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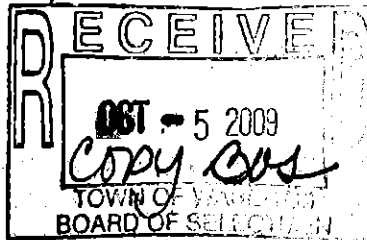
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October 2, 2009

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

Re: Town Meeting Vote to Authorize Selectmen to Lease [REDACTED]

Dear Members of the Board of Selectmen:

You have requested an opinion as to the nature of the vote required, and the quantum of vote required, to authorize the Board of Selectmen to lease the Westfield Site (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 and is a portion of a 72.52-acre parcel of land (the "Westfield Property") acquired 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, since the Westfield Property, including the Westfield Site, was acquired for general municipal purposes, a majority vote under G.L. c.40, §§3 and 4, in my opinion, is the only Town Meeting vote that is required to authorize the Board of Selectmen to lease the Westfield Site. In my opinion letter dated July 16, 2009, I advised a cautious and conservative approach of obtaining a two-thirds vote that would be free from challenge. In my opinion, however, the facts support the conclusion that the entire Westfield Property was acquired for general municipal purposes and thus a two-thirds "transfer" vote is not required under G.L. c.40, §15A.

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

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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. This conclusion is based on 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 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. Furthermore, because the Westfield Site is not proposed to be conveyed in fee, in my opinion G.L. c.40, §15 (which requires a two-thirds vote to authorize the conveyance of land acquired by eminent domain) does not apply to the proposed leasing of the Westfield Site.

The orders of taking may make it appear 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. In my opinion, however, even if the Westfield Property was acquired for several municipal purposes, no portion of the Westfield Property was acquired for one specific purpose. Furthermore, acquisition for "municipal buildings" is so broad as to indicate acquisition for general municipal purposes. Thus, it is my opinion that a warrant article 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, is not needed. The article should merely 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.

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 previously recommended 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. This recommendation was made so that no argument could be made later that such a vote should have been obtained. However, it is possible that the developer may seek a two-thirds vote to have the extra insurance and avoid any possibility of challenge.

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

Very truly yours,


Jeanne S. McKnight 

JSM/PAC/kjg

cc: Interim Town Administrator (by electronic mail - administration@wareham.ma.us)
383964/WARH/0289