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February 7, 2022

Brian R. Keyes, Chair
Louis J. Arcudi, III
Glenda A. Hazard
Members of the Selectboard
Town of Hopedale
78 Hopedale Street - P.O. Box 7
Hopedale, Massachusetts 01747

Re: Contract with Black Brook Realty Corp. and Ricardo Lima Promising to Grant Rights in Overdale Parkway

Dear Chairman and Members,

I represent members of the Overdale Parkway Association (the “OPA Residents”), a group of abutting landowners to the Overdale Parkway. The OPA Residents are opposed to and intend to vigorously contest the Town’s plans and agreement to grant rights in the publicly-owned parkway for the principal purpose of conferring a private benefit on Black Brook Realty Corp. and Mr. Lima (the “Developers”), under the pretext of the Developers granting a “gift” to the Town of improving the unpaved portion of the parkway.

For the reasons set forth as follows the agreement signed by the Selectboard and the Developers dated August 9, 2021 (“the Agreement”) is unlawful and will fail under challenge.

1. The Agreement ignores and violates the holding in the 2004 case involving the Town of Hopedale and Black Brook.

As you may be aware, in 2004 both Black Brook Realty Corp. and the Town unequivocally lost in the Land Court, the Appeals Court, and the Supreme Judicial Court, when these same OPA Residents challenged the Planning Board’s approval of Black Brook’s plan to use this same section of Overdale Parkway for access. Parker v. Black Brook Realty Corporation, 61 Mass. App. Ct. 308 (2004) (further appellate review denied).

I represented the Plaintiffs in the matter before both the Appeals Court and the SJC. The central holding in the case was that the unpaved portion of Overdale Parkway was not a public way, that Black Brook had no legal access rights in the unpaved portion of the Parkway, and that therefore the Planning Board could not grant Black Brook’s subdivision which relied on such access.

In the Land Court action underlying Parker, Judge Kilborn made the specific finding that Overdale Parkway over its unpaved portion was not a public way, but was used for official access to the park, and that any prescriptive rights in it would be limited to access to the park. While Mr. Lima was not a party to

that action, the decision is binding on the Town, which was a party, to this day.

Nothing has changed in any key respect from the circumstances covered by the legal holding in Parker. Neither Black Brook nor Mr. Lima have any deeded rights to use that portion of Overdale Parkway.

2. The Town lacks authority to divert public resources to principally benefit private parties.

There is no valid public purpose to laying out the unpaved portion as a public way such that the Developers could use it to obtain subdivision approval. The Town has not only never laid it out as a public way, but there has not been any independent suggestion that the Agreement advances any valid purpose unrelated to benefiting the private Developers.

The Town's attempted grant of rights to use that section of the parkway to the Developers would be for their private benefit alone, which would be an unlawful diversion of the Town's public land asset for private use. To allow the Developers to exploit the Town's property, in which they have no title rights, for their private economic gain by providing the access they need to develop their subdivisions, would directly contradict the holding in the Parker decision.

While the selectboard, pursuant to G.L. Ch. 82 Sec. 21, does have the power to lay out town or private ways, that doesn't mean that the Town can either create a public way solely to benefit specific developers, or that it can grant rights in public land to developers in order to establish private ways. Moreover, any layout under Sec. 21 must be approved by the Town Meeting before the way may be established. See G.L. Ch. 82 Sec. 23. By signing the Agreement with the Developers, the Selectboard is de-facto committing to laying out either a town or private way on town land, without having obtained Town Meeting approval.

3. The contemplated grant of rights in the Parkway to Developers for subdivision access would effectuate an eminent domain taking against the OPA Residents' real property interests.

Overdale Parkway is lawfully accessed and used by several abutting homeowners, including the OPA Residents, whose private rights to use it were reserved to them as appurtenant to their land when the Town acquired the parkway. The fact that the OPA abutters have private rights to use the parkway in no way requires the Town to make the parkway available to Developers, who lack such rights. Moreover, at the time that those rights were reserved to the OPA Residents' predecessors in title, there was no reservation of rights to grant such easements to additional parties. Rather, all grantees under the OPA Residents' titles had a right to expect that those having access rights would be limited in number to those granted or reserved the easements of access at that time. Therefore, the Town's attempt to grant rights to use the parkway to Developers for subdivision access would overburden and otherwise interfere with the exclusivity and utility of the OPA Residents' recorded easements, and would thus effectuate a partial eminent domain taking of valuable property rights.

4. The Town Meeting Vote relied on as authority for the Agreement is stale and of no effect.

The Agreement purports to be authorized by a Town Meeting Vote, from 37 years in the past, to

accept the improvement of the road as a gift from the Developers' predecessor in title. Assuming arguendo that it was valid then, despite its primary purpose to be to benefit private parties through the granting of rights in public resources, that vote is long stale and provides no current authority. There is longstanding law to the effect that authority conferred on public officials by one town meeting cannot carry over into the future, certainly beyond the term of the then serving officials:

The authority was conferred upon an existing board of public officers. [...] It must be presumed that in giving this authority the voters considered the membership of the existing board, and that they did not intend to allow the question to be postponed and afterwards determined by a board of selectmen that might be elected the next or any subsequent year. Littlefield v. Boston & A.R. Co., 146 Mass. 268 (1888).

5. Since Overdale Parkway is not a town way, and the Developers lack rights of private access, the Planning Board would be without authority to approve the subdivision of land which relies on access to the parkway.

Without a proper demonstration of the Developer's ownership of access rights, the Planning Board would have no authority to rely on promises of the developer to improve such a road, nor could it be assured that the road would be maintained and kept "safe and convenient" for travel to the public ways. Thus, granting any such subdivision would be beyond its authority under the Subdivision Control Law, G.L. Chap. 41, Sec. 81K-81GG.

6. The Unpaved portion of Overdale Parkway is subject to Article 97 restrictions.

As Article 97 land (land devoted to park purposes), no land in the parkway may be devoted to uses other than Article 97 purposes or disposed of to private parties (for residential subdivision access) without a 2/3 roll-call vote of the Massachusetts General Court.

I have been informed that the Town obtained a title opinion to the effect that the acquisition of the land for Overdale Parkway was an acquisition for a "town road" and not for park access. However, that opinion does not stand close scrutiny. The opinion apparently draws its conclusion based principally on the fact that the examiner could find no record in the Registry of Deeds of a dedication to park purposes. However, no such recording in the Registry is necessary; rather, such dedication can be inferred from evidence that the Town intended "to use the land permanently as a public park, because the consequence of a dedication is that '[t]he general public for whose benefit a use in the land was established ... obtains an interest in the land in the nature of an easement, [...] and upon completion of the dedication it becomes irrevocable.'" Smith v. City of Westfield, 478 Mass. 49, 63 (2017) [internal citations omitted].

In this case, the 50-foot strips of land which now comprise Overdale Parkway, including both the paved and unpaved sections, were acquired by the Town by deeds drawn in late 1916. At the same time, the Town acquired a large parcel from Wendell Williams that abutted the existing Town Park, for expansion of that park. The strips acquired to form Overdale Parkway run from Freedom Street and provide the only access to this land patently acquired for park purposes, and to nowhere else. All of the deeds, including that for the large parcel to add to the existing park, and the 50-foot strips to provide access

to that parcel, were recorded in the Registry of Deeds at the very same time, on January 6, 1917. All are indicated on the Registry Records as having been recorded together at 8:30 a.m. These facts strongly militate for the conclusion that the strips and the large parcel are intrinsically and inextricably linked as part of the acquisition and dedication of land for park purposes.

There is other strong evidence to support this conclusion.

The 1916 Report of the Park Commissioners specifies that “A 50-foot roadway from Freedom Street to the height of land on Darling Hill has been started, which upon completion will open the most sightly part of the park territory to the public.”

Moreover, the 1985 Town Meeting Minutes indicated that Article 33, which had requested on behalf of private citizens that the Town Meeting authorize a petition to the legislature to release the unpaved portion of Overdale Parkway from Article 97 in order to provide frontage for subdivision lots, was ruled out of order by the moderator because the Park Commissioners had determined not to release the land, and ultimately voted to be “passed over.” This is the same Town Meeting which the 2021 Agreement seeks to use for its authority to accept the “gift” of roadway improvement so that the developers can use the roadway for subdivision access. It would be inconsistent and irrational to rely on a vote of that town meeting to authorize a private gift of improving the road so it could be so used, when at the same time that same Town Meeting’s action makes clear that the parkway was devoted to park purposes and needed legislative approval for release from Article 97.

For all the foregoing reasons, the Agreement is invalid, and the Town must cease all efforts to advance its provisions or otherwise grant rights to the Developers and acknowledge that the unpaved portion of Overdale Parkway is Article 97 land.

It is of particular concern that recently Mr. Lima was observed to be digging up a section of the town land which comprises a part of the unpaved portion of the parkway. The Town must immediately prohibit any further such conduct by a private citizen on town land.

Please be advised that the OPA Residents intend to vigorously oppose further efforts by the Town to grant the Developers rights in the parkway, by an appropriate action in court, as they did in 2004, if necessary.

Sincerely,



Mark S. Bourbeau
Drohan Tocchio & Morgan

cc: Diana M. Schindler, Town Administrator
Lisa M. Pedroli, Town Clerk