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MEMORANDUM

TO: Board of Selectmen

FROM: Town Staff
Walter Mitchell, Esq.
Erika Alders, Esq.

DATE: September 30, 2009

SUBJECT: Legal Questions Regarding Friends of Hanover Crew Proposal

Attorneys Walter Mitchell and Erika Alders have reviewed this memorandum against cited source documents, and have confirmed its accuracy.

I. Wilson's Landing (Map 8, Lot 20) - Legal and Regulatory Background:
(See also memorandum of September 8, 2009 outlining the history of Wilson's Landing)

On August 14, 1972, Wilson and Clarisse Fullington donated the property, being "the southerly portion of an island or peninsula in the Connecticut River containing 2.98 acres, more or less..." to the town; together with a 25-foot-wide access right-of-way along the northeasterly side of the Fullington's remaining property from Route 10 "to the above-described island". Their stated purpose for donating this land and a right-of-way to it was "to provide access to the public to the Connecticut River for boating and recreational purposes and to provide access for firefighting equipment."

In August 1975, the Town of Hanover received a permit from the New Hampshire Water Supply and Pollution Control Commission, "to establish recreation and boat launching facilities" on this land, and a Special Exception from the Hanover Zoning Board of Adjustment "to permit the construction of an access road, dock [extending 30 feet into

the river], boat launching ramp, and parking spaces” according to the same plans approved by the NH Water Supply and Pollution Control Commission.

In October of 1975, the town’s attorneys examined the property title and found it to be valid and properly “vested in the Town of Hanover.”

In January of 1976, the Army Corps of Engineers granted to the Town of Hanover a permit “to construct and maintain a boat launching ramp, a bulkhead with gravel fill behind covering about 400 square feet, ramp and float extending 33’ from ordinary high water, in the Connecticut River...” and to “raise parking lot grade with 3,500 c.y.” of fill, according to plans identical to those approved both by the NH Water Supply and Pollution Control Commission and the Hanover Zoning Board.

In August of 1976, the Town of Hanover received a grant of \$8,500, matched by local funds, from the New Hampshire Department of Resources and Economic Development Land and Water Conservation Fund. This grant was for the “development, by the Town of Hanover, of a boat landing and picnic area on the Connecticut River.” The accompanying environmental impact statement acknowledged that these improvements were for the purpose for which the land had been deeded to the Town of Hanover.

The purpose behind the donation by the Fullington family and the acquisition by the Town was clearly for providing public access to the river for boating, recreation, and fire-fighting (emergency access) equipment.

II. Fullington Farm Parcels - Legal and Regulatory Background:

Original 9.4-acre Tract (Map 8, Lot 19);

Since October 2006 this tract has been divided into:

- A 7.0-acre parcel (Map 8, Lot 59), owned by Dartmouth College and subject to a 1990 Conservation Easement, and
- A 2.4-acre parcel (Map 8, Lot 19), now owned by the Friends of Hanover Crew (FOHC).

A. Restrictions of the Conservation Easement (106 Lyme Road; Map 8, Lot 59):

In 1990, Dartmouth College sold to the Town of Hanover a conservation easement on 7.0 acres of the 9.4-acre property that had been owned as a farm by Wilson and Clarisse Fullington, lying immediately south of Wilson’s Landing and between Lyme Road (Route 10) and the Connecticut River. The Town purchased this easement from the College with funds, in the amount of \$115,000, granted to the Town by the New Hampshire Land Conservation Investment Program (LCIP).

The conservation easement agreement was entered into on December 3, 1990, on behalf of the Town of Hanover by the Board of Selectmen. The Board of Selectmen has the

responsibility to interpret, monitor, and enforce the terms and conditions of the conservation easement.

1. Subdivision Limitations of the Conservation Easement Agreement:

Paragraph B of the Use Limitations (section 1) says that the “property shall not be subdivided or otherwise divided in ownership.” The conservation easement applies to the southerly 7.0 acres of the original parcel, not the entire original 9.4 –acre parcel. Appendix A of the conservation easement agreement describes the 7.0-acre portion of the parcel subject to the conservation easement.

At the time that the Dartmouth College Real Estate Office submitted a variance for the proposed subdivision, our attorney, Walter Mitchell, confirmed that it is the portion of the land subject to the conservation easement which cannot be subdivided, not the entire original 9.4-acre tract. The proposed subdivision of the original parcel into the 7.0-acre and 2.4-acre lots was supported by the Conservation Land Stewardship Program of the New Hampshire Office of Energy and Planning.

2. The Conservation Easement’s requirements as to views:

The conservation easement contains two references to views:

- a. Paragraph C. of the Use Limitations (section 1) states that “no structures or improvements shall be constructed, placed, or introduced onto the property...” and then sets forth several particulars. Among these are that fences are allowed “so long as such fences do not obstruct the views of the Property and the Connecticut River as seen from State Highway 10...” Thus, the provision about views applies to views from Route 10 and to effects that any fences may have on such views. This restriction, however, only applies to the 7.0-acre portion of the original property subject to the easement and **not** the 2.4-acre reserved area.
- b. Paragraph D. of the Affirmative Rights of the Grantee (section 3) provides that the “Grantee shall have the right to maintain the vista over the open fields to the Connecticut River as seen from vehicles travelling on State Highway Route 10.” This vista is not from any other vantage point than Route 10 and does **not** apply to any portions of the 2.4-acre reserved property.

3. Reserved Rights:

The agreement reserves certain rights to Dartmouth College, as Grantor, on the land subject to the conservation easement. These are called “Reserved Rights” and are spelled out in Section 2. These reserved rights include the planting of a vegetative buffer alongside the trail and up to Route 10 along the northern boundary of the easement, and include the right to “introduce and maintain one seasonal, non-permanent boat dock for the exclusive right of the Grantor...” but so as not to

interfere with the pedestrian trail. This implies that the Grantor could install a dock along the river's edge bounded by the 7.0 acre parcel.

B. Restrictions on the Fullington Farmstead Parcel (108 Lyme Road; Map 8, Lot 19):

The 1990 conservation easement does not include 2.4-acres of the property containing the farmhouse, the barn, and associated area which is shown on the accompanying property survey and identified as "Area reserved from Conservation Easement" and which is regarded by the easement as a different property "Reserved Parcel" from that subject to the easement. This reserved area is the same portion of the parcel that had been granted to Clarisse Fullington as a life-estate when Dartmouth purchased it in 1981, and which was subdivided in 2006.

1. Applicability of the Conservation Easement:

That this part of the original property is reserved from the conservation easement and thus is not subject to its limitations and terms, is confirmed by:

- The statement in Section 3, Affirmative Rights of the Grantee that "the riverside trail extends as a right-of-way across the unrestricted land of the Grantor, which is situated to the northeast of the Property."
- A letter dated June 30, 2006, to Zoning Administrator Judith Brotman from Stephen G. Walker, Stewardship Specialist, of the Conservation Land Stewardship Program of the New Hampshire Office of Energy and Planning, in a letter supporting Dartmouth College's request for the variance to enable the proposed subdivision of the original tract into a 7.0-acre lot subject to the conservation easement and a 2.4-acre "farmstead" lot not subject to the easement.

The only obligation on the 2.4-acre parcel imposed by the conservation easement is a 12-foot right-of-way across this lot for the "riverside trail". In Section 3, Affirmative Rights of the Grantee, the easement states that "the riverside trail extends as a right-of-way" across the farmstead land as far as the driveway leading from Route 10 to Wilson's Landing. It allows the Town, on both the land subject to the conservation easement and on this right-of-way extension across the farmstead lot "the right to construct, manage, use, and maintain a trail as a public footpath and to cut and clear trees, shrubs, and bushes from the bank of the river in order to preserve scenic views of the river from the trail."

It is worth noting that there is no obligation on the 2.4-acre parcel to provide buffering or protection of any kind for the adjacent 7.0-acre parcel which is subject to the conservation easement.

2. Zoning Restrictions:

a. Variance specific to the property:

On August 3, 2006 the Hanover Zoning Board of Adjustment granted to Dartmouth College a variance by which the Fullington farmstead (farmhouse and barn), amounting to 2.4 acres, could legally become a separate parcel, even though it does not meet the RR minimum lot size of 3 acres. On October 3, 2006, the Planning Board approved the minor subdivision of this lot off of the original 9.4-acre parcel.

The presentation by Larry Kelly of the Dartmouth College Real Estate Office of the variance request to the ZBA is replete with representations that the College's intention was that the 2.4-acre parcel would be used for single-family residential. However, the Zoning Board in item 18 of its decision, specifically stated that the variance would be valid for any use allowed by the Zoning Ordinance:

“18. The remaining criteria for a variance must also be addressed in this decision. The Reserved Parcel if subdivided could continue to be used as a single-family residence, **or used as otherwise permitted by the Ordinance**, without altering the essential character of the area, particularly since the subdivided parcel abuts a perpetually conserved 7-acre parcel in a unique setting along the Connecticut River, with a public trail along the riverbank.”

Walter Mitchell confirmed specifically, upon his full reading of the variance decision, that other uses allowed in RR by right or by special exception would not be precluded by this variance.

b. Uses allowed by the Zoning Ordinance:

The property is located in the Rural Residence “RR” zoning district. The Hanover Zoning Ordinance (table 204.7) allows several permitted uses (“uses by right”):

One-family dwelling, two-family dwelling; forestry, agriculture, outdoor recreation; produce stand; governmental use: limited to education, recreation; manufactured house subdivision, open space subdivision; and use accessory to permitted use

Wilson's Landing qualifies as an outdoor recreation use, or as a governmental use--recreation, and is thus permitted by right.

The Zoning Ordinance permits several other uses in this district by Special Exception:

Rooming house, manufactured housing park; removal of natural material; essential service; child day care agency, church; residential institution; private club; care and treatment of animals; passenger station; sawmill, temporary sawmill, outdoor storage; governmental use: limited to public safety, service, cemetery, parking, garbage disposal; bed & breakfast, hotel (located on that part of Route 10 known as Lyme Road, and served by public water and sewer); primary & secondary education; adaptive re-use; and use accessory to Special Exception.

Special Exceptions are permitted by the Zoning Board of Adjustment through finding at public hearing that a proposed use complies with criteria set forth in Section 206 of the Zoning Ordinance, including that the proposed use would not adversely affect:

- The character of the area in which the proposed use will be located;
- The highways and sidewalks and use thereof located in the area;
- Town services and facilities.

In granting a Special Exception the Zoning Board has the right to impose conditions as it finds reasonably appropriate to safeguard the neighborhood or otherwise serve the purposes of the ordinance, including:

- Setbacks larger than the minimums required by the ordinance;
- Screening of part or all of the premises of the proposed use by walls, fencing or planting;
- Modifying the design of any building involved in the proposed use;
- Requiring more parking spaces than otherwise required;
- Limiting the number of occupants or employees upon the premises, and restricting the method and/or time of operation and use, and of the size or extent of facilities;
- Limiting the size, location and/or lighting of signs more restrictive than those otherwise imposed by the ordinance, or prohibiting signs where, in the opinion of the Board, their display would be contrary to the purposes of the ordinance.

Depending on the specific nature of the final proposal, the FOHC's use of the Fullington farmstead property at 108 Lyme Road may qualify as an outdoor recreation use and thus be permitted by right, or may qualify as one or another of the uses allowed by Special Exception. This decision will be up to the ZBA.

III. Concerns about Private Use of Public Property:

Some citizens have expressed the opinion that the dock proposed to be installed and maintained by FOHC on the Wilson's Landing parcel would be a private use of public

property and have expressed concern about its propriety and legality, and some have cited the Town of Hanover Ordinance #20 as prohibiting such private use.

A. Town Ordinances:

Ordinance #20, entitled “Regulation of Public Land” does not govern nor prohibit the installation of structures on public properties; rather it requires a permit from the Town for specific activities, such as camping, removing or trimming trees, and maintaining trails, which individuals or groups may wish to conduct on public lands.

Other Town ordinances regulate or restrict some specific private uses of or activities on public properties:

- Ordinance #4, Private Construction on Class-VI Highways, requires permits for private work on public rights-of-way, such as grading, drainage, and tree maintenance and repair;
- Ordinance # 21, Sunday Activities, restricting times of business, athletic events, movies or theatrical performances, and public dancing;
- Ordinance # 27, Street Vendor Ordinance, requires permits for selling, displaying, or distributing merchandise on public properties;
- Ordinance #33, Noise Ordinance, regulating degrees and times of noisy activities in In-Town neighborhoods; and
- Ordinance #34, Regulation of Outdoor Activities, requires permits for large events which could disrupt traffic flow, block streets and sidewalks, and restrict access to structures, such as footraces, parades, festivals; or which could generate significant noise, such as fireworks displays.

B. Statutory Issues:

Our Attorney, Walter Mitchell, has advised that an improvement, such as the proposed dock, installed by or financed by a private group for use by a sports team, such as the Hanover High School Crew, recognized and sanctioned by the Dresden School District, a public agency, cannot legally be construed as being a private use. Furthermore, even if FOHC does not donate the dock to the Town, its unrestricted availability for use by the general public, as individuals or groups, also renders the proposed dock a public use.

C. Propriety of Receiving Installation of Dock at Wilson’s Landing from FOHC:

There is a long history of the Town of Hanover partnering with local civic, non-profit and youth sports fundraising groups to construct or improve Town athletic facilities on public property, without constituting improvements for private use only. Examples include:

- Hiking trails and footbridges installed or financed by real estate developers, and laid out and maintained by private individuals or groups, on Town-owned conservation lands and easements.

- Construction of Champion Arena, by the Hanover Improvement Society, by license on Town of Hanover property, as the Town's only public skating arena. Fees for use are charged by HIS to all users.
- Construction of the softball field at Sachem Field utilizing contributions from the Hanover Lion's Club. Field is available on a scheduled basis through the Recreation Department.
- The installation of dugouts, backstop, and fencing by a civic organization (Hanover Lion's Club) and by a team parents and supporters organization (Hanover Little League), for the ballfield constructed on Grasse Road.
- Citizen monetary and in-kind donations for the construction of the Ray School playground.
- In-kind contributions by private citizens, including a team parents and supporters organization (Hanover Little League), for ballfield improvements at Thompson Terrace.
- The construction of a press box and scoreboard at the High School football field by a private citizen and by a contributors' fund.
- Scoreboard for Hanover High School baseball funded by a contributors' group.
- Installation and maintenance by the Hanover Improvement Society of street trees, benches, and related Downtown streetscape improvements.