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LISA L. MEAD
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TO: Members of the Board of Selectmen
CC: Michael Lombardo, Town Manager
FR: Lisa L. Mead, Special Town Counsel
RE: Proposed Development of Patton Parcel / Legal Authority of the Board of Selectmen to Sell and Develop Same
DA: October 6, 2014

Reference is made to the above captioned matter. In that connection, you have requested that I provide to you an opinion with regard to the following specific issues:

1. May the Board of Selectmen sell a portion of the so called "Patton Property" for the purpose of developing senior housing?
2. May the Board of Selectmen participate as a co-applicant in the permitting process for said proposed development and use a portion of the Patton Property as part of the application?
3. What authority, if any, does the Board of Selectmen have to designate portions of the Patton Property for a particular use?
4. Does the Ground Water Overlay District restrict the number of housing units being proposed for the Patton Property?

In preparing to provide an opinion with regard to the foregoing questions, I have reviewed the May 12, 2012 Town Meeting Minutes, the April 5, 2014 Town Meeting Minutes, the Gift Agreement by and between the Town and the Patton's, the Amended Gift Agreement, the Deed from the Pattons to the Town, the Request for Proposal for the development of senior housing, the Purchase and Sale Agreement resulting from the Request for Proposal, the Zoning Bylaw for the Town of Hamilton and related statutes and reported cases.

I Facts

On May 12, 2012 by a unanimous vote of Town Meeting on Article 5-1, the Town authorized the Board of Selectmen to accept a gift of real property from the Pattons. The Town Meeting vote placed no restrictions on the gift nor did it specify a particular purpose for which the gift must be used. Indeed, the Town Meeting vote specifically stated the Board of Selectmen may accept such gift upon such terms and conditions that are acceptable to the Board.

The Board of Selectmen then entered into a Gift Agreement with the Patton's whereby the Patton's agreed that once conveyed to the Town, the Board could sell a portion of the property for the purpose of developing moderately priced housing.[1] The Patton's then conveyed the Property to the Town of Hamilton[2] by deed dated September 17, 2012.[3]

The Board of Selectmen issued an RFP for the purchase and development of moderately priced housing on a portion of the property consistent with the Gift Agreement. The selected developer proposes to place twelve units of age restricted moderately priced housing on 4 acres.

On April 5, 2014, Town Meeting,, by a two-thirds vote, approved Article 2-12, which authorized the Board of Selectmen to sell, develop or restrict four (4) acres, more or less, as identified as a portion of Map 19, Lot 1 and as more fully set forth on the plan presented at Town Meeting and to do so on the terms and conditions that the Board of Selectmen determine to be appropriate.

The Board of Selectmen thereafter entered into a Purchase and Sale Agreement with the developer, CP Barry, for the sale of four (4) acres of land and the subsequent construction of 12 units of age restricted moderately priced housing. As part of that proposal, the Board of Selectmen will join in the application for a special permit and will include as part of the application, a portion of land adjacent to the four (4) acres which said land will serve as open space or park land to fulfill the requirements of the Senior Housing Bylaw.

II Analysis

A. Authority of the Board of Selectmen to Sell Property for Senior Housing Development

The Patton Property was put in the care, custody and control of the Board of Selectmen by the vote of Town Meeting May 12, 2012. The Board through that vote was authorized to enter into an agreement with the Sellers, the Pattons, on the terms that the Board deemed acceptable to the Board. The Board then negotiated the terms which would allow them to sell a portion of the property for moderately priced housing. The Board then sought, and was given, appropriate approval to sell four (4) acres of the property via a vote at the April 5, 2014 Town Meeting. Indeed, again, the Town Meeting gave the Board the authority to enter into an agreement to sell the land upon terms and conditions the Board determined to be appropriate. In this instance, those terms included joining in with the Developer to submit an application for Senior Housing.

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[1] The initial Gift Agreement located the housing in the so-called northwest portion of the property. However, a subsequent amendment to the Agreement allowed the development of moderately priced housing elsewhere on the property without the need to give the Patton's a right of first refusal.

[2] A conveyance in a deed to the "Town" is tantamount to deeding to the care custody and control of the Board of Selectmen. G.L. c 40 sec. 3.

[3] Subsequent to the Deed being filed, an amendment to the Deed was also made consistent with the Amendment to the Gift Agreement. Said amended deed is dated February 4, 2104 and recorded at the Essex South Registry of Deeds in Book 33209 Page 48.

The initial vote in May, 2012 was taken pursuant to G.L. c. 40 sec. 3 which authorizes the Town to purchase or hold real property:

> "A town may hold real estate...and may convey same by a deed of its selectmen...
>
> All real estate...of the town, not by law or by vote of the town placed in the charge of any particular board, officer or department, shall be under the control of the selectmen..."

When it assumed the care, custody and control of the property, the Board had the authority to act in a manner which they deemed appropriate according to the Town Meeting vote. Indeed, the Board was required to obtain further authority to sell the property in accordance with G.L. c. 40 sec. 15A and they received that authority in April of 2014 by a vote of the Town Meeting. The Town Meeting directed them to undertake that transaction on terms and conditions which they deemed appropriate.

The Board of Selectmen has full authority to sell the property for the purpose of developing moderately priced age restricted housing.

B. May the Board of Selectmen participate as a co-applicant in the permitting process for said proposed development and use a portion of the Patton Property as part of the application?

The Board is responsible for the care, custody and control of the property. The Board may participate as a co-applicant in the proposal from CP Barry and the Board may request a division of the Patton Property to further their proposed sale and development of the property. As noted above, the Board may dedicate portions of the Patton Property for various public uses. The Town Meeting put the property in the Board's care, custody and control.

The Board is serving as co-applicant for two purposes: 1. They own the four (4) acres which is slated to be conveyed to the developer and 2. They own the portion of the proposed development, 9 +/- acres, which will be restricted to open space or park land as required under section V(E)(22)(b) of the Town of Hamilton Zoning Bylaw. As a result the entire 13+/- acres will be a part of the special permit application and subject to the conditions of the special permit.

Further, given that there was no restriction on a specific purpose for the use of the land, the Board is given wide latitude in putting the property to use for general or specific municipal purposes, which they deem appropriate. It has been firmly established that a town cannot put park land or other property dedicated for specific public use to another use, or sell or lease it, unless it receives authority to do so from the State Legislature. *See* Needham v. Norfolk County Commissioners, 324 Mass. 293 (1949); Loomis v. City of Boston, 331 Mass. 129 (1954); Brookline v. Metropolitan District Commission, 357 Mass. 435 (1970) Land which is held by a city or town in a private capacity, however, is not subject to the unrestricted authority of the legislature. *See*

Higginson v. Slattery, 212 Mass. 583 (1912) (where city had never formally dedicated area as parkland, city could use or transfer property for different purpose without having to seek legislative approval, since it's held absolute rights over the land which "no person can derive it of") *See also* Muir v. City of Leominster, 2 Mass App 587 (1974) (public lands devoted to public use cannot be diverted to another inconsistent public use without plain and exclusive legislation authorizing that diversion applies only to lands which are in fact devoted to one public use)

Here, the land was not devoted to any particular public use, and therefore the Board of Selectmen have broad authority to designate and/or use the property in any manner it feels fulfills the intent of the Town meeting vote. Indeed, the Appeals Court, in a recent decision, reiterated the considerable breadth of such authority: "G.L. c. 40, section 3...is broad enough to encompass [a] board's ability to execute the town's intent with a certain degree of flexibility." Faneuil Investors Group Ltd. Partnership v. Bd. of Selectmen of Dennis, 75 Mass. App. Ct. 260, 268-269 (2009).

Therefore, in this case, the Board is acting wholly consistent with the authority they were provided by Town Meeting, and there is nothing prohibiting the Board from being a co-applicant nor is there any prohibition on the Board using a portion of the Town Land and dedicating it to either open space or park land.

C. What authority, if any, does the Board of Selectmen have to designate portions of the Patton Property for a particular use?

As noted above, the Board has full authority to designate portions of the Patton Property to uses which would be considered general municipal uses and which of course are consistent with the deed into the Town. Here the dedication of a portion of the land for open space or parkland is in fact entirely consistent with the overall concept of the Patton Property and related uses in the area. The mere fact that the dedication is in relation to an application the negotiations of which the Board was authorized to undertake as part of the sale, does not negate the Board's authority, nor do they need any further authority.

D. Does the Ground Water Overlay District restrict the number of housing units being proposed for the Patton Property?

The proposed development is located in the Residence-Agricultural Zoning District. Senior Housing may be constructed in this district by issuance of a Special Permit from the Planning Board. Additionally, the Property is located within the Groundwater Protection Overlay District ("GPOD"). The question comes as to the applicability of the provisions of the GPOD on the proposal and how the requirements of the GPOD interplay with the Special Permit criteria for Senior Housing and the allowed uses in the underlying district. Specifically, a question has arisen as to the requirement in section V(D)(4)(a) which provides "Regardless of the minimum lot size of the underlying zone, there shall be a minimum lot area of 80,000 square feet for a building lot in the Ground Water Protection Overlay District." The term "lot" is defined in the bylaw in section VII as

"Lot: Shall mean an area of land in one ownership with definite boundaries, used, or available for use, as site for one or more buildings."

In the case at hand there are two lots which are part of the proposal, one at 4.5 +/- acres and one at 9 +/- acres. The Senior Housing Permit allows for a base number of two dwellings per acre with density bonuses based upon a number of other factors. In this case as part of a special permit for the RA district under Senior Housing the minimum lot size would be one acre. Nonetheless, given the applicability of the GPOD, the minimum lot size would be 80,000 sq. ft. and the proposal exceeds that requirement. Further, the GPOD does not prohibit greater density on a lot of 80,000 square feet nor does it speak to density at all. As a result, by the very language of the GPOD, "uses or activities permitted in the underlying district are controlled by the underlying district" allowing the property to be used for Senior Housing in accordance with the bylaw, does not conflict with the requirements of the GPOD so long as the lot is greater than 80,000 square feet. To impose any other meaning on the word "lot" in the GPOD would be interpreting the bylaw in a manner inconsistent with the terms thereof. Once must give plain meaning to the terms of a bylaw and not try to contort it to mean something not intended by the legislative body. (See Halebian v. Berv, 457 Mass. 620 (2010): In interpreting a statute, "[w]e begin with the language of the statute." Commonwealth v. Raposo, 453 Mass. 739, 743, 905 N.E.2d 545 (2009). We give effect to each word and phrase in a statute, and seek to avoid an interpretation that treats some words as meaningless.) If the Town wanted to control density and except certain allowed uses in the underlying district from the GPOD, the Town would have done so, they have not. Further, if the Town meant to limit the number of buildings on a lot in the GPOD, they would have specified same in the bylaw itself, they did not. The GPOD limits the size of a lot in the GPOD and further limits what can happen on that lot in section 6 of the GPOD. Nowhere in those limitations are there limits on the number of units on a lot. As such, a meaning different than what is evident from the plain meaning of the bylaw may not now be imposed in the implementation of the bylaw. The proposal to place twelve units in six buildings on a lot in the R-A district, pursuant to a Senior Housing Special Permit is fully consistent with and not violative of the provisions and prohibitions of the GPOD.