

November 18, 2021

Lee S. Smith
lsmith@k-plaw.com

Mr. Henry Hayes
Town Manager
Flynn Building
278 Old Sudbury Road
Sudbury, MA 01776

Re: Operating a Public Swimming Facility at the Sewataro Property located at 1 Liberty Ledge

Dear Mr. Hayes:

You have asked a series of questions regarding operating a public swimming facility at the Sewataro property located at 1 Liberty Ledge (“Sewataro” or the “Property”). My responses are as follows.

1. Does the Town have the ability to operate a public swimming facility at Sewataro?

In my opinion, at present, the Town does not have the ability to operate a public swimming facility at Sewataro. As you know, Sewataro is owned by the Town and is the subject of that certain “Contract for Day Camp Operator and Management of Real Property” dated as of September 10, 2019 (the “Contract”), by and between the Town and Camp Sewataro, LLC (the “Manager”). Under the Contract, Sewataro is under the care and control of the Town by and through the Select Board, and is managed by the Manager during the term of the Contract (initial Term expires September 10, 2022).

Pursuant to the Contract, the Manager operates a day camp at Sewataro each year between approximately June 1 and August 31 (the “Camp Season”). During the Camp Season, unless otherwise agreed in writing, use of the property by the Town and/or residents of the Town is limited to the defined “Camp Season Public Access Area” as shown in Exhibit 3 to the Contract (see Contract, Section 1.2.2.) It is my understanding that Sewataro presently has 4 small in-ground swimming pools, a swimming pond, and a recreational pond. At present, the swimming areas are not included within the Camp Season Public Access Area, however, such area may be modified by mutual written agreement of the parties.

Under Section 1.2.3 of the Contract, outside of the Camp Season, the Town and/or residents of the Town may use portions of the Property which is presently limited to “all open field areas, basketball courts, tennis courts and wooded areas. Use of the swimming areas is not presently permitted under the Contract outside of the Camp Season. The scope of the defined areas that may be used by the Town and/or residents outside of the Camp Season may also be modified by mutual



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written agreement of the parties to include additional areas of the Property including the swimming areas.

Accordingly, the Town would need to seek to amend the terms of the Contract with the Manager in order to address future use of the swimming areas. In my opinion, as part of that process, the Manager could seek to negotiate other Contract amendments that may or may not be favorable to or in the best interests of the Town.

2. What additional liability might the Town incur by operating public swimming facilities at Sewataro if (a) the Town runs the program or (b) if the Manager runs the program?

In my opinion, the Town could be exposed to additional liability for operating public swimming facilities at Sewataro under both scenarios- if the Town runs the program or if the Manager runs the program.

Pursuant to Section 9.5 of the Contract, the Manager provides a broad indemnification to the Town for both day camp and non-camp operations at the Property other than that which is undertaken by the Town including its employees, contractors, agents or representatives. Thus, in my opinion, if the Town were to operate a swimming program at Sewataro with its own employees, contractors, agents or representatives, the Town would likely not have the benefit of the Manager's indemnification set forth in Section 9.5 of the Contract and therefore be potentially exposed to additional liability than if it does not operate a swimming program on the Property.

Further, under Section 9.6(i) of the Contract, the Town provides a similar indemnification to the Manager for "all operations, programs or activities at the Property managed, operated or coordinated by or for the benefit of the Town" and (ii) for "any use of, or access to, the Property by the Town, residents of the Town or the general public...." As such, in my opinion, even if the Manager operated a swimming program on the Property on behalf of the Town and with its own employees, contractors, agents or representatives, the Town could be exposed to additional liability related to operating a swimming program at Sewataro.

However, depending on the facts and circumstances of a particular claim, the Town's liability may be limited.

The Recreational Use Statute, G.L. c. 21, § 17C, grants an exemption from liability for any negligence claims where a prospective plaintiff was injured when engaged in a recreational activity on the Town's land, and the Town did not "impos[e] a charge or fee" for the injured plaintiff's use of that land. G.L. c. 21, §17C; Patterson v. Christ Church in Boston, 85 Mass. App. Ct. 157, 160 (2014), review denied, 468 Mass. 1104 (2014). Specifically, the Recreational Use Statute states that

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any person who “lawfully permits the public to use such land for recreational ... purposes without imposing a charge or fee therefor, ... shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of willful, wanton, or reckless conduct by such person.”

In evaluating the application of the Recreational Use Statute, courts will look to “the objective circumstances surrounding [the injured plaintiff’s] entry and subsequent activities” to determine whether a plaintiff is a recreational user. Dunn v. City Of Boston, 75 Mass. App. Ct. 556, 559 (2009). When determining a defendant-town’s protection under the statute, “the issue is whether the landowner charges a fee for the particular use to which the plaintiff puts the land.” Marcus v. Newton, 462 Mass. 148, 155 (2012). The Supreme Judicial Court, however, clarified in Marcus that a town, as landowner, may impose a charge or fee “intended solely to reimburse it for marginal costs directly attributable to a specific user’s recreational use of the property” and remain exempt from ordinary negligence claims under the statute, but in general, a Town may not charge a general fee for the use of the swimming area in order to have the protections afforded by the Recreational Use Statute. See also Seich v. Town of Canton, 426 Mass. 84, 84 (1997) (even though plaintiff’s daughter paid basketball registration fee, plaintiff was not charged an “entrance fee for members of the public to use the property” and recreational use immunity thus applied).

Therefore, in my opinion, assuming that the swimming area(s) is made open to members of the public for recreational use, and the Town does not charge any fees for use of the swimming area(s), the Town could be exempt from liability for injuries or property damage to anyone who uses the swimming area(s).

The Town also may be immune from liability under the Massachusetts Tort Claims Act (“MTCA”), G.L. c. 258, if there is negligence on the part of a public employee or official. Section 10 of the MTCA provides a set of enumerated circumstances under which the Town would not be liable. Specifically, it states that a Town is not liable for any claims involving:

(a) acts of employees acting with care in implementing a statute or by-law; (b) discretionary or individual decisions made by employees that involve policy or planning; (c) intentional torts, including, among others, assault and battery; (d) collecting taxes; (e) licensing and permitting decisions; (f) failure to inspect property to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health or safety; (g) failure to establish a fire protection service; (h) failure to establish a police service; (i) actions by released or escaped prisoners; and (j) failure to act or prevent harm to a party.

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Notably, however, the MTCA does not protect a Town from the negligent maintenance of public property. G.L. c. 258, §2 10(j)(3). A Town is not, however, required to maintain public property in ways so as to prevent every type of possible injury that may occur from the use of the property. See., e.g., Moore v. Town of Billerica, 83 Mass. App. Ct. 729, 733 (2013) (failure to post warning signs or erect barriers on playground not negligent maintenance, and as such, Town was immune from liability under § 10(j)). This analysis further implicates the provisions of the Contract discussed above as, at present, the Manager is responsible for maintaining the Property, however, the Manager's indemnification of the Town is limited where the Property is open to residents pursuant to a Town program.

Note further that G.L. c. 140, s. 206 imposes certain requirements for "every public and semipublic outdoor inground swimming pool" including fencing, gates, and rescue equipment including a life ring and rescue hook. And, the state Board of Health Regulations (see 105 CMR 435) impose a broad range of minimum standards for swimming pools relating to public health and safety.

In addition to statutory limitations on liability that may be available, the Town can seek to limit its exposure to financial liability for claims by obtaining sufficient insurance coverage for the use in question. I recommend consulting with the Town's insurance representatives on this topic to determine whether offering the use of the swimming areas for residents is insurable, what risks they determine need to be addressed and the types and costs of insurance coverage may be available.

3. What are the issues associated with the Town charging fees to use the facilities at Sewataro?

In my opinion, the Town may charge fees (as distinguished from an impermissible tax), if it can be demonstrated that a three part test set forth in the case of Emerson College v. City of Boston, 391 Mass. 415 (1984) has been met.

First, the fee must be charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of the community. Second, the service must not be compulsory, meaning that the person paying the fee must utilize the service as a matter of choice. And third, the fee must not be used to raise revenue, but instead is intended to offset the cost of governmental services.

Thus, in my opinion, provided that that the Town is able to ensure that the fees to use facilities at Sewataro are particularized, avoidable, and reasonably reflect the costs to the Town for providing the services at issue, fees may be imposed for the use of the Property.

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However, as is described above, if the Town imposes lawful fees for use of the Property, the Town may lose the benefit of the limitations on liability afforded by the Recreational Use Statute, G.L. c. 21, § 17C.

4. Per section 1.2.6 of the Contract, when not in conflict with the operation of the Camp at the Property (e.g. summer weekends and after last camp session through Labor Day weekend) can the Manager facilitate public swimming at Sewataro?

Context: the Manager has indicated a willingness to facilitate public swimming in the swimming pond (not necessarily the 4 teaching pools) at such non camp hours, in response to the attached request. This is a separate and distinct approach from the Town (e.g. Parks & Rec) facilitating swimming.

Section 1.2.6 of the Contract states:

“Programmatic Activities. The Manager has proposed, and the Town supports, the scheduling of programmatic activities on the Property from time to time, utilizing the Property and selected facilities thereon when not in conflict with the operation of the Camp at the Property. Such activities may include access by residents of the Town, and other invited members of the general public. Such events may be planned by the Manager, or shall be planned and coordinated with the Town, by and through its Parks and Recreation Department, or such other delegates as the Town Manager may designate. The cost of programmatic events planned with the Town, if any, shall be allocated by mutual agreement of the Parties.”

In my opinion, pursuant to Section 1.2.6, the Manager may facilitate public swimming at Sewataro when not in conflict with the operation of the Camp at the Property for residents of the Town and other invited members of the general public.

However, as set forth above, the Town could be exposed to additional liability for the public swimming because under the scenario presented above, under Section 9.6(i) of the Contract, the Town provides an indemnification to the Manager for “all operations, programs or activities at the Property managed, operated or coordinated by or for the benefit of the Town” and (ii) for “any use of, or access to, the Property by the Town, residents of the Town or the general public....”

In my further opinion, the Recreational Use statute would still apply, subject to its limitations described above, thus consideration should be given to whether fees are charged to users of the Property because if fees are charged, exemption from liability may not apply.



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Please let me know if you have any questions or if I can be of further assistance.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Lee S. Smith".

Lee S. Smith

LSS/kes

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