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TO: Select Board ***(By Electronic Mail Only)***

CC: Town Manager

FROM: Janelle M. Austin, Esq.
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RE: Sewataro Property – Legal Inquiries

DATE: November 16, 2021

The Town has asked Town Counsel a series of questions regarding the use and operation of the Sewataro property ("Sewataro" or the "Property"), including operating a public swimming facility at the Property located at 1 Liberty Ledge. The consolidated responses to the recent inquiries are contained in this memorandum.

1. Is it an issue to have different fee for resident versus non-resident?

In our opinion, the Town may charge a different fee for residents versus non-residents, but it must have a rational basis for charging a different fee. Generally, any regulation that differentiates between residents and non-residents is subject to the limitations of the State and Federal Constitutions prohibiting discrimination in violation of a non-resident's right to equal protection of the laws. LCM Enterprises, Inc. v. Town of Dartmouth, 14 F.3d 675, 679 (1st Cir. 1994) (analyzing constitutional challenge to Town system of charging higher harbor usage fees to nonresidents than to residents). Therefore, the local law or regulation must bear a "reasonable relation to a permissible legislative objective." Id. According to the United States Supreme Court, it is reasonable to charge non-residents a higher user fee when residents assist in the operation and maintenance of the service through the payment of taxes and non-residents do not. Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 389-390 (1978). In this regard, use of the property by non-residents may lead to the exclusion of residents, increased operation and maintenance costs, and increased burdens on the Town's departments, including, for example, fire, police and public works. Property taxes alone may not fully cover these increased costs, which are born solely by Town residents. Therefore, it is our opinion that charging non-residents a higher fee for use of the Property would not violate the Equal Protection Clause of the United States Constitution, provided that the different fee structure is reasonably related to the increased Town costs associated with use of the property by non-residents.

2. In the case of a group of people, is it sufficient that the applicant/point of contact/responsible person for the reservation be a Sudbury resident to qualify as a resident group, and further, is there an issue with setting a minimum percentage of participating group members being residents to establish the group as a Resident group? (Responsible applicant attests to this)

With respect to these inquiries, in our opinion, as a matter of policy, the Town may identify what criteria will need to be satisfied to establish the resident criteria, including that the applicant or the group is located in Sudbury. In my experience in other communities, towns will establish residency criteria based on the primary address and/or organization of the group in a particular community or a particular percentage of individuals in a group or sponsored activity who are residents (e.g. 80% or 60%), as a matter of policy.

3. If there are no anticipated incremental custodial or related expenses (i.e., because of small size of event (e.g., < X participants) and because maintenance person performs daily tasks anyway) is there an issue with not requiring per use fee?

In our opinion, the Town can determine whether based on the nature or size of a particular event that no fee is needed. As you know, any fee imposed by the Town must comply with the provisions of the Massachusetts Constitution with respect to the authority of municipalities to charge fees. In Emerson College v. City of Boston, 391 Mass. 415 (1984), the Supreme Judicial Court set forth three factors to determine whether a charge is a fee that can be assessed on a case-by-case basis, or whether it is a tax that must be levied upon all residents equally. First, the fee must be levied 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. Finally, the fee must not be used to raise revenue, and must instead be used to offset the cost of governmental services.

4. Can the definition of non-profit be tightened up to be a registered 501(c)(3) organization? Further, can the definition of Sudbury non-profit group be tightened up to combine:
   a. the applicant/responsible person is a Sudbury resident
   b. that resident applicant/responsible person is a member of the non-profit organization
   c. the event is an activity for/of that nonprofit organization
   d. the individuals participating in the event are Sudbury residents

In our opinion with respect to the above inquiries, the Town can if it chooses to, clarify the definition of non-profit to include only organizations that have 501(c)(3) status. If the Town wishes to modify such definition, the Town may require a non-profit to submit current documentation of 501(c)(3) status for its records. For example, please see breakdown of priority groups in this policy for consideration: https://www.wayland.ma.us/sites/g/files/vyhlif4016/f/news /2020_field_facility_user_packet.pdf , pp. 4-5, which sets percentage of resident criteria and discusses 501(c)(3) status. Please let us know if you want me to review or draft such language.

5. Can definition of 'Sudbury group besides non-profits' be: applicant/responsible person is a Sudbury resident and the event is not an activity for/of a 501(c)(3) organization of which the applicant is a member?

In our opinion, the Town can make such a determination as matter of policy to further clarify such group classifications and eligibility for organizations that do not have 501(c)(3) status. We recommend that any such criteria be designated in the use policy.

6. Can the Town regulate the use of the Property by non-governmental entities?

In our opinion, the Town has the discretion to permit or prohibit the use of municipal facilities by non-governmental entities. Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384, 390 (1993). In Lamb's Chapel, the United States Supreme Court held that a school district may preserve its municipal property for its dedicated purpose. Id., at 390. However, once the Town makes its property available to a non-municipal entity, constitutional principles require that Town facilities be made available to such groups in an even-handed and content-neutral manner that does not discriminate between groups based on race, political philosophy, religion, or message. In our further opinion, in making public facilities available to private groups, the same basic restrictions are applicable to municipalities as applied to other governmental action. As always, the Town should not discriminate among different groups, but should evenhandedly provide access to its facilities. Under applicable constitutional principles, a municipality should not support or align itself with any particular group or position. Limiting access to certain types of groups could raise issues as to whether a variety of different nonprofit or religious groups or even political groups should fall within the term "non-profit organizations."

Accordingly, in our opinion, is important that the Town not appear to be favoring one group over another group because of the content of the ideas or beliefs of any particular group. Distinctions based on content could raise First Amendment, free speech and other constitutional objections to choices made in behalf of the Town. When choices are made solely within the discretion of a Town officer or employee and such choices have the potential to be based upon distinctions of ideas, beliefs, race, creed, color, or religion, the ability to exercise such discretion, without guidelines designed to guarantee equal access, may be subject to a facial constitutional challenge. A facial constitutional challenge is a challenge to the way a policy or regulation reads "on its face" without regard to how fairly the policy may actually be applied in practice. Facial challenges are allowed by the courts in First Amendment matters because of the sanctity with which courts view First Amendment rights.

Accordingly, to minimize potential liability, in our opinion, the Town's Use Policy for Sewataro should neutral and objective conditions for the grant and for use of public space. Such Policy should: (1) establish conditions on such grant and use so that grants of use are given when neutral criteria are met without undue exercise of Town discretion and so that the full responsibility for supervision of such events is that of the private organization; the presence of Town employees is certainly allowed, but care should be taken not to create the appearance that the Town is endorsing or sponsoring the ideas of any particular private group; (2) charge a fee for custodial and related costs; and (3) regulate private use so that all groups have equal and

adequate access to such public facilities. The goal of such Policy is to satisfy the Town's legal duty to administer the use of public facilities by private groups consistently and evenhandedly so that no group is favored or excluded in fact or in appearance.

In addition to legal matters related to equal access to public facilities, in our opinion, there can be potential liability from injury suffered by a participant or from injury resulting from the conduct of a participant in such use, either by way of personal injury to another participant or to a Town employee or by property damage to personal property or the public facility. A number of options are available to limit the Town's liability, including obtaining waivers as the Town does in other programs, as noted in the attached draft, and indemnification agreements from participants or requiring insurance by a group to cover its use of the property. The Policy in its current form contemplates that all users will execute a waiver form.

Further, in our opinion, the Town will want to confirm with its insurer whether the form of waiver is sufficient and whether any of the intended uses would affect the Town's premium or require additional insurance coverage.

7. Please provide an outline of the imposition of fees for the Property.

In our opinion, if the Town has accepted G.L. c.40, §22F, the Town Manager may set the fees if the Board so chooses as a matter of policy, which can be included in the policy or as a separate document referenced therein, with approval by the Select Board to cover the administrative costs. Please note that G.L. c.40, §22F, if accepted, authorizes any municipal board or officer "empowered to issue a license, permit, certificate, or to render a service or perform work for a person or class of persons," to establish fees for any board or officer that is appointed by an elected board, however, the appointing board must vote to approve the fees. Town Counsel understands that the Town has previously accepted this provision, but you may wish to confirm with the Town Clerk that the Town has accepted Section 22F. As in the case of any fee setting, the fee set by a board of officer pursuant to §22F must be "reasonable," in order to not become an impermissible tax. Therefore, Section 22F cannot and does not authorize the imposition of fees that exceed the amount necessary to compensate the Town for providing the services for its expenses.

As noted above, to the meaning of the term "reasonable" in the context of local fees, the Supreme Judicial Court in Emerson College v. The City of Boston, 391 Mass. 415 (1984), established a three-part test to determine whether fees charged by municipalities would be lawful. If a fee imposed by the Town does not meet all three of the criteria, it is subject to challenge as being unreasonable charge. As such, as noted in the above comments, any fee set for the use of the Property must therefore meet Emerson College standards of reasonableness.

With respect to your questions regarding differentiating between the Town collecting user fees and the Property Manager collecting user fees, in our opinion, the terms of Section 1.2.6 of the Contract (defined below) control. Programmatic activities may be planned by the Property Manager and/or the Town and "The cost of programmatic events planned with the Town, if any, shall be allocated by mutual agreement of the parties." In our further opinion, the allocation of fees collected would depend on costs associated with the use and which parties

incur such costs. Further, by mutual agreement of the parties, either the Town or the Property Manager could collect and process the fees and then account for them in a manner consistent with the agreement regarding the allocation of fees. The limitation in the last paragraph of Section 3.1.1 of the Contract requiring that "Camp Sewataro, LLC shall be the only entity to receive revenues and receipts and to pay expenses in any way related to the camp and the Property and that no individual, natural person or other legal entity shall be utilized to receive revenues or to pay expenses in any way related to the Property" is intended to prevent the Property Manager from utilizing multiple legal entities to act in a way to frustrate the intent of the Contract with respect to the Management Fee as set forth in Article 3. In the event that a mutual agreement regarding programmatic events would result in a conflict with respect to this clause, such language could be modified as an amendment to the Contract.

8. How should the permitting authority be defined in the Policy Document for Sewataro?

In our opinion, the Town may consider using the following language to define the permitting authority in the policy document: "Users shall obtain all necessary permits for Town activities, as required by law or Town bylaws, rules or regulations."

Part III, Section 5(b) of the Town Charter provides "The [Select Board] shall be the chief policy making board of the town and shall act by the issuance of policy statements and guidelines to be followed and implemented by all town agencies serving under the board." Section 11(g) states that the Town Manager is "to be responsible for the efficient use, maintenance and repair of all town facilities, except those under the jurisdiction of the school committee." In our opinion, the Select Board has the authority to establish policies with respect to the use of the Sewataro property, including establishing the Town Manager as the permitting authority.

With respect to your question regarding requiring Town Manager permission to allow use of the property by "for-profit, religious, or lobbying purposes", such determinations are policy decisions, however, consistency should be maintained throughout the policy with respect to any specific requirements such as 501(c)(3) corporations, as addressed above.

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

In our 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 our understanding that Sewataro presently has four 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 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 our 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.

10. 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 our 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 our 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 our 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 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 our 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.

Notably, however, the MTCA does not protect a Town from the negligent maintenance of public property. G.L. c. 258, §10(j)(3). A Town is not, however, required to maintain public property in ways 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, §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. Town Counsel recommends 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.

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

In our opinion, as noted in the fee analysis above, 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. The three-party analysis contained in Emerson is referenced above. Thus, in our 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. 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.

12. 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 our 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 our 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.

13. Can the Select Board modify or add anything new to the contract (extension), or would changes beyond what is already in the original contract/amendments require a need for a new bid/RFP process?

In our opinion, the analysis as to whether modifications (amendments) to the current contract would require a new bid/RFP process will depend on the particular proposed modification and whether it is consistent with the Request for Proposals for Management of Camp Sewataro dated July 24, 2019 (the "RFP"). The guiding principle is whether the subject of the modification is within or outside of the "four corners" of the RFP and whether the modification would create a competitive disadvantage to a party responding to the RFP. For example, as was set forth in the RFP, the current contract term is for three years and the Town has the option at its sole discretion to extend the agreement for two additional five year terms. In our opinion, the Town could extend the current contract by one year rather than five, assuming the other party to the contract agrees to do so (i.e. by mutual agreement). However, if there is a subsequent extension, it is our opinion that the term could not be for more than 4 years so as to remain consistent with the five year extension term specified in the RFP. In contrast, if the Town sought to extend the contract term beyond the two additional five-year terms, a new request for proposals would be necessary.

As always, please contact us with any questions.