NOLAParksForAll.org

January 8, 2018

Stacy Head
Council Member-At-Large
City Hall, Room 2W50
1300 Perdido Street
New Orleans, LA 70112

James Williams
Council Member-At-Large
City Hall, Room 2W40
1300 Perdido Street
New Orleans, LA 70112

Susan Guidry
Council Member District A
City Hall, Room 2W80
1300 Perdido Street
New Orleans, LA 70112

Latoya Cantrell
Council Member District B
City Hall, Room 2W10
1300 Perdido Street
New Orleans, LA 70112

Nadine Ramsey
Council Member District C
City Hall, Room 2W70
1300 Perdido Street
New Orleans, LA 70112

Jared Brossett
Council Member District D
City Hall, Room 2W20
1300 Perdido Street
New Orleans, Louisiana 70112

James Gray
Council Member District E
City Hall, Room 2W60
1300 Perdido Street
New Orleans, LA 70112

Re: Master Plan Amendments, Chapter 7 Reconsideration

Dear Councilmembers:

I write in support of the amendments drafted by NOLA Parks for All and sponsored by CM Cantrell, specifically the request for reconsideration of the proposal to ensure thorough public engagement and to consider including extra restrictions for the transfer of open space to recreational and other uses. In particular, NOLA Parks for All wants to make the Council aware that it believes that the Planning Commission was given **incorrect legal advice** when it considered these proposals at it October 10, 2017 meeting.

BACKGROUND

For many years, citizens have complained about the conversion of open green space in municipal parks, particularly Audubon and City Parks, to commercial uses, such as restaurants, intensive uses, such as museums, and specialized uses, such a ball fields. Some of these conversions created paywalls in parts of the parks, others limited the use of public space to specific activities, and some essentially privatized public space. There was vigorous push back over the Audubon and City Park golf courses, the soccer fields on the Fly, and now over the expansion of the sculpture garden in City Park. The park administrators have sometimes claimed that these changes were needed to pay for maintenance, or that they had been permitted in documents created years ago. The complaints of lack of public participation have increased over the years, but the loss of public open space has continued apace.

In an attempt to insure greater public participation and protect the remaining open space, NOLA Parks For All drafted a set of recommended changes to the Master Plan. Those amendments were sponsored by CM Cantrell. Key among the proposed amendments was a proposal to require enhanced review by the CPC and the Council for conversion of park open space to intensive, commercial or specialized uses. This recommendation appears numerous times in the Cantrell/Parks for All Amendments, including the following:

GOAL 3. A commitment to no ~~net~~ loss[1] of public parkland, and to a strict limitation on conversion of open green space to specialized uses or to intensive and commercial uses.

POLICIES FOR DECISION MAKERS/RECOMMENDED STRATEGIES

3.A. Establish systems to ensure that the City does not lose acreage dedicated to parks and that existing open green space in parks is not converted to specialized uses, such as golf courses and stadiums, or to intensive and commercial uses, such as restaurants and event facilities.

RECOMMENDED ACTIONS

1. Require enhanced public review, such as the conditional use process, of disposition of public parkland and apply any funds from sales of parkland to acquisition of new parkland.

* * *

4. Require enhanced public review, such as the conditional use process, of changes of use of public parkland that would limit access by the general

[1] The change in policy in the Goal from a commitment to "no net loss" to "no loss" has been accepted into the new Master Plan.

> public and casual park patrons or be more intensive or commercial than the existing use.[2]

THE STAFF REPORT

The Council sent back to the CPC for reconsideration proposed language to "consider including extra restrictions for the transfer from open to recreational space." The Staff Report dismissed the issue stating that "process and specific use allowances are more appropriately are [sic] addressed through the Comprehensive Zoning Ordinance." *Preliminary Staff Report, 2016-17 Master Plan Amendments Reconsideration ("Staff Report"), p. 1.* While it is certainly true that the CZO is a more specific document regarding uses than the Master Plan, there is no reason which would prohibit the inclusion in the Master Plan of recommendations for additional oversight of significant changes to parks by the CPC and Council. Indeed, the original Master Plan stated at pages 7.18 -19: " . . . the Planning Commission . . . should establish a set of criteria and a deliberative process before any parkland is designated to be *taken out of park and recreation use*." While the latter recommendation was addressed to park land that was to be sold or otherwise alienated, there is no reason why the Master Plan could not also incorporate recommendations for the development of additional criteria and processes to be used when the park entities seek to convert park open space to intensive, commercial, or specialized uses.[3]

THE CPC HEARING

Parks for All's President, Scott Howard, appeared at that October 10, 2017 Planning Commission hearing on the master amendments and argued in favor of language that would support additional CPC and Council oversight – in the form of a conditional use requirement – for significant changes to parks. https://www.youtube.com/watch?v=uE4UAJoCfX4 Following that presentation, Commissioner Kyle Wedberg asked the staff to address Parks for All's recommendation that the conditional use process be imposed on conversions of open space:

> MR. WEDBERG: Can I get your thoughts on the recommendation of the first speaker of adding a conditional use process for conversion of open to recreational space?

---

[2] The germ of this was already contained in the prior Master Plan at pages 7.18 -19: " . . . the Planning Commission . . . should establish a set of criteria and a deliberative process before any parkland is designated to be *taken out of park and recreation use*."

[3] The principle that parkland should not be sold or that any such sales should require strict scrutiny addresses only part of the problem. What is difference between (1) the City selling a piece of a public park to a private party who wants to build a restaurant on it and (2) the entities governing parks deciding to operate a restaurant in a public park themselves? In both cases, public green space has been diminished. Thus, the change of use of public green space to a specialized use or to a more intensive and commercial use, even without the sale of public green space, should be subject to additional criteria and processes, which the Council asked the CPC to consider.

Robert Rivers, the Executive Director of the CPC, responded:

> MR. RIVERS: I can handle that. This is an issue we debated quite extensively when we did the CZO. The way the hierarchy is set up in our system is that we have neighborhood parks and we have regional parks. Regional Parks are defined in a way that permits certain accessory uses, and a limited number of commercial uses are considered to be accessory to those regional facilities. That's the one issue. The other issue is [that] a large amount of park space in this City is regulated and governed by the state and not by the City. And, absent changes in state law, we are concerned that the governing authorities of those parks would not be subject to any of the regulations that would flow from that [the proposed change to require CPC and council oversight]. That is basically why we made our recommendations the way they are.
>
> https://www.youtube.com/watch?v=d9fVte5vAhE

Following Rivers's explanation, the Commission voted, and the reconsideration requested by CM Cantrell for "extra restrictions" returns to the Council with "no recommendation."

RIVERS'S LEGAL CONCLUSIONS WERE INCORRECT

Rivers stated the Staff had rejected the Council's request for reconsideration because City and Audubon Parks are "regulated and governed by the state and not by the City" and "the governing authorities of those parks would not be subject to any of the regulations that would flow from" the request for "extra restrictions." **Rivers was incorrect.** In the first place, even assuming that Audubon and City Parks and their governing bodies were state entities, that does not exempt them from local planning and zoning regulation, and secondly, Audubon and City Parks are owned not by the state, but by the City, and the bodies that control them are ultimately creatures of local government.

STATE ENTITIES ARE NOT IMMUNE FROM NEW ORLEANS ZONING LAW

Even assuming that the Audubon Commission and City Park Improvement Association were state entities, they still would be subject to land use regulation by the City. The City of New Orleans, having a home rule charter that preexists the 1974 Louisiana Constitution, has the constitutional authority "to initiate and enforce local building and zoning ordinances consistent with the constitution within the city boundaries," and "the power of immunity from legislature's authority to withdraw, preempt, or deny the city's power to initiate such legislation." *City of New Orleans v. Board of Commissioners of the Orleans Levee District*, 640 So.2d 237, 241 (La. 7/5/1994).

In *Board of Commissioners*, the Orleans Levee District ("OLD") sought to build a marina on state owned land without obtaining a conditional use permit, which was required by the

zoning regulations of the City of New Orleans ("CNO") for development of marinas. *Id.* The City sought a declaratory judgment and injunction to restrain OLD's violation of the City's ordinances. OLD claimed that, as a state agency, it could not be enjoined from using state owned property to perform a governmental function. *Id., 240 - 1.* In rejecting OLD's argument, the Louisiana Supreme Court first explained that the grant to the City in *Article VI, § 4* of the 1974 Louisiana Constitution of the power of initiation of zoning regulations is limited only by the requirement that the City "may not exercise that power inconsistently with the 1974 Constitution." *Id., 244.* Secondly, the Court held that the City was immune from the power of the legislature to withdraw, preempt, or deny the city's power to enact and enforce zoning and building ordinances consistent with the constitution within its boundaries." *Id., 245.* The court held that the delegates to the 1974 convention "intended to confer a greater degree of immunity upon preexisting home rule cities . . . than upon local governmental subdivisions that acquired home rule powers subsequent to the adoption of the 1974 Constitution." *Id, 246.* It also "reject[ed] the notion . . . that *Article VI, § 4* of the 1974 Constitution adopts by implied reference a 1921 constitutional provision that requires the CNO's exercise of its home rule power to yield to any inconsistent general state law." *Id., 247.* The *Board of Commissioners* Court also held that the City's enactment and enforcement of zoning and building regulations as to a state agency on state property does not abridge the police power of the state and does not violate *Article VI, § 9(B)*, which provides that "[n]otwithstanding any provision of this Article, the police power of the state shall never be abridged." The Court held that *Article VI, § 9* "was adopted as a principle of harmonizing the replete home rule powers granted local governments with a basic residuum of the state's power to initiate legislation and regulation necessary to protect and promote the vital interests of its people as a whole." *Id., 249.*

The "home rule abilities and immunities are to be broadly construed, and any claimed exception to them must be given careful scrutiny . . . ." *Id., 252.* The burden of a state entity claiming that a home rule municipality's local law abridges the police power of the state bears a heavy burden: It "must show that the local law conflicts with an act of the state legislature that is necessary to protect the vital interest *of the state as a whole*. To establish that the conflict actually exists, the litigant must show that the state statute and the ordinance are *incompatible and cannot be effectuated in harmony*. Further, to demonstrate that the state statute is 'necessary' it must be shown that the protection of such state interest cannot be achieved through alternate means significantly less detrimental to home rule powers and rights." *Id. 252 (emphasis added).*

Rivers's statements to the effect that Audubon Commission and City Park Improvement Association would not be subject to local land use regulation were clearly incorrect, because even if it is assumed that those entities are state agencies, state agencies are, absent compelling circumstances, bound by land use regulations promulgated by a home rule municipality such as the City of New Orleans.

THE CITY CHARTER SUBJECTS THE AUDUBON COMMISSION TO THE CITY'S LAND USE REGULATIONS

The Audubon Commission is part of the Executive Branch of the City; it is an "unattached board or commission" as set out in *Article V, Chapter 8* of the *City Charter*, which sets out its powers, *etc.* as follows, clearly requiring that the Audubon Commission follow the city's land use regulations:

> The powers, duties, functions, administration, and operation of the Audubon Commission shall be as provided in this chapter to administer, operate, and maintain facilities administered by the Commission, including Audubon Park, the Aquarium of the Americas, Woldenberg Riverfront Park, the Species Survival Center, the Louisiana Nature Center and other educational, cultural and recreational facilities, and to perform such other duties as are provided by applicable law, subject to the provisions of the City's Master Plan, its land use regulations, and its permitting authority
>
> *City Charter, Section 5-802 (emphasis added).*

THE PARKS ARE OWNED BY THE CITY AND THE STATE CANNOT TAKE GOVERNANCE OF THE PARKS FROM THE CITY

Rivers's statement that the parks were "regulated and governed by the state and not by the City" is also largely incorrect. In *City of New Orleans v. State, 443 So.2d 562 (La. 1983)*, the Louisiana Supreme Court held that the City of New Orleans, and not the State, was the owner of Audubon Park and its improvements, and that *Act 485 of 1983*, by which the legislature had attempted to create a new commission for Audubon Park, was an unconstitutional taking of the City's property without just compensation. The Court exhaustively reviewed a long history of acts of the legislature and city ordinances, as well as a series of land transfers by which the land now comprising Audubon and City Parks was acquired. It noted that there "is no question that the property of City Park, which was 'laid out by the City of New Orleans as a public park' after the 1852 donation of the land in the Succession of John McDonough, has always belonged to the City of New Orleans." *Id., 570.* The Court noted that *Act 191 of 1914* – which is the enactment that the Audubon Commission lists on its own website as the source of its authority "as an independent agency to oversee the operation of Audubon Park,"[4] – "continued to recognize that the Audubon Park Commission was an agency of the City." *Id., 570.*

[4] Audubon Commission Handbook, "A Brief History," https://audubonnatureinstitute.org/audubon-commission.

CONCLUSION

The Planning Commission was given incorrect legal advice at its October 10, 2017 meeting. The information undercut the Council's request for reconsideration by suggesting that there were legal impediments to requiring review by the CPC and Council of any conversions of public green space to commercial, intensive or specialized uses. The public's objections to such changes in the past have gone largely unheeded, and an additional layer of review is needed to insure that there is adequate opportunity for public comment before public green space is sacrificed for commercial purposes, and to insure that the City preserves green space for the health and recreational needs of future generations. **We urge you to give the Parks For All proposals a thorough hearing and that you ask your legal counsel to advise you as to whether the legal reasons presented to the Planning Commission are genuine and pose any impediment to protecting our public parks by adding an additional layer of scrutiny to changes which would significantly reduce public green space.**

Cordially,
/s/ Scott Howard
Scott Howard

/s/ J. Keith Hardie, Jr.
J. Keith Hardie, Jr.