

Attorney General Reviews Complaint of Easement Violation *Lessons for Conservation Commissions*

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Did you know that the Charitable Trusts Unit (the “CTU”) of the Office of the NH Attorney General is responsible for the oversight of charitable trusts, which include donated conservation easements? Are you familiar with the process the CTU uses to review complaints of easement violations? Do you know what steps your conservation commission can take to help ensure its decisions will be upheld in the event of a complaint and review by the CTU?

The Attorney General recently issued a report in response to a complaint of a potential violation of an easement held by the Town of North Hampton. This report is instructive for conservation commissions because it outlines the process the CTU uses to respond to complaints of easement violations and explains how conservation commissions can uphold their fiduciary duties as holders of conservation easements.

Following is a summary of the facts of the situation and the CTU’s conclusion, plus a summary of lessons that conservation commissions can take away from this report.

Facts and Attorney General’s Conclusion

Facts: The Town of North Hampton Conservation Commission (the “Conservation Commission”) holds a donated easement on property known as Lamprey Field. The three purposes of the easement are to retain open space, protect the salt marsh, and preserve scenic enjoyment of the salt marsh and farm land from two public roads. The easement prohibits commercial activities except for agriculture, which must not materially impair the scenic quality of the property viewed from public roads. Barns are permitted as necessary to support agriculture if sited to have minimal impact upon scenic views from public roads.

The landowners obtained a permit in October 2013 to move a barn from an adjoining lot onto a new concrete foundation built on the easement property at a high spot visible from a public road. The barn was moved around September 2014. A neighbor complained to the CTU in October 2014 that the relocation violated the terms of the easement.

The Conservation Commission became aware of the planned movement of the barn in June 2014, and the Chair apparently stated at that time that agricultural uses and barns were permitted. Later in December 2014, the Conservation Commission formally considered the barn relocation at a meeting where the neighbor had an opportunity to speak. The Conservation Commission subsequently consulted with the town administrator and town counsel, held a site walk on the property, and discussed and voted on the matter in March 2015. The Conservation Commission considered a number of factors, including alternative location options for the barn, that protected views are subject to change on a working farm, and a review of the neighbor’s complaint. The Conservation Commission ultimately voted that the barn relocation did not violate the terms of the easement.

Attorney General Review: The CTU limited its review to the fiduciary duties the Conservation Commission owes as the holder of the easement. The CTU explained how the three fiduciary duties owed by holders of charitable trusts apply to holders of conservation easements. Under the duty of loyalty, conservation commissions may not engage in conflicts of interest transactions or related private inurement. The CTU found no evidence of this in this case. Under the duty of obedience, conservation commissions must adhere to the

conservation values set forth in the easement deed. The CTU found that the Conservation Commission carefully considered the easement language and conservation values of the easement. Under the duty of care, conservation commissions must actively monitor the activities on and changes to the conserved property to ensure compliance with the terms of the easement deed. The CTU noted that the Conservation Commission could have been more proactive with its review of the permit and the neighbor's complaint.

The CTU also explained that conservation commissions are public bodies subject to the Right to Know Law, RSA Chapter 91-A. Therefore, they must—with few exceptions—conduct their business before the public. That includes allowing their records to be inspected and copied by the public.

The CTU noted that while it has the power to take legal action against an easement holder that avoids or neglects its conservation easement enforcement responsibility, the CTU will not seek remedies against easement violators except in rare circumstances. The CTU also clarified that while organizations and interested citizens have the right to inform holders of conservation easements about alleged violations, those not a party to a conservation easement may have no independent standing to enforce a conservation easement.

The CTU concluded that the decision of the Conservation Commission was well supported by the language of the easement deed and that the Conservation Commission ultimately reviewed the matter with considerable care. Therefore, the CTU chose not to take any action with respect to the Conservation Commission's decision to permit the barn relocation.

Lessons for Conservation Commissions

Fiduciary Duties: The three fiduciary duties owed by conservation commissions that hold donated conservation easements are summarized below. Bullets indicate action items conservation commissions can take to help ensure they uphold each fiduciary duty.

Duty of Loyalty - Duty to avoid engaging in conflicts of interest transactions or related private inurement.

- Consider implementing a conflict of interest policy under which potential conflicts of interest, including financial conflicts, must be disclosed and discussed so actual conflicts can be avoided.

Duty of Obedience - Duty to adhere to conservation values set forth in the easement deed.

- When considering potential violations or planned activities on a conservation easement, carefully consider the language of the easement, the conservation values contained in the easement, and any reserved rights.
- When conflicts between easement terms arise, consider them carefully and document the decision-making process. The CTU acknowledges that easement holders must sometimes balance competing interests (in this case, promoting farming versus preserving a pristine landscape).
- If a violation is discovered, notify the possible responsible parties and ensure the violation is remedied. The seriousness and permanency of the violation should inform the nature of the remedy.

Duty of Care - Duty to actively monitor the activities on and changes to the conserved property to ensure compliance with the terms of the easement deed.

- Periodically inspect conservation easement properties.
- Establish a complaint intake process to promptly follow up with allegations of violations and carefully consider such complaints. The nature of the violation should

inform the scope of investigation, so a more serious allegation should result in a more thorough inquiry.

- Implement a system so that building inspectors, or other town officials, can identify land as subject to a conservation easement before any permits are issued.
- Commit to a review process when learning of substantial work planned for land subject to a conservation easement.

Right to Know Law: Since conservation commissions are public bodies subject to this law, decisions regarding alleged violations of easements should be made at meetings open to the public. With limited exceptions, documents related to alleged easement violations should be made available to the public for inspection and copying.

Note: This article does not constitute an official legal opinion of the New Hampshire Association of Conservation Commissions, its members or the Society for the Protection of NH Forests