

August 12, 2009

**BY HAND DELIVERY**

Scarborough Town Council  
Scarborough Municipal Building  
PO Box 360  
Scarborough, ME 04070-0360

Re: Land Exchange Between Town of Scarborough and Trumans; Orders No.  
09-88, 09-89, 09-90 and 09-91/Request for Reconsideration

Dear Chair and Members of the Scarborough Town Council:

This letter is written on behalf of the Save Old Depot Street Association, and on behalf of Scarborough residents and/or taxpayers Robert and Pammela Rovner, Suzanne Richard Rousseau, Gaston Lee, Paul Kirby, George Pulkkinen, Judy Shirk, Lily Serrecchia, Joe Tedeschi, Christine Provencher, John and Carol Barrett, Dianne McLellan, Joe DeGrinney and Don Cote.

Our clients support the Scarborough Town Council's reconsideration of the four orders (09-88, 09-89, 09-90, and 09-91) it approved on July 15, 2009 to effect a discontinuance and exchange of a 49.5 ft. wide portion of the paved Pine Point Road (formerly "Depot Street," the "49.5-foot wide road") for an approximately 21 ft. wide strip of abutting private land as described in the Trumans' deed at Book 4969, Page 313 of the Cumberland County Registry of Deeds ("the 21-foot wide strip"), and request that the Council reverse its approval of those orders. Reconsideration appears to be the only way that the concerns of the Save Old Depot Street Association can be addressed, since Section 901 of the Town Charter limits the referendum process to ordinances, and to orders or resolves that either appropriate or authorize borrowing of \$100,000 or more for capital expenditures, and these orders for a discontinuance and land exchange are not within any of these categories.

**Legal Considerations**

It is appropriate that the Council reconsider and reverse its approval of the discontinuance and land exchange, not only because the exchange will restrict the public's current year-round access to Pine Point Beach via Pine Point Road and because

DOUGLAS S. CARR  
PHILIP C. HUNT  
JOHN S. UPTON  
PEGGY L. McGEHEE  
MELISSA HANLEY MURPHY  
JOHN A. CIRALDO  
JOHN A. HOBSON  
JAMES N. KATSIARICAS  
TIMOTHY P. BENOIT  
J. GORDON SCANNELL, JR.  
FRED W. BOPP III  
MARK P. SNOW  
WILLIAM J. SHELS  
DAVID B. McCONNELL  
PAUL D. PIETROPAOLI  
HOPE CREAL JACOBSEN  
RANDY J. CRESWELL  
JENNIFER H. PINCUS  
DAWN M. HARMON  
CHRISTOPHER M. DARGE  
ANTHONY J. MANHART  
STEPHANIE A. WILLIAMS  
PETER J. McDONELL  
KEITH J. DUNLAP  
SARA N. MOPPIN  
  
**OF COUNSEL**  
THOMAS SCHULTEN  
OWEN W. WELLS  
ANDREW A. CADOT  
JULIANNE C. RAY

it is inconsistent with the Town's Comprehensive Plan,<sup>1</sup> but also because it is legally invalid.

**Two fatal legal flaws render the July 15 votes invalid:**

**1.) The Town failed to provide the required statutory notice to discontinue the public easement, which must be provided when a municipality also intends to discontinue the public easement as part of its order of discontinuance of the road; this notice requirement is separate from and in addition to the required notice to discontinue the town way:**

The Council's discontinuance process did not comply with the notice requirements of State statute in Title 23 M.R.S.A. § 3026. Under Section 3026, upon the discontinuance of a town way, a public easement automatically is retained in that road unless the municipality states otherwise in its order of discontinuance -- that no public easement will remain after the road discontinuance. If it intends to also discontinue the public easement, the municipality must state this in the statutorily required notice it sends to abutters and to the municipal planning department.<sup>2</sup> However, on June 12, 2009, the Town Attorney sent to the Town Planner only a notice to discontinue the town way over the 49.5-foot wide road -- it did not state that "no public easement shall remain in said town way after its discontinuance,"<sup>3</sup> although the Order of Discontinuance adopted by the Town Council states this.

Thus, the Section 3026 Notice of Discontinuance sent by the Town on June 12, 2009 fails to comply with this separate Section 3026 notice requirement, as it does not mention that the Order of Discontinuance of the road also includes a provision to discontinue the public easement. As a result of the Town's failure to provide such statutorily required Notice to Discontinue the Public Easement, a substantial number of Scarborough residents, including a number of our clients, were not even aware that the Council intended to discontinue the public easement until after the June 17 Council meeting. They were thus deprived of an opportunity to be heard on the issue. Having failed to provide the required statutory notice of discontinuance of the public easement to

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<sup>1</sup> As to these concerns, this letter incorporates by reference all the arguments made to the Council in Perkins, Thompson's letter to the Council dated June 17, 2009 on behalf of the Sand Dollar Inn.

<sup>2</sup> Section 3026 (1) provides that "A municipality may discontinue a town way or public easement after the municipal officers have given best practicable notice to all abutting property owners and the municipal planning board or office . . . ." Section 3026 (2) states that such notice "means, at minimum, the mailing by United States Postal Service, postage prepaid, first class" of such notice.

<sup>3</sup> The public easement discontinuance provision in the Order of Discontinuance states in full: "FURTHER ORDERED, that no public easement shall remain in said town way after its discontinuance and that all remaining interests of the municipality shall pass as per the deeds described in Town Council Orders 09-88, 09-89 and 09-90." Only one Notice to Discontinue was sent by the Town to its Planning office, which was the June 12, 2009 Notice to Discontinue the Road, a copy of which is attached, and that notice made no mention of discontinuance of the public easement.

the public, the discontinuance order adopted by the Council is invalid and likely is not effective with regard to the public and its interest in the way.<sup>4</sup>

**2.) The value of the 21-foot wide strip traded to the Town is substantially less than the value of the 49.5-foot wide road, and thus the trade is invalid on the grounds of inadequate consideration:**

The 21-foot wide strip is worth substantially less than the 49.5-foot wide road, rendering the Town's exchange a prohibited "waste" of public resources and an abuse of discretion. Using the Lighthouse Motel's assessment records, the value of the 49.5-foot wide road given by the Town to the Motel provides a net gain to the Trumans of \$342,777.<sup>5</sup>

The law typically requires that when a municipality exchanges its property for the property of a private party, there must be "substantial equivalency between what the municipality is giving up and what it is receiving." *Am. Jur.2d*, Municipal Corporations, Section 508 ("Exchange of Property"). "A municipality must obtain substantial or valuable consideration in order for a transfer of its property to constitute a bona fide sale. . .". *Id.* at Section 509 ("Adequacy of Consideration"). Taxpayers have legal standing to challenge in court the wrongful disposition of public properties by municipalities. *See Am. Jur.2d*, Taxpayers' Actions, Section 29 ("Wrongful Disposition of Public Properties"), which states that, as a general rule, courts will enjoin or rescind the wrongful conveyance of municipal property upon suit by a taxpayer, on the theory that taxpayers are the equitable owners of the public property and such property is held in trust for them by public officials.

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<sup>4</sup> This is consistent with the Law Court's holding as to the notice requirement in the companion statute, 23 M.R.S.A. §3024, which requires additional notice following the vote to discontinue a town way. Under Section 3024, owners of record and abutting landowners must be given 1) actual notice of the approved discontinuance, or 2) the municipality must record a deed or certificate in the registry of deeds describing the property and stating the final action of the municipality. In *Earwood v. Town of York*, the Law Court found the Town of York had violated §3024 for 1.7 miles of discontinuance of Bell Marsh Road. 1999 ME 3, 722 A.2d 865, 867 (1999). Although the Town had issued an Order of Discontinuance pursuant to 23 M.R.S.A. §3026 and held a public hearing about the proposed discontinuance, it did not provide actual notice to some rural owners whose property abutted the road, nor did it file a certificate with the registry of deed. *Id.* at 866-67. The Court's ruling demonstrates that the notice requirements must be complied with for a discontinuance order to be valid, whether the notice requirement is a Section 3024 notice provided **after** a Council vote of discontinuance, or a Section 3026 notice provided **prior to** the Council vote of discontinuance.

<sup>5</sup> The four Orders approved by the Council at its July 15 meeting, Nos. 09-88, 09-89, 09-90 and 09-91, convey 19,831 square feet of the Town's land to the Trumans while the Town receives 13,044 square feet from the Trumans - they have the effect of increasing the area of the Trumans' property by 6,787 sq. ft. (more than 1/8th of an acre) by transferring what currently is public land to the abutter's private ownership. However, using the Lighthouse Motel's current tax assessment for its land only (in the amount of \$2.2 million per acre) yields a value of \$342,777 for the extra 6,787 sq. ft. to be conveyed by the Town to the Trumans. The Town apparently has not performed an appraisal of the exchanged parcels' values.

Courts have long applied these legal principles. Some examples are:

- In the Colorado case of *Tamblyn v. City and County of Denver*, 118 Colo. 191, 194 P.2d 299 (1948), taxpayers sued the city and county alleging that the sale of a public square for approximately half its market value was wasteful and a gross abuse of discretion. The Colorado Court confirmed the taxpayers' right to sue, stating that, "If the property [exchanged by the municipality] greatly exceeds in value the contract price . . . it follows that the officers of the city . . . have abused their discretion . . . ." *Id.* at 195-96.
- In the New York case of *Grand Realty Co. v. City of White Plains*, 510 N.Y.S.2d 172, 125 A.D. 639 (1986), the New York court held that the plaintiff's lawsuit to prevent the sale by the city of land to a developer on the grounds that "consideration received for the parcels was grossly disproportionate to their fair market value" was "sufficient to state a cause of action."
- In the Pennsylvania case of *Heilig Bros. Co. v. Kohler*, 366 Pa. 72, 76 A.2d 613, *rev'd on other grds*, 63 York L.Rev. 69 (1950), the Pennsylvania Court upheld a taxpayer challenge to a sale and conveyance of real estate that the city had negotiated partly in secret, and without determining if a higher offer was firm, on the grounds of inadequate consideration, and held the conveyance null and void.

In Maine, the Law Court has upheld taxpayer actions to challenge municipal contracts that provided inadequate consideration. In the case of *Tuscan v. Smith*, 130 Me. 36 (1931), the Law Court held that 10 Skowhegan taxpayers had standing to challenge the city's conveyance of a lease in a municipal building where the consideration, in the form of payment in services instead of money, was inadequate, and there were conflicts of interest. The Court stated that there was no substantial reason why the suit "by or on behalf of individual taxpayers should not be entertained to prevent the misuse of [municipal] corporate powers" and it quoted with approval the United State Supreme Court's statement that "Contracts made in violation of [municipal] duties are against public policy, are unenforceable, and will be cancelled by a court of equity". *Id.* at pp. 43-44.

In the more recent Maine case of *Lehigh v. Pittston*, 456 A.2d 355 (Me. 1985), the Law Court held that taxpayers had standing to challenge the city's conveyance to a corporation of an option to purchase its airport, and declared the option null and void. Further, in 2007, the Law Court held in *Mason v. City of Augusta*, 2007 ME 101, 927 A.2d 1146 that a city contract to sell property that had been approved by the city council, was saved from being held illegal because the contract sales price was going to be adjusted according to a future appraisal.

There is such a clear and substantial difference in value between the 49.5-foot wide road and the 21-foot wide strip as to render the conveyance an abuse of discretion and waste of public resources, and taxpayers in Maine have standing to raise the issue in court.

### Policy Considerations

There are several policy considerations that strongly favor reconsideration of these orders.

As we previously had written to the Council, the discontinuance of Pine Point Road without retention of public easement and its exchange to create a narrower access to the beach is inconsistent with Maine's Growth Management Act and with the Town's Comprehensive Plan. The Council's actions do not **"maintain and protect public access"** to the beach as the Town's Comprehensive Plan directs. The Council's discontinuance and exchange trades a 49.5 foot wide, year-round, paved access road for a 21-foot wide strip that will not be accessible year-round, as the Town Manager noted in a meeting with some of our clients. Moreover, the proposed deed restrictions (and proposed parking configuration) will not prevent vehicles parked at the Lighthouse Motel from blocking the public's view of the beach. The Council's actions eliminate both visual and physical access from a public area, Pine Point Road, to the water.

Some Town Councilors asserted there is a safety problem in the use of vehicles on this road that requires the new access, but they have not presented any support for this assertion. Indeed, police, fire and rescue have used Pine Point Road as an access to the beach to protect public safety, so that its discontinuance and the proposed new access may create a public safety problem. Moreover, by memorandum dated June 17, 2009 to the Town Manager, Town Fire Chief B. Michael Thurlow stated that "Even though the [Fire] department would likely not access the beach from Depot Street, I believe it would be very important to maintain a fire lane for access as close to the beach as possible in any design plans that are being considered for this area." The Town also has pointed to the need to obtain land to add to existing Town land (Tax Map 22, Lot 109, obtained from the Beach walk subdivision) for a turnaround, but the Scarborough Chapter 306 standards for a fire lane call for a minimum 20-foot wide designated unobstructed passageway with a minimum 50-foot outside turning radius, which cannot be provided within the 21-foot wide strip.

Moreover, the result of this land exchange is that the Lighthouse Motel now likely has redevelopment opportunities that previously were not available to this already non-conforming operation – redevelopment opportunities that could negatively impact the neighborhood. At the very least, the Council would be wise to examine the Trumans' redevelopment plans before facilitating those plans through a land exchange.

To the extent that encouragement of commercial growth in Scarborough is the impetus for Council action here, the Council is picking economic winners and losers -- enhancing the value and parking of the Lighthouse Motel while diminishing the value and physical and visual access to the beach of the Sand Dollar Inn and other area businesses that rely on Pine Point Road for access. This land exchange also diminishes the value of properties owned by neighboring residential property owners, who rely on Pine Point Road for visual and physical access to the beach.

Finally, there is in all of this a process issue. The Town Council had established a committee of property owners and Town staff and had hired a facilitator to address issues in this area. The Committee had barely completed its first tasks -- the road reconstruction between East Grand Avenue and Pine Point Road/Depot Street and open space design -- and was prepared to address Pine Point Road/Depot Street, when the Town Manager began direct discussions with the Trumans. As early as December 2008, the Sand Dollar Inn Owners met with the Town Manager to express their concerns regarding a potential land exchange with the Trumans. He assured them that he would include them if there were any discussions of such negotiations. This did not happen. In late spring, upon hearing rumors that land exchange discussions were occurring, they again contacted the Town Manager, who told them they would be involved at the appropriate time. They were not. In late March, 2009, Pine Point landowners who heard rumors of these discussions were told by the Town Manager that they would be involved. They were not. Despite apologies from the Town Manager for not including them, what resulted was a fait accompli -- a plan issued on June 12 and presented to the Council on June 17 which was prepared by the Town and the Trumans without the involvement of directly-affected Pine Point landowners and in disregard of a facilitated process intended to resolve the access issues.

### Conclusion

We ask that the Council consider the legal issues of inadequate consideration in the land trade and lack of compliance with the notice requirements of Section 3026<sup>6</sup> and the policy concerns stated above, and (1) reconsider its July 15, 2009 vote approving these four orders, and then (2) reverse its previous vote by voting to deny all four orders.

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<sup>6</sup> There are other legal flaws in the process that are of concern. Of particular concern is the fact that part of the discontinuance process was held in executive session, the effect of which was to preclude the public, including our clients, from having an adequate opportunity to provide informed testimony at the hearing--as they were not privy to the discussions in that May 2009 executive session with the abutter where the land swap, including the discontinuance, apparently was discussed out of the public's hearing. Also, the Council failed to make findings of the necessity for road discontinuance, findings that are prerequisite to a discontinuance. See *Lewiston Urban Renewal Authority v. City of Lewiston*, 349 A.2d 763, 766 (Me. 1976), and *Brown v. Warchalowski*, 471 A.2d 1026, 1032 (Me. 1984). Similarly, the Council also failed to make findings in support of a presumption of abandonment under 23 M.R.S.A. § 3028.

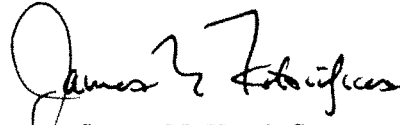
Further, the history of Pine Point Road (formerly Depot Street) provided to the Council by historian Robert Baizley indicates that there may have been funding for the road provided by a federal agency some years past, which may prevent the Town, in having accepted those funds, from conveying out its interest or discontinuing the road, without the federal agency's prior approval. See *Lehigh v. Pittston*, 456 A.2d 355 (Me. 1985) (conveyance of airport to private party prohibited by agreements with Federal Aviation Agency, which had helped to fund the airport). The Town should review any Pine Point Road/Depot Street funding agreement with county, state and federal agencies to ensure that discontinuance does not violate any such agreements, and also should conduct a through title search regarding this way to determine if it is encumbered by State and/or county rights and obligations.

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Thank you for your consideration.

Sincerely,

  
Peggy L. McGehee

  
James N. Katsiaficas

cc: Christopher Vaniotis, Esq.

K:/Rovner/2009-08-12 PT to Town Council

**BERNSTEIN SHUR**  

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**COUNSELORS AT LAW**

207 623-1596 main  
207 626-0200 facsimile  
bernsteinshur.com

146 Capitol Street  
PO Box 5057  
Augusta, ME 04332-5057

June 12, 2009

Mr. Dan Bacon  
Planning Department  
Town of Scarborough  
259 US Route 1, PO Box 360  
Scarborough, Maine 04070-0360

Re: Notice of proposed discontinuance of town way

Dear Mr. Bacon:

I am writing on behalf of the municipal officers of the Town of Scarborough to give you notice of their intention to meet on Wednesday, June 17, 2009 at 7:00 p.m. at the Scarborough Town Offices, 259 US Route 1, to consider Town Council Oder No. 09-91, which states as follows:

Act to discontinue all of that portion of the town way accepted on March 28, 1872 and depicted as "Town Road" on a plan entitled "Plan of Pine Point, Scarborough, Me." recorded in the Cumberland County Registry of Deeds at Plan Book 6, Page 36, formerly known as Depot Street and renamed Pine Point Road in 1976, which lies southeasterly of the intersection of King Street and Pine Point Road, with the westerly boundary line of that portion of Pine Point Road to be discontinued being defined by the turning of an approximate 49.5 ft radius, with the radius point on the pin at the intersection of the northeasterly sideline of Pine Point Road and the northwesterly sideline of King Street, from the southeasterly sideline of Pine Point Road to the extension and on the same course of the southeasterly sideline of King Street and then on the same course of that sideline extension to the southeasterly sideline of King Street as depicted on said plan. Said discontinuance to take effect only upon recording in the registry of deeds of the deeds described in Order No. 88, Order No. 89 and Order No. 90.

Very truly yours,

*Amanda A. Meader*

Amanda A. Meader