



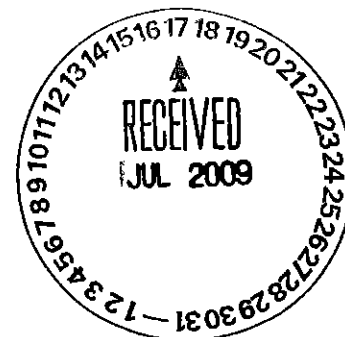
KOPELMAN AND PAIGE, P.C.
The Leader in Municipal Law

101 Arch Street
Boston, MA 02110
T: 617.556.0007
F: 617.654.1735
www.k-plaw.com

July 16, 2009

Jeanne S. McKnight
jmcknight@k-plaw.com

Hon. Bruce Sauvageau and
Members of the Board of Selectmen
Wareham Town Hall
54 Marion Road
Wareham, MA 02571



Re: Lease of Westfield Site to Developer for Assisted Living/Affordable Housing

Dear Members of the Board of Selectmen:

You have requested an opinion as to the purpose for which the so-called Westfield Site may be used, and the process by which the Board of Selectmen may be authorized to lease the Westfield Site to a developer of an assisted living/affordable housing facility for up to 99 years. The Westfield Site consists of 18.5 acres ("the Westfield Site") and is a portion of a 72.52-acre parcel of land ("the Westfield Property") taken by eminent domain by the Town in 1977

In my opinion, as explained below, since the Westfield Property, including the Westfield Site, was acquired for general municipal purposes and not for any particular purpose, it is not restricted from being used or leased for assisted living/affordable housing purposes. In my further opinion, the process by which the Board of Selectmen may be authorized to lease the land for the purpose described above, should include a two-thirds vote of the Town Meeting under G.L. c.40, §15A and G.L. c.40, §§3 and 4.

The Westfield Site May be Used or Leased for Assisted Living/Affordable Housing

I reviewed the vote under Article 10 of the June 30, 1977 Special Town Meeting authorizing the Board of Selectmen to acquire by gift, purchase, eminent domain or otherwise four parcels of land "for municipal purposes." I reviewed two orders of taking, one dated August 9, 1977, recorded with the Plymouth County Registry of Deeds in Book 4314, Page 191, taking a parcel of 15.5 acres, and the second dated August 30, 1977, recorded with said Deeds in Book 4323, Page 111, confirming the taking of the 15.5-acre parcel (Parcel 4 in the second taking), and also taking parcels 1, 2 and 3, by which the Board of Selectmen purported to acquire these parcels for specific municipal purposes not mentioned in the Town Meeting vote, that is, "school or municipal buildings, and/or recreational, playground and park purposes." It may be that these purposes were added in light of case law providing that a municipality cannot validly take land by eminent domain for general municipal purposes. *Byfield v. Newton*, 247 Mass 46 (1923). Any irregularity or *ultra vires* act by the Board of Selectmen in purporting to take the land for the specified purposes, however, did not effect the valid acquisition of this land pursuant to the Town Meeting vote, in my opinion, because of the earlier receipt and recording of a deed of gift of these four parcels from Campanelli, Inc., against whom the second taking had been made, dated May 12, 1977, recorded with said Deeds

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in Book 4314, Page 189. The deed from Campanelli, Inc., does not state a purpose for which the land was acquired, and there was apparently no "acceptance" instrument signed by a Town board stating a specific purpose. Based on these facts, it is my opinion that the Westfield Property was acquired for general municipal purposes, as specified in the Town Meeting vote. As such, it is my opinion that the Westfield Site may be leased and used as now proposed, assuming that the necessary procedural steps are taken to authorize a transfer of the land from general municipal purposes to the purpose of leasing for affordable housing.

Process for Authorizing Transfer for a New Use

An argument can be made, however, based on the orders of taking, that the Westfield Property was acquired not for general municipal purposes but for several specific municipal purposes, those being school or municipal buildings, and/or recreational, playground and park purposes. For this reason, I recommend that a warrant article be presented to Town Meeting to transfer the Westfield Site from the Board of Selectmen for the purpose for which it is currently held, to the Board of Selectmen for the purpose of leasing, pursuant to G.L. c.40, §15A. The article should also include language authorizing the Board of Selectmen to lease the Westfield Site for up to 99 years and on such other terms, conditions and restrictions as the Selectmen deem appropriate, which may include the reservation of an affordable housing restriction and other restrictions. A further step is required under G.L. c.40, §15A; that is, the Board of Selectmen must determine that the Westfield Site is no longer needed for the purpose(s) for which the land was acquired; this vote may be taken before or after the Town Meeting vote. Harris v. Wayland, 392 Mass. 237 (1984).

While it is my opinion that the Westfield Property was acquired for general municipal purposes and is presently held by the Board of Selectmen for any municipal purpose, I recommend that such a two-thirds "transfer" vote be sought under G.L. c.40, §15A (which applies to land held for a specific purpose) to transfer the land from the Board of Selectmen for the purpose for which it is currently held, to the Board of Selectmen for the purpose of leasing, as well as a vote under G.L. c.40, §§3 and 4 to authorize the Selectmen to enter into a 99-year lease. An argument can be made, however, that a "transfer" vote is not needed and a majority vote under G.L. c.40, §§3 and 4 will suffice, because the land is not held for a specific purpose.

Article 97 does not apply to the Use of the Westfield Site

In my letter to the Town dated September 20, 2004, I addressed whether the Westfield Property was subject to restrictions under Article 97 of the Massachusetts Constitution. In that opinion, I concluded that the property was not so restricted. As further explained below, my opinion on the question has not changed.

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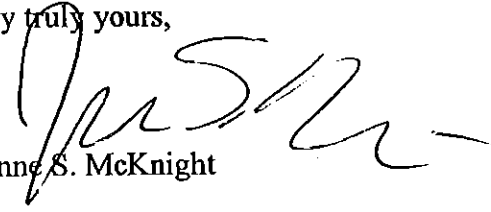
Whether the Westfield Property was acquired for general municipal purposes or for the several municipal purposes of school or municipal buildings, and/or recreational, playground and park purposes, it is my opinion that the Westfield Property was not acquired for a specific purpose protected by Article 97. If Article 97 did apply to this land, any transfer would not be effective and the land could not be leased until approval of each branch of the Massachusetts legislature were obtained by a two-thirds roll-call vote. Obviously, if the Westfield Property was acquired for general municipal purposes, it was not acquired for the type of specific purposes that are protected under Article 97, such as conservation of land and water, and the like, or even, as interpreted by the Attorney General in his 1973 opinion on the scope of Article 97, outdoor recreation.

Even if one could argue that the Westfield Property was acquired for several specific purposes, in my opinion, at the time of its acquisition, no particular portion of the Westfield Property was acquired for a specific purpose protected under Article 97 and, in my opinion, in these circumstances, Article 97 does not apply to any portion of the land. Furthermore, even if it could be argued that the portion of the Westfield Property later developed and used for playground or park purposes has, by a combination of the taking for playground and park purposes among other purposes and later development for playground or park purposes, become protected under Article 97, it is my understanding that the Westfield Site has not been developed for any specific purpose and remains vacant. Therefore, it is my opinion that the specific area proposed to be developed for assisted living and affordable housing, the Westfield Site, is not subject to Article 97.

Please note that this letter does not address zoning issues regarding the use of the Westfield Site; nor does it address title issues. Those issues will be addressed in separate opinions.

If you have further questions regarding this matter, do not hesitate to contact me.

Very truly yours,


Jeanne S. McKnight

JSM/smm

cc: Interim Town Administrator (by e-mail)
Richard Heaton, H&H Associates, LLP (by e-mail)