REPORT OF THE ATTORNEY GENERAL

Lamprey Field Conservation Easement

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INTRODUCTION

The Town of North Hampton Conservation Commission (Conservation Commission) holds a conservation easement over certain land on Atlantic Avenue in that town, known as Lamprey Field. A neighbor, R. Casey O'Kane (Neighbor), maintains that certain alterations made by Al and Dona Perkins, the current owners of Lamprey Field (Current Owners), violate the terms of the easement. The Conservation Commission has determined that no violation has taken place. The Attorney General, Director of Charitable Trusts agreed to review the record of that decision. This Report sets forth the results of that review.

APPLICABLE LEGAL STANDARDS

Conservation Easements as Charitable Trusts

A conservation easement protects a parcel of land burdened by the easement for the conservation purposes specified in the deed. In New Hampshire, a perpetual conservation easement donated as a gift to a charitable organization or a government entity constitutes a charitable trust. Accordingly, charitable trust principles apply and the holder of the easement is subject to fiduciary duties in dealing with the property. *See*, Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements, available at http://doj.nh.gov/charitable-trusts/conservation-easements.htm

Duties of Holders of Charitable Trust Conservation Easements

The duties of loyalty, care and obedience pertain to fiduciaries of any charitable trust. In the case of holders of conservation easements, the duty of loyalty, for instance, prohibits engaging in conflicts of interest transactions with respect to the conserved property or neighboring property. The duty of care requires active monitoring and enforcement of the easement. The duty of obedience requires adherence to the conservation values set forth in the easement deed.

More specifically, the easement holder has a duty of care to monitor the activities on and the changes to the conserved property to insure compliance with the terms of the easement deed. That responsibility includes periodic inspections and a review of complaints. If an inspection or a complaint uncovers a possible violation, then it should be forwarded for investigation to those responsible at the easement holder organization. The nature of the possible violation determines the scope of the investigation, i.e. a more serious or immediate alleged violation requires a more robust inquiry.

If the investigation leads to a determination that a violation occurred, then the duty of obedience applies, as well as the duty of care. The easement holder should notify the landowner and anyone else who may be responsible for causing the violation. The easement holder then must take steps to make sure that a violation is remedied, keeping in mind the overall purpose of

the easement. The nature of that remedy may vary with the seriousness of the infraction, its permanency and its effect on the overall conservation values protected by the easement.

Rights of Third Parties to Enforce Conservation Easements

Environmental organizations, neighbors, and interested citizens all have the right to inform the holder of a conservation easement about alleged violations. Such information can be invaluable in protecting conservation values, given the limited resources of many easement holders. It is advisable that conservation organizations have a complaint intake process so there will be appropriate follow-up when an allegation is made of a violation of the terms of an easement.

Beyond that important watchdog role, environmental organizations, neighbors, and interested citizens may not have independent standing to enforce a conservation easement. Generally, standing is limited to those suffering a "legal injury". *Billewicz v. Ransmeier*, 161 N.H. 145, 149 (2010). One court has denied standing to neighbors seeking to enforce a conservation easement. *Tallman v. Outhouse*, Rockingham Superior Court No. 08-E-238 (October 26, 2009). *Cf.*, RSA 564-B:4-405 (standing to enforce express charitable trusts). *See generally*, *Weeks Restaurant Corp. v. Dover*, 119 N.H. 541, 545 (1979) (standing of neighbors in land use cases).

Conservation commissions that hold conservation easements have certain additional responsibilities. They are public bodies subject to the Right to Know Law, RSA Chapter 91-A. As such, with a few exceptions, they must conduct their business before the public and their records are subject to inspection and copying by the public.

Powers and Duties of Director of Charitable Trusts

The Director of Charitable Trusts exercises the common law and statutory authority of the Attorney General to supervise and enforce charitable trusts. RSA 7:20. The Charitable Trusts Unit (CTU) usually exercises that authority with respect to those entities holding charitable assets. In the case of a conservation easement, that entity is the grantee, the holder of the easement. The CTU may consult with an easement holder seeking advice in its stewardship activities. The CTU may even decide to take legal action against an easement holder that avoids or neglects its enforcement responsibility.

Ultimately, however, it is up to the easement holder to enforce a conservation easement against a landowner or anyone else violating the easement. Except for that rare circumstance where an easement holder goes out of existence, the CTU will not seek remedies against easement violators. Again, the CTU will hold the easement holder accountable to meet its fiduciary duties.

LAMPREY FIELD

Easement Terms and Creation of Charitable Trust

The conservation easement deed at issue here, granted on December 22, 1993 by D. Morris Langley, Trustee to the Town of North Hampton through its Conservation Commission, was recorded at the Rockingham County Registry of Deeds at Book 3029, Page 0275. It concerns land on Atlantic Avenue, commonly referred to as Lamprey Field. Mr. Langley donated the easement as a gift. Accordingly, that deed created a charitable trust held by the North Hampton Conservation Commission.

The easement deed lists three purposes: retain open space, protect the salt marsh, and preserve scenic enjoyment of the salt marsh and farm land from Atlantic Avenue and Route 1A. It then delineates a number of use restrictions, and specifically prohibits commercial activities except for agriculture. Agricultural activity is defined and limited so as not to materially impair the scenic quality of the property viewed from public roads. Barns and sheds are permitted only as necessary to support on-site agriculture and recreational uses of Lamprey Field consistent with the purposes of the easement and sited so as to have minimal impact upon scenic views from public roads. Soil disturbance is only acceptable to accomplish the agricultural or conservation purposes, and only if not detrimental to the easement purposes.

Alterations to Lamprey Field

Lamprey Field consists of more than 24 acres of salt marsh and agricultural land. The farm land mostly slopes back from Atlantic Avenue toward the marsh, and some of the farm land is wet. It has been used in recent years to grow hay and other crops. Apparently a row of mature maple trees stood between the rear of the field and the marsh which were removed after 1993.

On October 22, 2013 the Current Owners obtained a building permit and thereafter, on or about September, 2014, moved an old timber frame barn from an adjoining lot onto a new concrete foundation built at a high spot on the Atlantic Avenue side of the property. The concrete foundation creates a full height cellar beneath the main floor with a wide opening onto the lower side of the sloping field.

Claimed Violation of Easement

The Neighbor first voiced concern about Lamprey Field in September, 2014. His claim is straightforward: does the relocation of the barn onto Lamprey Field violate the terms of the conservation easement? More specifically, does the relocation of the barn violate the open space, scenic enjoyment, agricultural use and soil disturbance terms of the easement?

CONSERVATION COMMISSION ACTIVITY

Involvement of Conservation Commission

The Current Owners dealt with the North Hampton building inspector who issued the permit to move the barn. It appears the Conservation Commission became aware of the planned movement of the barn onto the easement land in June, 2014, but only in a perfunctory manner. At that time, the Chair of the Commission apparently stated that agricultural uses and barns were permitted at Lamprey Field under the easement.

The full Conservation Commission first formally considered the movement of the barn and related activity at Lamprey Field at its meeting on December 9, 2014. The Neighbor spoke to the Commission about his concerns. The Commission consulted with the town administrator and town counsel. The Commission thereafter held a site walk on March 9, 2015. It finally held a discussion and vote on the subject at its March 10, 2015 meeting.

Decision of Conservation Commission

The Conservation Commission voted unanimously at its March 10, 2015 meeting that the movement of the barn did not violate the terms of the conservation easement. Factors in that decision included:

- The barn is a permitted agricultural use under the easement
- Permissible locations for placement of a barn at Lamprey Field are limited given the wetlands
- The tracks to the barn's main floor and cellar promote the barn's agricultural uses
- The protected views benefit the general public traversing the length of Atlantic Avenue, not the static view seen from a neighbor's home
- Protected views are subject to change on a working farm
- As of 1993, there was a stand of mature maple trees to the rear of the fields in front of the marsh
- A letter from the Current Owners' counsel setting forth their overall agricultural plans, their planned agricultural uses for the barn, and the connection between those uses and the placement of the barn
- A review of the Neighbor's complaint concerning the application of the easement to the placement of the barn
- The Commission's site visit

REVIEW OF CONSERVATION COMMISSION DECISION

Scope of Review

The Attorney General, Director of Charitable Trusts has supervisory and enforcement authority over charitable trusts. It can make determinations whether a fiduciary, like the holder of a conservation easement, is properly exercising its duties of loyalty, care and obedience toward the purposes of the easement. If a holder of a conservation easement is not performing its duties, the Director has many options available. The Director can counsel the easement holder on how to meet the expectations of the law. If the deficiencies are serious enough, the Director may seek judicial relief, which can include charging the trustee for costs incurred, citing the easement holder for breach of trust, or ordering the removal and replacement of the easement holder.

In the present case, the Assistant Director of Charitable Trusts first received a communication in October, 2014 from the Neighbor about the alleged easement violation. The Assistant Director made an inquiry with the Town Administrator as early as October 20, 2014. A member of the Conservation Commission consulted with the Director in March, 2015 about its consideration of the allegations. The Director agreed to review the Conservation Commission's decision on June 5, 2015. Thereafter the Director and Assistant Director took a site walk on July 16, 2015. Finally, the Director and Assistant Director reviewed the minutes of the Conservation Commission, the information and documents supplied by the Neighbor, and the materials supplied to the Conservation Commission by the lawyer for the Current Owners.

Results of Review

This review is limited to the fiduciary duties of the Conservation Commission as the holder of the Lamprey Field easement.

Duty of Loyalty. There is no evidence of any conflicts of interest or related private inurement that may have affected any members of the Conservation Commission in making their decision with regard to the Lamprey Field easement.

Duty of Obedience. The March 10, 2010 decision of the Conservation Commission, outlined above, reflects a careful consideration of the language of the easement, the conservation values contained therein and the Current Owner's reserved rights to conduct agricultural activities. The Commission needed to balance what can be conflicting goals: promoting farming and preserving a pristine landscape. A site visit revealed that the barn is placed in such a way as to promote agricultural activity, both in the upper and lower levels, while being situated at a distance from wet areas in the fields and the marsh.

Duty of Care. The Conservation Commission could have been more proactive as a body when it learned in June, 2014 about the permit and when the Neighbor voiced a complaint later in the year. The record does not show that the building inspector consulted with the

Conservation Commission before issuing a permit on October 22, 2013. The Conservation Commission could implement a better system so that the building inspector, or other town officials, can identify land that is subject to a conservation easement before any permit is issued. The Commission could also commit to a review process when it learns of substantial work planned for land subject to an easement it holds.

This observation does not change the fact that the Conservation Commission's eventual decision is well supported by the language of the easement deed and the actual use of the barn. Once the Conservation Commission began to look into this matter in earnest, in December, 2014, it did so with considerable care. It reviewed the language of the easement deed, consulted with counsel, listened to the Neighbor and the lawyer for the Current Owners, and made a site visit.

CONCLUSION

The determination of the Conservation Commission -- that the relocation of a barn onto Lamprey Field did not violate the terms of the conservation easement – is a reasonable exercise of the Commission's fiduciary duties as the holder of the easement. Accordingly, the Attorney General, Director of Charitable Trusts will take no action with respect to that determination.