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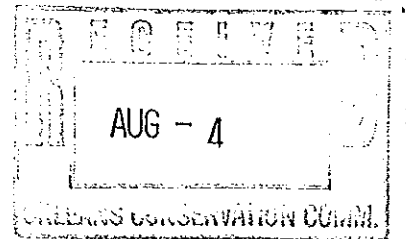
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July 28, 1998

Orleans Conservation Commission
Town Hall
19 School Road
Orleans, MA 02653

Re: Kent's Point

Dear Members of the Commission:

You have asked whether the Conservation Commission has the authority to raze the buildings located on the Kent's Point Conservation land which is under the control and jurisdiction of the Commission and whether the funding for such a project may come from the Conservation Commission Fund or must it be appropriated by Town Meeting.

DISCUSSION

I.

Under the Conservation Commission Act (G.L. Chapter 40 §8C) the Conservation Commission has broad discretion in determining how its lands are used. The basic standards under which the Commission holds land are contained in the phrase "maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces in land and water areas." The Act does not define the word "improve", however, *Webster's Seventh Collegiate Dictionary* defines "improve" in pertinent part as follows:

- 1: to make greater in amount or degree,
- 2a: to enhance in value or quality: to make better
- b: to increase the value of (land or property) by betterment (as cultivation or the erection of building).

Clearly, the Commission has the authority to improve the lands under its jurisdiction and control to the extent that such improvement is consistent with the terms of the Act.

There is no legal requirement for the Commission to alter conservation land; on the other hand, the Act does not require that land be kept entirely in its natural condition. Some changes may be desired to enhance aesthetics, biological diversity, passive recreation, safety or to increase accessibility. As long as the alterations are consistent with the primary purpose of the land

which is natural resource protection, they may be undertaken.

The Commission's broad discretion over the use of its lands may be limited by:

1. funding sources for acquisition of the parcel;
2. conditions written into the deed or will of the prior owner or donor;
3. the wording of a Town Meeting vote to dedicate the land to the care and custody of the Commission;
4. the expectations of the community as expressed during negotiations for the parcel;
5. limitations imposed by state or federal funding.

Thus although the Commission has broad authority over the use of its lands some of the above factors may create a barrier to the complete discretion of the Commission with respect to such use.

In the case of Kent's Point the buildings were in existence at the time of the purchase of the land. The purchase did not include a condition requiring the Commission to maintain the buildings nor did it prohibit the Commission from razing the buildings.¹ Therefore, it would appear that the Commission would have the authority to make a decision to raze the buildings. The demolition of the buildings would be in essence returning the property to its natural condition and would therefore not be inconsistent with the purposes of the Act. The actions of the Commission would be in the nature of maintaining or improving the land under its control.

Also the Commission may want to raze the buildings due to potential liability issues relating to such matters as the condition of the buildings, the presence of lead paint, or the presence of asbestos. The Municipal Torts Claims Act (G.L. Ch. 258) protects the municipality from liability to a great extent, however, G.L. Ch. 21 §17C is applicable and provides that landowners (including municipalities) who open their land to public recreational use without charging fees will not be liable for injury to persons or property unless their conduct is "willful, wanton, or reckless." Also, G.L. Ch. 231 §85Q imposes on landowners a special duty of care towards children who trespass onto land, but only if the owner maintains an "artificial condition" on the land. Clearly potential liability is a factor to be considered by the Commission with respect to the use and control of conservation land.

¹Other than the requirement that the Seller be granted a lease of a portion of the premises and buildings which lease has since expired.

II.

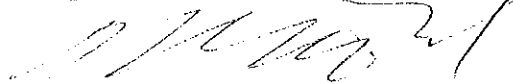
Conservation funds are described in the Conservation Commission Act. Such a fund may be established by a municipality through a vote of town meeting to ensure that the Commission will have cash which can be spent for any purpose stated in G.L. Ch. 40 §8C without further authorization. (This does not include matters related to the state Wetlands Protection Act.) Such purposes include the purchase of land, capital improvements to such land, and expenses directly related to such purchases i.e., surveying, title searches, legal expenses of deed preparation, and title passing. Maintenance and improvement of its land and monitoring of conservation restrictions are also within the purposes of §8C.

Money voted to the fund remains there until expended or until transferred out by town meeting. No further authorization is needed to spend money from the fund, even for the purchase of land. However, the conservation fund is not sacrosanct. Under G.L. Ch. 44 §33B, any previous appropriations (even money voted into the conservation fund) may be transferred to another use by a majority vote of town meeting if the funds have not been legally obligated. (This override does not apply to gifts in the fund.)

To determine whether the fund may be used for a particular purpose the Commission must review the provisions of the Act and also the vote by which the fund was established to see if there were any limitations or procedures included and the terms, if any, of any gifts to the fund. As noted above, it would appear that the Commission would have the authority under the Act to raze the buildings. Moreover, it is my understanding that no limits were placed on the use of the fund. Thus it is my opinion that if the Commission decides to raze the buildings, the Conservation Fund may be used for such purpose and no further appropriation by town meeting is necessary.

If you have any questions please do not hesitate to call.

Very truly yours,



Michael D. Ford

MDF\djw

cc: John Kelly, Town Administrator
Board of Selectmen
Town Clerk

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