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Mr. James Goudie
Management Analyst
Town of Sudbury
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Re: Liberty Ledge/Sewataro Property

Dear James:

You have asked a series of questions regarding the "Contract For Day Camp Operator and Management of Real Property" for the Liberty Ledge property and Camp Sewataro, as amended, located at 1 Liberty Ledge, Sudbury (the "Property").

Reference is made to (1) the Contract dated as of September 10, 2019, by and between the Town of Sudbury (the "Town") and Camp Sewataro, LLC (the "Manager" or the "Contractor"), (2) the First Amendment to the Contract dated as of February 18, 2020 (addressing Eligibility for Scholarships), (3) the Second Amendment to the Contract dated as of June 9, 2020 (addressing the Camp Season Public Access Area), (4) the Third Amendment to the Contract dated as of April 12, 2022 (addressing a 5-year term extension until September 9, 2027 and various other Contract revisions), and (5) the Fourth Amendment to the Contract dated as of February 24, 2026 (addressing Public Swimming Facilities), (together, the "Contract").

Your specific questions and my responses follow below.

1. *Given that the 2019 Town Meeting vote authorized the acquisition of the Liberty Ledge property for "general municipal purposes," would the Town be permitted to lease the property to a private entity? Should there be a separate or explicit Town Meeting vote authorizing the current arrangement?*

In my opinion, in order to lease the Property to a private entity, a Town Meeting vote is required. See, G.L. c. 40, s. 3. The vote on Article 25 of the 2019 Annual Town Meeting authorized the acquisition of the Property for "general municipal purposes" and broadly authorized the Select Board to "execute all documents and instruments, including without limitation, responses to requests for proposals, land development, land disposition or other agreements, deeds, easements upon such terms and conditions as the Board of Selectmen [sic] deems appropriate, and to take all other action necessary to effectuate the vote taken hereunder". However, in my opinion, the vote was not broad enough to allow for the conveyance of the property by lease or otherwise.

Following Town Meeting approval, the Town may lease the Property to a private entity provided that the Town comply with the provisions of G.L. c. 30B, s. 16 regarding the disposition of real property worth more than $35,000 which requires (1) declaring the property available for disposition and identifying any reuse restrictions; (2) determining the value of the property; and (3) advertising and soliciting proposals for the lease of the property (issuing a request for proposals or "RFP") that must include any mandatory lease terms (typically included in a draft form of lease), and awarding the lease according to the proposal evaluation criteria set forth in the RFP. Note that the property may be leased for less than its fair market value provided that it is for a valid public purpose that will promote the public welfare. See generally, G.L. c.30B, §16; Office of the Inspector General, The Chapter 30B Manual, p. 89 (2023).

With regard to the "current arrangement", I assume that you are referring to the Contract. As stated above, the vote on Article 25 of the 2019 Annual Town Meeting authorized the acquisition of the Property for "general municipal purposes" and broadly authorized the Select Board to "execute all documents and instruments, including without limitation, responses to requests for proposals, land development, land disposition or other agreements, deeds, easements upon such terms and conditions as the Board of Selectmen [sic] deems appropriate, and to take all other action necessary to effectuate the vote taken hereunder".

In my further opinion, the vote on Article 25, and presumably a vote of the Select Board, authorized the issuance of the RFP (pursuant to G.L. c. 30B) which was issued on June 10, 2019 (the "Sewataro RFP") "seeking proposals for a Contractor to manage day camp programming to be offered at Camp Sewataro…. further providing that the Contractor "will be responsible for all aspects of camp operations and buildings and grounds". The Sewataro RFP specified that "the term of the contract shall be for three years beginning in August 2019….The Town shall have the option at its sole discretion to extend the agreement for two (2) additional five-year terms." Accordingly, in my opinion, given the authority cited above, no additional Town Meeting vote is necessary in order authorize or ratify the Contract.

2. *Under M.G.L. c. 59, § 2B, is a private, for-profit entity occupying or using publicly owned land responsible for paying real estate taxes? If so, is the current operator of Camp Sewataro subject to ordinary real estate taxes, a payment in lieu of taxes, or another form of payment?*

Pursuant to G.L. c. 59, § 2B, "real estate owned in fee or otherwise held in trust for the benefit of the United States, the commonwealth, or a county, city or town, or any instrumentality thereof, if used in connection with a business conducted for profit or leased or occupied for other than public purposes, shall for the privilege of such use, lease or occupancy, be valued, classified, assessed and taxed annually as of January first to the user, lessee or occupant in the same manner and to the same extent as if such user, lessee or occupant were the owner thereof in fee, whether or not there is any agreement by such user, lessee or occupant to pay taxes assessed under this section."

In my opinion, the Property is used year-round for public purposes. The Sewataro RFP states that "In order to be considered, the proposers must submit a plan describing how these camp services are to be provided in accordance with access for the general public and other town uses." [ ] "The Contractor must be willing to include in its proposal public access to the facility during non-camp hours and during camp hours as described in the proposal…. Proposers should identify…whether un-used building[s] could be used for Town purposes."

In Addendum 4 to the Sewataro RFP dated July 22, 2019, Question 7 asked, "The RFP mentions that real estate taxes would be part of the expenses, however, now that the town owns the property, why would there be real estate taxes?" The answer provided by the Town was "The RFP mentioned taxes as part of the expenses in the current program statistics only in order to accurately and adequately explain what was included in the current camp expenses."

The Sewataro RFP made clear that the Town was seeking a contractor to operate a successful camp and, manage, operate and maintain the property and facilities that are owned by the Town while remaining available for access by the general public.

Additionally, the Contract specifically addresses the public purpose aspect of the uses of the Property. Section 1.2.3 of the Contract states, "…for all periods of time during the Term other than the Camp Season, the Town and/or residents of the Town may use all open field areas, basketball courts, tennis courts and wooded areas at the property (such areas being referred to as the "Public Access Area Outside of Camp Season") pursuant to the second paragraph of Section 1.2.4 below."

Section 1.2.4 (Use of Property by Town Residents) provides that "During the Camp Season, the Camp Season Public Access Area may be used by residents of the Town each Monday through Friday from 6:00 p.m. until dusk and Saturdays and Sundays and federal holidays from 9:00 a.m. until dusk, without charge to the Town or its residents…. For all periods of time during the Term other than during the Camp Season, the Public Access Area Outside of Camp Season may be used by residents of the Town each Monday through Sunday from 9:00 a.m. until dusk without charge to the Town or its residents." The Third Amendment to the Contract expanded the "Camp Season Public Access Area in Section 1.2.2 "to include certain activity spaces proximate to the back gate of the property."

Notwithstanding these allowable uses, there may be some temporary restrictions imposed by the Contractor on such use from time to time for "(i) programmatic activities scheduled in advance in conjunction with the Town", (ii) special events open to the public scheduled in advance with the

Town, and (iii) for purposes of maintaining such area for camp uses. Public access to the property is not permitted during which the camp is in session."

Additionally, in Section 9 of the Third Amendment, the Manager agreed to make certain Public Access Disability Enhancements, and Section 1.2.5 (Public Events) provides for programmatic activities available to the residents of the Town and other invited guests.

Section 10 of the Third Amendment further provides for Public Swimming Facilities and the Fourth Amendment amended Section 10 of the Contract to specifically require the Manager "to use commercially reasonable efforts to make available to the Town and its residents the use of the swimming pond and one (1) of the swimming pools at the Property…for public swimming…. Management and oversight of the use of the Public Swimming Facilities shall be the responsibility of the Manager."

The Contract provides for the necessary and attendant rights and obligations associated with operating a day camp, and also for managing, operating and maintaining Town-owned property, while maintaining public access to Town property as described above- all, in my opinion, making clear that the property is used for a public purpose.

As consideration for the Contract, the Town negotiated a financial agreement that is set forth in Section 3 of the Contract (as amended by the Third Amendment thereto). The Contractor pays the Town a "management fee" consisting of an annual fee and a revenue share payment and retains what remains from day camp operation and other revenue. The sum retained by the contractor is its compensation for the management, operation and maintenance of the Town-owned property, including assuming certain financial liabilities associated therewith, as solicited under the Sewataro RFP, and is characterized as such in the Contract.

The Contract, while in part, permits the operation of a for-profit day camp for a 3-month portion of the calendar year (June 1 through August 31 of each year- the "Camp Season"), a fundamental aspect thereof is that the Manager is to assume responsibility for the management, operation, maintenance and care of the Property which is owned by the Town and used year-round for public purposes as described in detail above.

Notwithstanding the above, in my opinion, the decision on how to classify the particular use of the Property is a determination to be made by the Board of Assessors. And, in my further opinion, in connection with the negotiation of the terms of an extension of the Contract, the Town could seek to enter into a payment in lieu of taxes agreement (or "PILOT" agreement) with the Contractor subject to the limitations described in more detail in the answer to question 5 below.

3. *Is the Town legally permitted to enter into a 30-year agreement for the operation or management of the property? If so, would such an agreement require authorization from Town Meeting or compliance with any additional statutory or procurement requirements?*

In my opinion, pursuant to G.L. c. 30B, s. 12(b), "Unless authorized by majority vote [of Town Meeting], a procurement officer shall not award a contract for a term exceeding three years, including any renewal, extension, or option. Such authorization may apply to a single contract or to any number or types of contracts, and may specify a uniform limit or different limits on the duration of any such contracts."

As stated in the answer to Question 1 above, for the current Contract, the Town Meeting vote on Article 25 of the 2019 Annual Town Meeting authorized the Select Board to execute agreements in response to requests for proposals "upon such terms and conditions as the Board of Selectmen deems appropriate" and the Sewataro RFP specified that "the term of the contract shall be for three years beginning in August 2019" and that "The Town shall have the option at its sole discretion to extend the agreement for two (2) additional five-year terms."

Accordingly, in my opinion, because the Sewataro RFP specified a three-year contract term with the Town having the discretion to extend it for two additional 5-year terms, entering into a thirty-year agreement for the operation or maintenance of the Sewataro property would require Town meeting authorization and the issuance of a new Request for Proposals in accordance with G.L. c. 30B. (See also, my answer to Question 5 below.)

4. *What are the legal distinctions between a contract for the operation of a camp or management of real property and a lease? What characteristics of an agreement determine how it would be classified?*

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. See, <u>Restatement (Second) of Contracts § 1</u> (Am. Law Inst. 1981). The Massachusetts Board of Registration of Real Estate Brokers and Salespersons more simply defines a contract as "a voluntary, legally enforceable promise between two competent parties to perform (or not to perform) some legal act in exchange for consideration." G.L. c. 30B defines a contract as "all types of agreement for the procurement or disposal of supplies or services, regardless of what the parties may call the agreement."

Regarding a lease, I first refer you to the attached legal opinion previously prepared and dated April 12, 2022, that addresses these questions and others. For your convenience, here are some relevant excerpts from that opinion.

"In Massachusetts, a commercial lease confers upon the tenant "the right of possession of the land, and the exclusive occupation of it for all purposes not prohibited by its terms." See, Jones v. Donnelly, 221 Mass. 213 (1915) citing Lowell v. Strahan, 145 Mass 1 (1887). Where the "dominion, control and possession of the estate [the land] were not given up by the land owner", the rights of the parties are "derived entirely from the written contract, and are governed thereby." See, Jones. Where no possessory interest, i.e., the right to occupy or exercise control of the land to the exclusion of others, has been granted, a lease has not been created."

"Section 1.2 (Control of Property) states, "The Property shall remain under the custody and control of the Town, acting by and through the Board of Selectmen [sic] pursuant to the terms of this Agreement. The Town hereby grants the Manager the right to enter and use the property for purposes relating to the operation of a day camp, the occupation of the Residences for residential purposes, the management and care of the Property, and for all other purposes permitted under this Agreement and to arrange for and permit the use of the Property by third parties all as is more particularly set forth hereinbelow."

"In my opinion, Section 1.2 of the Contract makes clear that the property remains under the custody and control of the Town, no possessory interest has been granted to the Manager, and that only rights to enter and use the property according to the terms of the Contract have been granted to the Manager. Further, the rights retained by the Town, including without limitation, the requirement under the Contract that the property be made available for the use of the Town and its residents, both during and outside of the camp season, mean that there is no exclusive right of possession held by the Manager and no sufficient legal interest in the land has been granted to the Manager to create a lease."

I therefore reiterate my prior opinion that the Contract for Day Camp Operator and Management of Real Property is a contract and not a lease.

5. *The Town is now considering whether to exercise the final five-year extension available under the current agreement. As part of that extension, what changes or additional requirements may the Town request? May the Town negotiate new terms or impose additional requirements on the current operator without conducting a new RFP process? Are there limits on how substantially the existing agreement may be modified through the extension process?*

In my opinion, as stated above, and in my April 12, 2022 opinion, the Town may exercise the final five-year extension as provided in the Contract. In my further opinion, any revisions to the Contract, as previously amended, should be fundamentally consistent with the terms of the Sewataro RFP or, in other words, within the "four corners" of the Sewataro RFP. In general, competitive procurement and "[s]tatutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally." Phipps Products Corp. v. Mass. Bay Transp. Auth., 387 Mass. 687, 691-92 (1982) (and cases cited), and See generally, G.L. c.30B. The issue in these circumstances is whether the proposed revisions to the contract constitute such changes that the failure to re-solicit new proposals would be prejudicial to fair competition. In other words, if the substance of the contractual revisions were included in the Sewataro RFP, would a respondent have offered a different proposal, or would others who did not respond have submitted a proposal.

In addition, pursuant to G.L. c. 30B, s. 13(4), a contract amendment cannot exceed 25% of the total original contract price.

If substantial changes to the Contract are to be considered, further analysis on this issue with the specified facts in question would be necessary. Additionally, the current contractor, (the Manager) would have to agree to the contract modifications as per Section 15.1 of the Contract which states that the Contract "may not be amended, modified, supplemented or extended except by a written instrument executed by the Town and the Manager."

Please let me know if I can be of further assistance.

Very truly yours,

Lee S. Smith

LSS/caa
Enc.
cc: Town Manager