its own residents who are fighting office complex

BY ERIC ADLER

UPDATED DECEMBER 06, 2023 11:05 AM





A rendering of the Karbank office and retail development proposed for Westwood, at Rainbow Boulevard and 51st Street. *Perspective Architecture + Design*



Only have a minute? Listen instead

Powered by **Trinity Audio**

00:00



1.0x

10:51

Reality Check is a Star series holding those in power to account and shining a light on their decisions. Have a suggestion for a future story? Email realitycheck@kcstar.com.

In the Johnson County suburb of Westwood, the saying “You can’t fight City Hall” might have an added caveat.

Residents are welcome to fight, but a few who have persisted in their attempt to block a four-building office and retail development received a letter from the Westwood city attorney threatening to sue them.

The result in Westwood, a sylvan town of 1,850 people just west of Kansas City, is that a small but resolute group of neighbors say they have been “cowed” and “bullied” into silence and, for some, anonymity in the press, out of fear of being sued by their local government.

Westwood’s mayor, David E. Waters, told The Star that the city’s threat of legal action came only in response to the residents’ own initial threat of litigation to challenge the development.

“As of today,” he said in an email, “no such legal actions have been taken by any parties in this matter, and it is certainly our hope and expectation that there will be none.”

The city's threat, however, now has some residents exploring the possibility of suing the city, saying it suppressed their constitutional right to free speech.

"I, for one, am willing to speak out about this," said resident Bernard Brown, himself an attorney.

"... I do not cotton to government officials threatening citizens with tort lawsuits just for speaking out and raising questions about how government is doing its job — just as good citizens should do. And I will not sit silent while this goes on. They can sue me and I'll take that risk."

One resident, who requested anonymity out of fear of litigation, called the city's reaction to residents' dissent "harassment."

"I do think that there's civil rights that are being violated," she said. "And the irony, if it is irony, is that our public taxpayer dollars would be used to sue us. ...You have this David and Goliath situation."

Said a third, "I think the threats are outrageous. I cannot comprehend how a city government could possibly even think of threatening its constituents in any regard for any reason."

In October, after months of debate, the Westwood City Council and mayor voted 5-1 to sell 7.6 acres of public land around 50th Street and Rainbow Boulevard, including the 1-acre Joe D. Dennis Park, to the Karbank Real Estate Co. so it can build the development.

In the deal, Karbank is to acquire not only the park land, but also 1.8 acres of adjacent empty city green space at 5050 Rainbow Blvd., once occupied by the Westwood Christian Church, and 4.8 acres of property at 3511 W. 50th St., where the former Westwood View Elementary School still stands. (The district built a new Westwood View school nearby last year.)

In return, Karbank, based in Mission Woods, has agreed to pay off a \$275,000 debt that the city still owes on the church property, donate \$2.65 million to the city so it can purchase the school building and its land from the Shawnee Mission School District, pay for the building's demolition and grade the land for a new 3.9 acre park to replace Joe D. Dennis.

Numerous Westwood residents support the project, one city leaders see as improving the town's amenities, adding offices and retail, and boosting the tax base while giving them a bigger park. The city recently announced a park planning steering committee to help select a designer.



A sign at Joe. D. Dennis Park at 50th Street and Rainbow Boulevard in Westwood announced a public hearing to consider rezoning of the park and adjacent acres for a proposed Karbank office and retail development. At an Oct. 12 meeting, the City Council approved the plan. Eric Adler eadler@kcstar.com

BUT IS IT REALLY A PARK?

As opponents to the development tell it, the current wrangle began on Oct. 12, several hours before the City Council approved the plan.

Through an attorney, Todd Hauser of Bushyhead LLC in Lee's Summit, his clients — two unnamed residents, one from Westwood, and another living by the the park in nearby Westwood Hills — sent a letter to Waters suggesting that the vote be postponed. The letter said that based on Kansas law, statute 12-1301, if the city wanted to transfer park land, it must first publish the proposal in the official paper once each week for two weeks in a row. The city, the letter said, had failed to do that.

That night, the council nonetheless voted to rezone the land for the Karbank proposal.

A week later, on Oct. 19, Hauser sent a second later to Waters saying that he had “a brief discussion” with Westwood’s city attorney, Ryan Denk, who practices with MVP Law. He said he was told, in effect, that in 1969, when the title for the land that eventually became Joe D. Dennis Park was conveyed to the city, it was never technically identified for use as a city park, city funds weren’t used to buy it and a park tax levy was not used to support it. Thus, the Kansas law didn’t apply to Joe D. Dennis Park, he was told.

"It was their contention," Hauser told The Star, "that it was not a city park."

In his letter, Hauser included documents showing that, whatever the original title showed, the park was and is a city park. He included:

An October 1973 newspaper clipping of the park's dedication; a 1973 park plaque designating the property as "Westwood Park"; a 2002 plaque designating the park as Joe D. Dennis Park, named for Dennis, a city mayor from 1965 to 1984; maps designating it as a city park; a city web page calling it a park; a tax assessment document calling it a park; also a Freedom of Information Act document sent to him this year by Westwood's city attorney titled, "J15050-Title Report 5000 Rainbow (Park Property)."

In the letter, Hauser asserted that because the city failed to publish the proposed transfer of the park, as required under Kansas law, Westwood's citizens now had the right to gather signatures on a petition to put the park transfer up for a citywide public vote.

"My client is not requesting an overturn of the rezoning of this parcel," Hauser wrote, "but rather they are requiring the Mayor and City Council to follow their statutory duty. ... Support the statutory right of the citizens of Westwood, Kansas, to

petition for an election to decide if the sale, trade or exchange of Joe D. Dennis Park should happen.”

At the end of the letter, Hauser wrote, “If the City continues to refuse its statutory duty, my clients reserve the right to take all necessary steps, including legal action, to insure (the law) is followed.”

A month later, Denk fired back with a lengthy letter to Hauser saying that the claim that the city had not complied with the law was “without merit.”

“(T)he City,” he warned, “is prepared to take such legal action against you and/or your clients as may be necessary to protect its title and contractual relationships.”

Over the next 10 pages, Denk laid out a litany of legal arguments, beginning with the transfer of its title, as to why the Kansas statute did not apply to Joe D. Dennis Park.

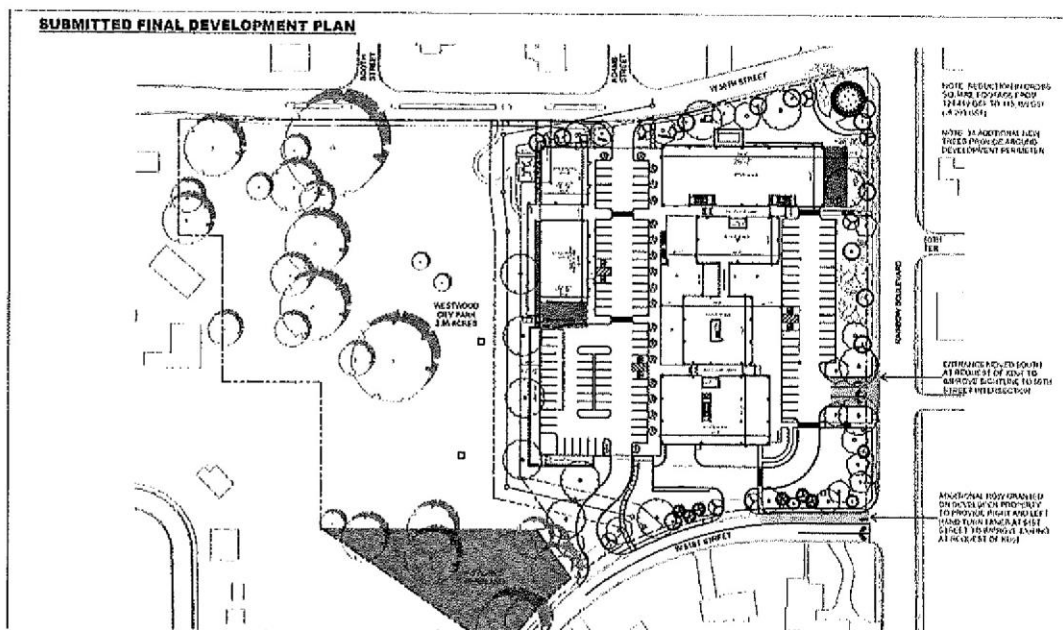
He blasted Hauser for not revealing the names of his clients and whether they were from Westwood. As the letter concluded, he cautioned that Hauser’s clients’ “meritless” claims could interfere with it’s ability to meet its contractual obligations with Karbank.

"As such, please be advised," Denk wrote, "that should you or your clients proceed further in this matter, the City reserves its rights to pursue legal claims against your clients for slander of title and tortious interference with the contractual relationships with the City."

Later: "Accordingly, the City hereby demands that you and your clients immediately and formally withdraw any claims and demands related to K.S.A. 12-1301, and furthermore cease in publishing your and their continued slandering of the City's title (whether through web sites, Facebook posts, door-to-door, or electioneering, as occurred in front of City Hall yesterday, during voting hours). ...

"We hope that further action by the City will not be required in this matter, but your and your clients' refusal to comply with the terms of this letter will leave the City with no other choice."

The threat worked.



Overview of a planned park, retail and office development on Rainbow Boulevard in Westwood, between West 50th and 51st streets. *City of Westwood*

RESIDENTS 'SCARED AND COWED INTO SILENCE'

Hauser responded, writing on Nov. 16 that Westwood could have simply said the Kansas law didn't apply in this case, but instead "the Mayor and City Council directed their counsel to send a long-winded defensive dissertation demanding that our clients cease exercising their fundamental rights to freedom of speech."

As one client told The Star, he felt “scared, and cowed into silence.” Lengthy litigation would cost too much.

“It was a thunderbolt,” the second client said. “I mean, I was just devastated. Basically to say that we were pursuing something that was unreasonable, and if we interfered with this process, our city would sue us.”

Waters told The Star that the city has been working on the Karbank proposal since March.

In that time, he said, city leaders had gone to great lengths to be transparent, listen to residents, and keep them informed, with weekly emails, newsletters, updates on its Facebook page, renderings shared at City Hall with a webpage dedicated to the proposal.

Leaders took several land use studies into account in coming to the decision to support the development. Multiple public hearings were held. Public input helped shape and improve the project, Waters said. The city accepted a protest petition from opponents, which required a supermajority of the City Council, 75%, to approve the rezoning.

“All resident feedback was welcomed and helpful,” Waters said, “and we daresay instrumental, in making the project the very best it could be. The City is excited that

this project is moving forward.”

At the end of his letter, Hauser castigated the mayor and council for what he called “a disappointing approach to government.”

“In an era in which civil rights for all is a revered and celebrated topic,” Hauser wrote, “the Mayor and City Council chose to not engage in promoting the civil rights of their residents.”

He ended the letter informing the mayor and council that his clients would no longer pursue any legal action requiring the mayor and city council to “to perform their statutory duty under the law.”

“Their activities in this matter are concluded,” he said.

The city’s threat, other residents said, has already chilled the activities of others who had been gathering signatures on a petition in the hope of putting the land transfer up for a public vote.

“Unfortunately, the intimidation has already worked,” said still another resident, who also requested anonymity. “Three residents who have worked hard on this matter have already stepped away, afraid of being sued.”

Westwood's sale of the park to Karbank is set for Jan. 4.

**CITY OF WESTWOOD, KANSAS
RESOLUTION NO. 138-2024**

A RESOLUTION OF THE GOVERNING BODY OF THE CITY OF WESTWOOD, KANSAS, AUTHORIZING AND PROVIDING FOR THE CALLING OF AN ELECTION IN WESTWOOD, KANSAS, FOR THE PURPOSE OF SUBMITTING TO THE QUALIFIED ELECTORS OF THE CITY THE QUESTION OF TRADING, EXCHANGING, OR SELLING REAL PROPERTY COMMONLY KNOWN AS JOE D. DENNIS PARK, AND PROVIDING FOR THE GIVING OF NOTICE OF SAID ELECTION.

WHEREAS, reference is hereby made to that certain real property commonly known as "Joe D. Dennis Park, generally located at the southwest corner of 50th and Rainbow Boulevard in Westwood, KS 66205", such real property also being commonly known and numbered as 5000 Rainbow Blvd. (Johnson County, Kansas, Parcel Nos. RP630000010001 and RF2512033060) ("Joe D. Dennis Park");

WHEREAS, on or about November 7, 2023, and November 14, 2023, and pursuant to K.S.A. 12-1301, the City of Westwood, Kansas (the "City") published the following notices in the official City newspaper, The Legal Record:

"CITY OF WESTWOOD, KANSAS

NOTICE

Pursuant to K.S.A. 12-1301, notice is hereby given that the City of Westwood, Kansas, intends to sell certain property that may be considered public park property, such property commonly known and numbered as 5000 Rainbow Blvd. (Johnson County Parcel Nos. RP630000010001 and RF2512033060) and 5050 Rainbow Blvd. (Johnson County Parcel Nos. RP270000000008D and RP300000010012B). Full legal descriptions of such parcels are available at Westwood City Hall, 4700 Rainbow Blvd. The City of Westwood reserves all rights to challenge the applicability of K.S.A. 12-1301 as to such parcels.

/s/ David E. Waters, Mayor

11/7 11/14";

WHEREAS, on December 12, 2023, certain petitions were filed with the City Clerk, purportedly under the authority of K.S.A. 12-1301, requesting a public referendum on the sale of Joe D. Dennis Park (the "Petitions"), which Petitions stated as follows:

**"PETITION OF PROTEST OF THE CITY OF WESTWOOD, KANSAS'
SALE, TRADE, OR EXCHANGE IN CONNECTION WITH JOE D. DENNIS
PARK**

Re: The City of Westwood, Kansas' sale, trade, or exchange of Joe D. Dennis Park

The undersigned hereby invokes the provisions of Kansas Statutes Annotated 12-1301 (Land for park purposes; sales or exchanges in connection with parks; use of moneys; notice; protest; election; validation of prior sales and conveyances) and do hereby register protest under K.S.A. 12-1301 against the City of Westwood, Kansas' proposal to sell, trade, or exchange the following described property:

Joe D. Dennis Park generally located at the southwest corner of 50th and Rainbow Boulevard in Westwood, KS 66205.

The undersigned hereby certify that they are a qualified elector within the corporate limits of Westwood, Kansas, and join this petition with the intent to meet the threshold number of qualified electors necessary to require the governing body to place on the ballot the question as to whether the Joe D. Dennis Park shall be sold, traded, or exchanged.”;

WHEREAS, On January 9, 2024, the City received the following determination from the Johnson County Election Office, establishing that, as provided by K.S.A. 12-1301, the Petitions were signed by qualified electors of the City equal in number to not less than ten percent (10%) of the electors who voted at the last preceding regular City election as shown by the poll books:

“The Johnson County Election Office has completed petition signature verification, in compliance with Kansas Election Standards Chapter V verification chart, for a petition regarding the protest of the sale, trade, or exchange in connection with Joe D. Dennis Park, the originals of which were submitted by your office on Friday, December 29, 2023. I make no determination as to the legal sufficiency of the petition.

Signatures submitted: **220**

Total signatures accepted as registered City of Westwood, Kansas, voters, as of December 29, 2023: **169**

We will need the City’s written confirmation of: 1) Whether the petition is valid; 2) if valid and an election is called, the question for the ballot; and 3) the date requested for the election.”;

WHEREAS, K.S.A. 12-1301 further provides that, with the filing of the Petitions, no sale, trade or exchange of Joe D. Dennis Park shall be made until the Governing Body shall be instructed so to do by a majority of all the votes cast on this proposition at a regular or special election, and that any election required under K.S.A. 12-1301 provided shall be called and held as provided by law for bond elections;

WHEREAS, the Governing Body of the City deems it advisable to authorize and provide for the calling of an election in the City for the purpose of submitting to the qualified electors of the City the question whether Joe D. Dennis Park shall be sold, traded, or exchanged;

WHEREAS, it is deemed advisable to hold such election in accordance with the mail ballot election law (K.S.A. 25-431 *et seq.*); and

WHEREAS, it is deemed advisable to call such election in the City to be held on April 1, 2025.

NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF WESTWOOD, KANSAS:

SECTION 1: The above recitals are hereby incorporated into this Resolution.

SECTION 2: The Governing Body of the City hereby accepts the validity of the Petitions and rescinds Resolution No. 125-2024, such that the same shall be of no further force or effect.

SECTION 3: Pursuant to K.S.A. 12-1301, the Petitions, and certain determinations by the Kansas Court of Appeals in its Memorandum Opinion dated November 15, 2024, No. 127,371, it is hereby authorized, ordered and directed that an election shall be and is hereby called to be held in the City on April 1, 2025 (the "Election"), at which time there shall be submitted to the qualified electors of the District the following proposition, in such ballot form and format as required by applicable law:

Shall the following be adopted?

"whether the Joe D. Dennis Park shall be sold, traded, or exchanged".

- ☐ Yes
☐ No

SECTION 4: The vote at the Election shall be by mail ballot, and the proposition stated above shall be printed on the ballot, together with voting instructions as provided by law.

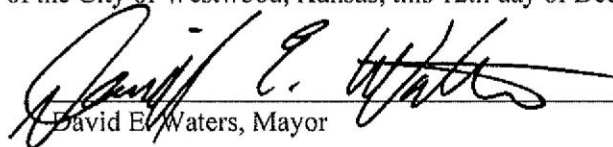
SECTION 5: The City, with the approval of the Election Commissioner, shall give notice of the Election as provided by law by publishing a Notice of Election in substantially the form attached hereto as Exhibit A and incorporated herein by this reference, with such changes as approved by the Mayor, once each week for two (2) consecutive weeks in a newspaper of general circulation in the City, with the first publication to be not less than twenty-one (21) days prior to the date of the Election, and the last publication being not more than forty-five (45) days prior to the date of the Election.

SECTION 6: The Governing Body hereby retracts that certain letter dated November 8, 2023, from McAnany, Van Cleave & Phillips, P.A., to Mr. Todd Hauser of Bushyhead, LLC, regarding "Objection to sale of 5000 Rainbow".

SECTION 7: The Mayor, City Administrator, and the City Attorney are hereby authorized and directed to take such other actions as may be appropriate, desirable, or necessary to accomplish the purposes of this Resolution.

SECTION 8: This Resolution shall be in full force and effect from and after its adoption.

ADOPTED by the Governing Body of the City of Westwood, Kansas, this 12th day of December, 2024.


David E. Waters, Mayor

ATTEST:


Abby Schneweis, City Clerk

REVIEWED AND APPROVED AS TO FORM:



Ryan B. Denk, City Attorney

EXHIBIT A TO RESOLUTION NO. 138-2024

(First published in *The Legal Record* on _____, 2025,
and subsequently on _____, 2025.)

**NOTICE OF ELECTION
CITY OF WESTWOOD, KANSAS**

Notice is hereby given to the qualified electors of the City of Westwood, Kansas (the "City") that an election has been called and will be held on April 1, 2025, for the purpose of submitting to the qualified electors of the City the following proposition:

Shall the following be adopted?

"whether the Joe D. Dennis Park shall be sold, traded, or exchanged".

- ☐ Yes
☐ No

This election will be conducted in accordance with K.S.A. 25-431 *et seq.* (the "Mail Ballot Election Act"). The Election Commissioner shall conduct the election by mailing an official ballot to each qualified elector in the City, such qualified elector being registered at least thirty (30) days prior to the date of election. The official ballot will be mailed not sooner than the 20th day before the date of the election and not later than the 10th day before the election. The Election Commissioner anticipates mailing ballots for this bond election to all qualified voters on or about April 1, 2025. Instructions on how to mark the ballot to vote either for or against the proposition submitted thereon will accompany the ballots, together with a stamped, addressed return identification envelope in which the marked ballot must be placed.

IT IS IMPORTANT FOR EACH QUALIFIED VOTER TO NOTE THAT YOUR BALLOT CANNOT BE COUNTED UNLESS YOU TAKE THE APPROPRIATE STEPS:

- (1) You must personally sign and place your correct address on the return identification envelope;
- (2) If you choose to mail your ballot, you must put it in the identification envelope and place it in the United States mail early enough so that it will be received by the Johnson County Election Commissioner not later than April 1, 2025;
- (3) If you elect not to mail your ballot, you must PERSONALLY deliver it in the return identification envelope to the office of the Johnson County Election Commissioner, 2101 East Kansas City Road, Olathe, Kansas 66061, at any time during regular business hours from 8:00 A.M. to 5:00 P.M., Monday through Friday, but before 12:00 Noon on April 1, 2025.

If the ballot of a qualified elector is destroyed, spoiled, lost or not received in the mail by the qualified elector, or if an elector registers within thirty (30) days of the election, a ballot or replacement ballot may be obtained from the Johnson County Election Commissioner. Persons qualified to receive a replacement ballot may do so by signing an application prepared by the Johnson County Election Commissioner and submitting the application by mail or in person at the office of the Johnson County Election Commissioner at the above address.

The authority to conduct this election called by the City under the provisions of the Mail Ballot Election Act does not authorize the use of voting machines or written ballots located at the usual polling

places for the City. Consequently, all qualified electors of the City are hereby notified that no polling places will be open during the election, and all ballots must be cast in the manner specified herein and in accordance with the voting instructions which will be sent to all qualified electors with the official mail ballot. Telephone inquiries from qualified electors having additional questions about the procedure to follow in order to vote in this election may be made by calling (913) 715-6800.

The election officer conducting the election will be the Election Commissioner of Johnson County, Kansas, whose address is 2101 E. Kansas City Road, Olathe, Kansas 66061.

DATED: _____.

(Seal)

Fred Sherman
Election Commissioner
Johnson County, Kansas