

TK

HALE AND DORR LLP

C O U N S E L L O R S A T L A W

60 STATE STREET, BOSTON, MASSACHUSETTS 02109
617-526-6000 • FAX 617-526-5000

STEPHEN H. OLESKEY
Internet: stephen.oleskey@haledorr.com
617-526-6544

Privileged and Confidential/Attorney-Client Communication

March 18, 1999

BY FAX (978)768-2505

Town of Essex Board of Selectmen
Town Hall
Martin Street
Essex, MA 01929-1219

RE: Conomo Point

Dear Board Members:

In accordance with the February 25, 1999 letter by which the Town of Essex engaged Hale and Dorr LLP as special town counsel in connection with the disposition of town-owned land at Conomo Point, we have summarized below our analysis of legal issues on which the Selectmen have sought our opinion. Our analysis and conclusions are based upon documents and information that we have been provided and the research that we have conducted to date. Key conclusions are summarized below:

Summary of Conclusions

1. We are not aware of limitations or encumbrances on the use or disposition of land at Conomo Point arising from the 1826 deed from John Procter, the enactments of the Town of Essex, or otherwise, which are not common to all such activities of the Town.

2. Under the leases, it does not appear that the tenants have a right to perpetual use or occupancy of the leased land at Conomo Point. To the extent that such a right did exist as may be claimed by the tenants, it appears to have been lost in settling the 1987 litigation.

3. Under Massachusetts law, structures on leased lots ordinarily would be regarded as part of the land. We are informed, however, that the Town may have treated these structures as personal property. As such, the structures would not revert to the Town on the expiration of the leases. On termination of the leases, tenants would have a reasonable time to remove those structures.

4. The strength of a claim by tenants for compensation for the structures at the termination of the leasehold would be influenced by whether the claim derives from some instrument or act of the Town in which the Town gave express recognition to the tenants' rights to be compensated for the structures at the end of the leasehold. We believe that the Conomo Point Planning Committee ("Committee") members and other residents of the Town have greater knowledge of the facts that may bear on this issue than we do.

5. While not free from doubt, it seems that the parties to the lease intended that the so-called "right of first refusal" provision in the lease means that an individual tenant whose lot was offered for sale would have the right of first refusal to purchase that lot.

6. We have not identified a reason why, subject to respecting the rights of tenants under existing leases, the Town could not vote now on its plan for public use in 2011 of some or all of the land at Conomo Point. Such a vote, however, is subject to amendment by the Town at a later date.

Ownership of the Land

The Town appears to own the Conomo Point land in fee simple absolute under a 1826 warranty deed from John Procter. We are not aware of limitations on the use or disposition of that land at Conomo Point by virtue of the 1826 deed, the enactments of the Town of Essex, or otherwise. However, we have not conducted a title search, nor have we examined the Town by-laws or records of Town meeting action after the date when the property was purchased. We are relying on information provided to us by the Committee and Town Counsel. The issue of rights to the structures on the land is a separate issue addressed below.

Leases

Our review of a model lease (we did not review individual leases) does not indicate that the tenants have a right "in perpetuity" or otherwise, based on the lease, to stay on the land when the leases expire in 2011. It appears probable to us that a

court would decide that claims to a so-called "moral," i.e., equitable, right to the perpetual use of the property, to the extent there were any such enforceable rights, were lost as a result of the settlement of the 1987 litigation and the resulting execution of the leases in settlement of that suit.

Moreover, the leases expressly provide that the "[l]essee agrees to quit and deliver the premises to the Lessor or its attorney peaceably and quietly at the end of said term." This is to us a significant provision, especially given the litigation context in which the leases were written. As we understand it, both the tenants as a group and the Town were represented by counsel, so that there is no argument that the tenants lacked equal access to competent counsel.

As to rights to the structures constructed on the leased premises, the law is as follows: absent an agreement to the contrary, the structures would ordinarily be regarded as part of the land and would be deemed to be abandoned if they had not been removed when the leases expired. We are informed, however, that the Town in various ways may have expressly treated the structures as the personal property of the tenants. This treatment may have included actions from time to time in which the Town may have recognized explicitly that the structures were the personal property of the tenants and were not claimed to be part of the land. In short, it appears that the Town may not have consistently made express claims that the structures were Town property, but on the contrary, may have regarded them as the personal property of the tenants.

In such a circumstance, under established Massachusetts property law, the tenants should be given a "reasonable time" to remove the structures at the termination of the leasehold like other personal property. What is a reasonable time to remove a structure as large as a house may be a matter of factual dispute, but it would appear to us on a preliminary basis that giving tenants a uniform period, such as one year, to remove the structures would be reasonable given the difficulty involved in moving a house. However, we see no reason why such a determination needs to be made at this time. It is sufficient in our view that the Town understand that the tenants may have a strong claim that the structures are their personal property, and that the tenants, therefore, should be given some period defined in the law as a "reasonable period" to remove the structures at the end of their leaseholds in 2011. Steps taken by the Town before 2011 to formally alert the tenants to the need to move their structures will improve the Town's position that reasonable time was afforded.

We are mindful, also, that the tenants apparently have contended from time to time that, in their view, there is no practical way to remove the structures and that, if the land reverts to Town ownership, they will assert that they are entitled to be compensated at "fair market value" for the "taking" of their personal property. In this respect, we are aware of significant changes under the federal and Massachusetts Constitutions in the treatment of property, both real and personal, over approximately the last 20 years. We have not attempted to research this evolving body of law to determine whether there is some theory under which some or all of these tenants could make a constitutional claim to the deprivation of their property without due process of law if, upon the expiration of the leases, some or all of them assert that they are unable to remove their structures. However, in our view, a judge passing upon such a claim would be influenced by whether that claim derives from some instrument or act of the Town in which the Town gave express recognition to the tenants' rights to be compensated for the structures at the end of their leasehold. At least, we believe the tenants would need to point to an instrument or act of the Town from which some implication could be fairly drawn under which it could be said that the Town had agreed or at least acquiesced in a position that the tenants would be compensated for their structures at the end of the leasehold. As noted above, we have not been asked, nor have we made a thorough review of the Town records, nor have we made a title search, let alone reviewed each and every present lease. We believe that the Committee members and other residents of the Town have greater knowledge of the facts that may bear on this issue than we do.

Town Action Regarding the Lots

We have been asked in substance if, as a matter of law, it appears to us to make any difference in terms of possible tenant claims for deprivation of property if some, but not all, of the lots are sold upon the expiration of the leases (or at some earlier date). As a preliminary matter, as the Town is aware, the leases provide:

If the Town, at any time, shall vote to sell any or all of the lots at Conomo Point, Lessee shall have the right of first refusal to purchase their leased lot(s) upon such terms and conditions as the Town shall have prescribed for such sale.

While there appears to be some possible ambiguity in this language, upon which the tenants have already fastened, it seems to us likely that the parties to the lease intended that this

language mean that an individual tenant whose lot was offered for sale would have the right of first refusal to purchase that lot. Conversely, it would seem less likely that the Town and each individual tenant intended, when the present leases were executed, to offer each tenant the right to purchase his or her lot if the Town decided to sell some lots at Conomo Point, but not the tenant's lot. However, there is some ambiguity in the language and wherever there is ambiguity there is the opportunity for controversy and litigation.

We have considered whether offering some, but not all, lots for sale would effect the outcome of the kind of litigation which may be brought. Again, while we have not exhaustively researched this issue, it seems unlikely to us that possible future litigation would be determined ultimately by whether some, but not all, of the lots have been offered for sale. Put another way, assuming that the Town has been through a lengthy and rational planning process to consider the disposition of the land on or after the expiration of the leases in 2011, and that the result of that process is a rational plan under which some, but not all, of the property would revert to Town use with the balance being sold, we do not believe that the outcome of the kind of litigation that we foresee would turn on such a distinction. Moreover, that some tenants' leases lapse, with no right of first refusal to purchase that property, would not appear to give those tenants stronger claims against the Town merely because other lots are offered for sale to existing leaseholders.

We have also been asked whether issues such as the nonconformity of some or all of the lots with Town zoning, the location of some of all of the lots in an area of critical environmental concern ("ACEC") and/or flood plain or the presence of other environmental or Town restrictions on the use of some or all of the lots should affect the Town's decision whether to sell some or all of those lots upon the expiration of the leases. We do not believe that these factors prevent the Town from selling the lots, although they might affect the rights of the eventual buyers to use those lots, particularly if it is desired to expand the use of the lots beyond the use which presently exists. In short, while the effect of these various restrictions and nonconformities may impact the ultimate use of certain lots, they should not impact the Town's right and ability to sell those same lots. That is not to say, however, that flood plain concerns, conformity with zoning and other regulatory issues could not affect the Town's deliberations over whether it wants to sell properties whose present and later use will contravene a federal, state or local regulatory scheme. In short, the fact that some or all of these lots violate or may violate various regulatory laws

could be a factor that the Town considers in evaluating whether to sell some or all of these properties.

We also have been asked about the role of the Massachusetts Department of Environmental Protection (the "Department") in the Town's ongoing decision-making process. We do not believe the Department has a specific role to play in that process. However, the Department's position on such matters as the treatment and disposal of wastewater from this property, as well as the view of other state agencies on such matters as ACEC or flood plain usage, may influence the Town's deliberations, as discussed above.

We have been asked what legal issues surround the disposition or sale of a lot when the then tenant chooses not to exercise a right of first refusal to buy the property. In such an instance, in light of the lease language and relevant law, and subject to the advice that Town Counsel may give about conformity with state law in the disposition of municipal property, we believe that the Town could either decide to sell the land to some other person or persons or could decide that it did not wish to sell the land and could withdraw it from private use for public use. Such a decision is subject to resolving rights tenants may establish in the houses as their personal property, as discussed above.

We have been asked whether there is a legal constraint on sale of the undeveloped lots. Subject to the advice that Town Counsel may give about conformity with state law in the disposition of municipal property, we see no difference in principle between the sale of undeveloped and developed lots, except that: (1) as noted above, particular tenants may have a right of first refusal under their leases to purchase developed lots if they are offered for sale; and (2) developed lots by definition have structures on them which will require resolving rights that tenants may establish in the houses as their personal property, as discussed above.

We have been asked whether tenants could be required now to furnish a bond to ensure the eventual removal of structures or improvements upon the expiration of the leases in 2011. We believe that since no provision was made in the leases for such a bond, the Town could not impose such a requirement now without the consent or agreement of the tenants.

We have been asked for our views about the possible disposition now of some or all of the Town land for municipal use after the expiration of the leases in 2011. We see in principle no reason why, subject to respecting the rights of tenants under existing leases, the Town could not vote now on its plan for public use in 2011 of some or all of the presently leased lots.

The issue of the binding effect of such a vote now prior to the expiration of the leases in 2011, is a matter best reserved to the opinion of the Town Counsel. In general, it is our understanding that Town meeting votes can be set aside or reversed by the action of later Town meetings.

Whether the Town wishes to decide before 2011 that such of the land which is to revert to Town ownership should be committed to a public use such as park or conservation land, is in the first instance a policy and not a legal decision. While we have not exhaustively researched this subject, there are statutes which would, it appears, allow the Town to commit to parkland or conservation uses land not to be retained in private use (after 2011). There appears to us in principle to be no reason why such a decision could not be made by the Town now to be effective on and after the land is freed from the tenancies in 2011.

With respect to parkland in general, creation of parkland is governed by M.G.L. Chapter 45, § 1-9. Land once dedicated as parkland is restricted from later development as defined in Section 7 of Chapter 45. In order to commit property not to remain in private use to a specific Town use such as parkland will require dealing with the issues relating to the existing structures as discussed above, before the park could be used. It appears that, if some or all of the Conomo Point lands were used as parkland, i.e., used for a public purpose, then legislative action probably would be required subsequently to change that use and, a two-thirds vote of each branch of the General Court may be required to do so.

* * * * *

If you have any questions about this letter, feel free to call me or Bob Fitzpatrick. Also, please let one of us know if you would like to meet with us to discuss this letter or if you would like us to review proposed articles for the warrant for the May Town meeting.

Very truly yours,

Stephen H. Oleskey
Stephen H. Oleskey /PET

SHO:cmd

cc: Brian P. Cassidy, Esq.