

Boston

Kopelman and Paige P.C.

Northampton

31 St. James Avenue

Boston, MA 02116

Worcester

(617)556-0007 / (617)654-1735 - fax

Pittsfield

THIS DOCUMENT IS CONFIDENTIAL**FAX TRANSMITTAL COVER SHEET**Date: November 18, 2004 Number of Pages Including Cover: 3Account Code: 0037 Original Will Follow: Yes X No This Fax was Sent By: Kathleen M. O'Donnell, Esq. Operator Initials: **PLEASE DELIVER TO:**

Name

Fax Number

Alan Agnelli, Town Administrator978-368-8486**COMMENTS OR INSTRUCTION:**

PLEASE CONTACT SENDER AT (617)654-1754 IF YOU HAVE NOT RECEIVED THE NUMBER OF PAGES
NOTED ABOVE OR IF THERE ARE ANY PROBLEMS WITH THIS TRANSMISSION

11/18/2004 20:35 FAX 617 654 1735

KOPELMAN AND PAIGE

002

LEONARD KOPELMAN
DONALD G. PAIGE
ELIZABETH A. LANE
JOYCE FRANK
JOHN W. GIORGIO
BARBARA J. SAINT ANDRE
JOEL B. BARD
JOSEPH L. TEHAN, JR.
THERESA M. DOWDY
DEBORAH A. ELIASON
RICHARD BOWEN
DAVID J. DONESKI
JUDITH C. CUTLER
KATHLEEN E. CONNOLLY
DAVID C. JENKINS
MARK R. REICH
BRIAN W. RILEY
DARRIN R. KLEIN
JONATHAN M. SILVERSTEIN
ANNE-MARIE HYLAND
JASON R. TALERMAN
GEORGE X. PUCCI

EDWARD M. REILLY
DIRECTOR WESTERN OFFICE

KOPELMAN AND PAIGE, P. C.

ATTORNEYS AT LAW

31 ST. JAMES AVENUE

BOSTON, MASSACHUSETTS 02116-4102

(617) 588-8007

FAX (617) 654-1735

PITTSFIELD OFFICE

(413) 443-6100

NORTHAMPTON OFFICE

(413) 585-8632

WORCESTER OFFICE

(508) 752-0205

WILLIAM HEWIS III
JEANNIE S. MCKNIGHT
KATHLEEN M. O'DONNELL
PATRICIA A. CANTOR
THOMAS F. LANE, JR.
MARY L. GIORGIO
THOMAS W. MCENANEY
KATHARIN GOREE DOYLE
LAUREN F. GOLDBERG
ALEX FREY A. HONIG
MICHAEL E. RANDAZZO
GREGG J. CORBO
RICHARD T. HOLLAND
ELIZABETH R. CORBO
MARIA C. ROTA
JACKI S. MARSH
JOHN J. GOLDBROSEN
CHRISTINE EVERETT
BRIAN E. GLENNON, II
JONATHAN D. BICHMAN
JOSEPH S. FAIR
LAURA H. PAWLE
CAROLYN M. MURRAY
JACKIE COWIN
SARAH N. TURNER
JEFFREY T. BLAKE
ERIC SLAGLE

November 18, 2004

BY FACSIMILE - (978) 368-8486

Hon. Joanne C. Foster and
Members of the Board of Selectmen
Lancaster Town Hall
P.O. Box 293
Lancaster, MA 01523

Re: Town Green Buildings - Land Use Restriction

Dear Members of the Board of Selectmen:

You have asked us to review certain materials assembled by the Town Green Buildings Advisory Committee ("Committee") in connection with its review of future uses for the Memorial School/Tercentenary Building and the Prescott Building ("Town Buildings"). You have specifically asked us if there are any restrictions that might affect re-use or development of the Town Buildings. You have also asked for advice on how the Town might best determine the exact property lines for the land on which the Town Buildings are located.

We have been provided with a copy of the will of Pauline Thayer. Under this first codicil to this will, the Town was given the 18.9 acres of land (the "Thayer Land") originally leased to the Nathaniel Thayer Playground Assoc. by lease dated December 19, 1912 "to be used by the said town for the purposes of providing a proper and adequate recreation and playground center for the inhabitants of the Town of Lancaster". I understand that your surveyor, David Ross, has determined that a portion of the Memorial Building sits the Thayer Land. I also understand that Mr. Ross's research indicates that the rest of the land under the Town Buildings was acquired by several deeds, none of which contain restrictions on the use.

On the assumption that the restriction was created upon the death of Mrs. Thayer in 1934, under G.L. c. 184 § 28, the restriction itself would be unenforceable after 1984. Section 28 states

KOPELMAN AND PAIGE, P.C.

Hon. Joanne C. Foster and
Members of the Board of Selectmen
November 18, 2004
Page 2

that "no restriction imposed before January 1, 1962 shall be enforceable after the expiration of fifty years from its imposition unless a notice of restriction is recorded before the expiration of such fifty years or before January 1, 1964, whichever is later subject to certain conditions. The materials you have provided do not indicate that an extension of the restriction was recorded.

Notwithstanding the provisions of this Section, the recreational use is permanently protected under Article 97 of the Massachusetts Constitution.

Article 97 created a constitutionally mandated protection for land acquired for open space, conservation, and recreation purposes. Specifically, Article 97 provides as follows:

Article XCVII. Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof: - The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

As interpreted by the courts, Article 97 prohibits the change in use of any land acquired for conservation, open space, and recreational purposes to any other use without following the procedures set forth in Article 97, including a two-thirds vote of both houses of the legislature.

Once Article 97 became law in 1972, it applied to all land acquired and held for recreation purposes. In my opinion the Thayer Land became subject to the protections of Article 97 in 1972.

In the event that the Committee recommends a change in the recreational use of the Thayer Land, the municipal body that holds custody of the Thayer Land, which I assume is the Recreation Commission, must vote to declare that the Thayer Land is no longer needed for

KOPELMAN AND PAIGE, P.C.

Hon. Joanne C. Foster and
Members of the Board of Selectmen
November 18, 2004
Page 3

recreational purposes. Town Meeting must then vote, by a two-thirds majority, to transfer custody to the Board of Selectmen for the new municipal purpose, which might include purposes of sale. Because of the protections afforded by Article 97, the change in use also requires the approval, again by a two-thirds vote, of both houses of the legislature.

In answer to your question on professional services necessary to make the determination of the exact property lines for the land on which the Town Buildings and the Town Hall are located, in my opinion, this determination should be made by a professional land surveyor.

I understand that the Town's ownership of the land under the Town Buildings was acquired through several deeds and under the will of Pauline Thayer. However, as with any property owner, these various parcels are now merged into one, albeit in the Town's case, held by different "custodians".

In my opinion, the question of the property description could be approached in the same fashion as the boundary line agreement with First Church. I recommend that a surveyor be engaged to prepare a plan of all of the Town's property on Main Street and that the property be divided into "lots" designated as "Town Hall", "Library", "Town Green", "Tercentenary Building", and "Memorial School".

The next step would be to make a determination of the custody of the various lots. To the extent that custody is held by municipal bodies other than the Board of Selectmen, these custodians should be contacted to begin the process for voting their particular parcel as "surplus". These votes would be done in anticipation of a transfer of custody by Town Meeting. The Town should also begin the process for release of the Article 97 protection of the recreational use for the Thayer Land.

If the Committee decides to sell any of the lots, a recordable plan would be necessary. Authorization to sell the newly created lot must be obtained from Town Meeting. Please keep in mind however that the legislature will more than likely require the Town to provide an adequate substitute for the lost recreational land.

KOPELMAN AND PAIGE, P.C.

Hon. Joanne C. Foster and
Members of the Board of Selectmen
November 18, 2004
Page 4

If you have any further questions regarding the issues regarding the potential re-use of the
Town Buildings, please do not hesitate to contact me.

Very truly yours,



Kathleen M. O'Donnell

KO'D/jmb

236927/LANC/0001