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Memorandum

To: John Jannell, Conservation Administrator
Cc: John Kelly, Town Administrator
Date: January 12, 2015
Re: Kent's Point Questions

In advance of the public hearing on the Kent's Point Conservation Area Management Plan (1995) you have asked for my insight on five questions. The questions and my responses are as follows:

Question No. 1: It appears no State funds (re-imburement) were ever taken for the acquisition. Can the Commission restrict access to residents only? Is this consistent with any deed language or other restrictions?

Response:

If the property had been acquired with State funds under the Self-Help Program, the provisions of 301 CMR 5.08 would prohibit discrimination on the basis of residence. Specifically, 301 CMR 5.08 provides, in pertinent part, that:

- (1) Operation, Maintenance, and Reasonable Use Limitations. Property acquired or developed with Program assistance shall be operated and maintained in accordance with standards and guidelines of the Division. In accordance with the applicable program contract, participants may impose reasonable limits on the type and extent of use of areas and facilities acquired or developed with Program assistance as necessary for maintenance or preservation.
- (2) Nondiscrimination. Property acquired or developed with Program assistance will be open to entry and use by all persons who are otherwise eligible regardless of race, color, national origin, sex, sexual preference, age or disability.
- (3) Nondiscrimination on the Basis of Residence.
 - (a) Discrimination on the basis of residence, including preferential reservation, membership or annual permit systems, or user fees is prohibited on the Project site unless this provision is waived by the Secretary.
 - (b) The Secretary will approve or deny all proposed fee or access limiting systems. Waivers will not be granted which are inconsistent with the Federal Land and Water Conservation Fund Act, P.L. 88-578, Section 6(f)(8), 16 USC s.4601-4 . *et seq.*

According to the Kent's Point Management Plan no state or federal funds were used for the acquisition of the property (Plan, page 2). Thus, there does not appear to be an express State prohibition on restricting access to town residents.

The deed from Charlotte Kent conveyed the property to the Town of Orleans, acting through its conservation commission, under G.L. c. 40, §8C, IN TRUST ... "upon the express public trust by the grantee for open-space-conservation purposes (including the use of the land for a Town shellfish laboratory and a lease back to the grantor). When a grant of a parcel of land is impressed with a charitable trust, the grantor expresses an intent in plain words to create a trust in perpetuity in the subject parcel. The municipal acceptance of the grant creates a contract that neither the heirs of the grantor, municipality, nor legislature may impair. *Opinion of the Justices*, 369 Mass. 979 (1975). Clearly, per the deed the property is subject to an express public trust and can only be used for open, space and conservation purposes. However, the deed does not, however, specifically require that the property be open to use by both residents and non-residents.

In *Bedell v. Town of Otis* (Mass Land Ct. 2005), the Land Court held that a Town could open a public beach area (acquired by the Town together with other lots through tax takings) to the public provided measures were taken to mitigate the effects of a public beach on the plaintiffs' (other owners in the subdivision) easement rights, including among other things, that the beach be limited to Town residents and their guests and that parking be restricted to Town residents, whose vehicles must be denoted by a Town sticker. The restrictions were deemed reasonably necessary to protect the plaintiffs' express easement rights to the roads and the beach. In *Bedell*, the Town acquired title to the property pursuant to tax takings and not pursuant to a deed providing that the property be used in perpetuity for conservation and open space. However, the case indicates that access restrictions based on residency are not prohibited with respect to Town-owned property. As noted in *Bedell*, the restrictions were deemed reasonable to protect the easement rights of the other lot owners.

Under M.G.L. c. 40, §8C, a conservation commission may be established for the promotion and development of the natural resources and for the protection of watershed resources of the town. The conservation commission may develop a conservation and passive outdoor recreation plan which shall be, as far as possible, consistent with the town master plan and with any regional plans. The commission shall manage and control conservation land and may adopt rules and regulations governing the use of land and waters under its control, and prescribe penalties for any violations. The general rules of the Conservation Commission (applicable to use of lands under management of the Conservation Commission) and attached as Appendix F to the Management Plan provides under Number 1 that "[c]onservation lands shall be open for enjoyment by the general public..." – there is no discrimination on the basis of residency. The Kent's Point Management Plan states (p.1) that the plan is intended to develop and promote Kent's Point for quiet public enjoyment. Again there is no discrimination on the basis of residency. It is not clear if the authority of the Commission under G.L. c. 40, §8C to manage and control property under its jurisdiction includes the right to discriminate against non-residents. The question to be addressed is how such a residency requirements relates to management and control of

conservation land. To the extent such discrimination is allowed, it may be that such an action must be undertaken by the Board of Selectmen or Town Meeting.¹

Another factor to consider might be whether the restriction is to apply to just parking or does it also apply to foot traffic. For example, some towns provide for resident only parking at certain beaches. It is my understanding that in Chilmark on Martha's Vineyard, two town beaches are restricted to residents only of the Town of Chilmark, or their guests or tenants and this restriction also applies to foot traffic.²

There is a possibility that a non-resident only rule could be challenged as unconstitutional under the State and Federal Constitution. In *Leydon v. Town of Greenwich*, 257 Conn. 318 (2001), the Connecticut Supreme Court affirmed a lower court decision that an ordinance restricting access to non-residents to a municipally owned park was unenforceable. The ordinance allowed only town residents access to beach-park areas. The Court affirmed the decision on the federal and state constitutional principles of the First Amendment (the lower court had decided the case on the basis of a common law public trust doctrine). The Court concluded that nonresident access to the beach was protected by the right of freedom of expression given to all citizens. Under freedom of expression protections provided by the First Amendment and the Connecticut State Constitution, citizens are allowed to freely gather and conduct activities such as political debate and recreation. A "traditional public forum" is a place where the government customarily allows assembly and free debate of ideas, and includes areas such as streets and parks where the government holds title to the land but allows these areas to be used by its citizens. The United States Supreme Court has held that the government may only limit expression in these areas based on time, place, and manner of the expression but not its content. The regulation must not restrict specific types of expression and must be made so specific as to help further an important governmental interest. In other words, the government must have some very important reason, like public safety, in order to limit the use of these public areas. The Connecticut Court found Greenwich Point to be a traditional public forum because it had the characteristics of a public park, including, the presence of shelters, ponds, a marina, a parking lot, and picnic areas. The Court found that the ordinance restricting access to only town residents violated the rights of nonresidents to participate in expressive activities, and that the town failed to show why the ordinance protected an important town interest. Here, the Kent's Point Conservation Area does not appear to be a "traditional public forum," however, in discussing property security the Management Plan refers to the area as "the development of a town park in the area," so perhaps there is a possibility that any resident only rule could be challenged under the State and Federal Constitution

¹By way of example, management and control of conservation land, does not does not include, in the absence of town meeting vote authorizing the transaction, the authority of a conservation commission to lease premises under its charge, even if the lease restricts the use of premises to conservation purposes. Statute authorizing formation of conservation commissions and defining their powers and duties neither explicitly nor implicitly authorizes conservation commission, on its own, to lease land for conservation purposes. *Cranberry Growers Service, Inc. v. Town of Duxbury*, 415 Mass. 354 (1993).

² Caselaw indicates that resident parking restrictions should be upheld if they are rationally related to a legitimate government objective. *Commonwealth v. Petralia*, 372 Mass. 452 (1977).

In summary, based on the above review, I would caution the Conservation Commission that they may not have the power to restrict the property to residents-only and that such an action per Footnote 1 may be within the province of the Town Meeting which authorized the purchase of the property from Miss Kent for conservation and open space purposes.

Question No. 2: If the Conservation Area was restricted to Residents how would this typically be enforced?

Response:

The enforcement of resident-only restriction would be problematic. Residents would probably have to obtain a sticker for their cars. If the restriction applied to walkers, then walkers would also need some type of sticker or access permits. Stickers/permits would have to be obtained at certain designated town offices. Information as to the access restrictions would have to be posted on the website, Town Hall, and posted on signs at Kent's Point and the access thereto.

Since there is no attendant on duty at Kent's Point, it would appear that enforcement would probably be by the police, checking the cars/visitors for proper access stickers/permits.

With respect to enforcement, the Town Code, Article 1, section 1-1 provides that:

“Any bylaw of the Town of Orleans or rule or regulation of its boards, commissions and committees, the violation of which is subject to a specific penalty, may, in the discretion of the town official who is the appropriate enforcing person, be enforced in the method provided in MGL C. 40, § 21D.”

Section 1-2, defines “enforcing person” to be:

“Any Selectman or any police officer of the Town of Orleans, with respect to any offense, and such other officials as the Board of Selectmen may from time to time designate, each with respect to violation of bylaws and rules and regulations within his respective jurisdiction. If more than one (1) official has jurisdiction in a given case, any such official may be an "enforcing person" with respect thereto.”

G.L. c. 40, §21D provides in pertinent part that “[a]ny city or town may by ordinance or by-law not inconsistent with this section provide for non-criminal disposition of violations of any ordinance or by-law or any rule or regulation of any municipal officer, board or department the violation of which is subject to a specific penalty.”

Question No. 3: Is it the Commission's responsibility to keep the public from using Keziah's Lane (private)? Do the owners of Keziah's Lane have the right to block the public from the use of this way to access Kent's Point.

Response:

Assuming that the general public does not have a right to use Keziah's Lane, neither the Town or the Commission is responsible from keeping the public from using the Keziah's Lane. (This would be the case with other private ways in Town.) However, per the Management Plan (p.11) legal access to Kent's Point is over private Frost Fish Lane and the Management Plan evidences the intent of the Commission to work with the neighbors on any and all issues arising from the Kent's Point Conservation Area. Per the Management Plan, the Town provides maintenance for Frost Fish Lane and signs have been posted indicating the access to Kent's Point. The Commission could certainly review the placement of the signs and perhaps the need for more signs or additional information on the Town website with respect to the access route.

Assuming that Keziah's Lane is private, it does not appear that the owners of Keziah's Lane could simply block off the road. They could most likely put up no-trespassing signs, however, additional information would be necessary to determine if they could, for example, put up gates. Clearly, they could not block the overlapping portions of Keziah's Lane and Frost Fish Lane. Private ways must be open to police and emergency vehicles. Keziah's Lane provides access to many homes, and a portion of Keziah's Lane provides access to Kent's Point, so public safety reasons would certainly be a factor to consider with respect to any proposed blocking of the road.

Question No. 4: Is it the Commission's responsibility to limit the number of car trips over Frost Fish Lane or somehow manage the frequency of the use of the area?

Response:

I did not find any requirement for the Commission to limit the number of car trips over Frost Fish Lane or to somehow manage the frequency of the use of the area [Frost Fish Lane]. The Town has a right of way over Frost Fish Lane. The Town's use of Frost Fish Lane is subject to the terms of the Agreement for Judgment filed in the Superior Court Case No. 95-420. The Agreement provides that:

1. The Defendants [Town] have a right of way over Frost Fish Lane for ingress and egress to the Kent's Point Conservation Area.
2. The Defendants [Town] may allow the public to use Frost Fish Lane for all purposes for which ways are commonly used in the Town of Orleans for access to Kent's Point Conservation Area for conservation and passive recreation purposes in accordance with the Kent's Point Conservation Area Management Plan dated March, 1995. The Defendants acknowledge that the current right of access does not include access for passenger buses or passenger vans for hire.
3. The Defendants [Town] may construct and maintain a twenty car public parking area together with a two car handicapped parking area within the Kent's Point Conservation Area.
4. The Defendants [Town] may from time to time perform maintenance on and make improvements to Frost Fish Lane for the purpose of maintaining said road in a safe and passable condition provided, however, that the width of said road shall not be increased. Without limiting the generality of the foregoing, the Defendants [Town] agree to maintain the existing improvements, including, the existing speed bumps, speed limit signs and drainage facilities.
5. Neither the Plaintiffs nor the Defendants [Town] waive any rights that they may have with respect to any changes in the use of Frost Fish Lane and the Kent's Point Conservation Area for any additional purposes or to any greater extent other than as set forth herein.

Per the Agreement for Judgment the use of Frost Fish Lane will necessarily be limited by the size of the parking area (as well as the limitation on passenger vans and buses).

Question No. 6: The area is currently posted, "Prohibited uses: Un-restrained Dogs". Is the current posting consistent with the allowed and prohibited uses described in the 1995 Plan? Does the Commission reserve the right to modify "allowed" and "prohibited" uses if new management challenges arise?

Response:

The current posting would appear to be consistent with the 1995 Plan except for the fact that dogs whether restrained or unrestrained are not allowed along the beach path (and perhaps the beach area).

It would appear that the Commission has the right to modify allowed and prohibited uses if new challenges arise. The Update and Review provisions of the Plan (p. 30) provide that the "Commission should update the plan as necessary" and that "new or modified components to the management plan can be adopted by the Commission at any time after a publicly-advertised public meeting." These provisions would allow modifications to the allowed and prohibited uses if management challenges arise.

However, any changes to the Plan would have to be consistent with the terms of the Agreement for Judgment. The Agreement authorized the Town to "allow the public to use Frost Fish Lane for all purposes for which ways are commonly used in the Town of Orleans for access to Kent's Point Conservation Area for conservation and passive recreation purposes in accordance with the Kent's Point Conservation Area Management Plan dated March, 1995." For example if restrained dogs are a problem then that use could be changed; or, if restrained dogs on the beach path are not a problem, then changes could be made to that rule. However, the Town could not allow the use of Frost Fish Lane for passenger buses or passenger vans for hire. Further, the Town could not construct a larger parking area (per the Agreement for Judgment the Town is limited to a "twenty car public parking area together with a two car handicapped parking area").

Any changes would be subject to the Agreement for Judgment provision which provides that the parties do not "waive any rights that they may have with respect to any changes in the use of Frost Fish Lane and the Kent's Point Conservation Area for any additional purposes or to any greater extent other than as set forth herein." Kent's Point is limited to conservation and passive recreation purposes, so the area could not be used for any additional purposes. Likewise the use of the area is limited by the size of the parking area so it does not appear that that the area would be used to any greater extent. At the time of the Plan, the lease area was not part of the area open to the public, however, the Plan contemplated such use, so the use of the former lease area for conservation and passive recreation would not be the use of the area to a greater extent. In any event it would be necessary to evaluate any proposed changes to make sure that any changes are consistent with the Agreement for Judgment.