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April 3, 2012

Ms. Georgette Cole, Mayor
Town of Washington Grove
Post Office Box 216
Washington Grove, Maryland 20880

VIA EMAIL

Re: The "Meadow"

Dear Georgette:

You have requested that I provide a basic overview of the rights of the Town of Washington Grove vis-à-vis the Maryland National Capital Park and Planning Commission (MNCPPC) regarding the matter of the Piedmont Crossing "Meadow" often referred to as the "Legacy Open Space [LOS]" property. Initially, I would like to address a few preliminary matters.

Nomenclature: "Meadow" vs. "LOS"

I believe it best for the Town in the future that the property in question always be referred to as the "Meadow", as opposed to the "LOS". I think use of the latter term may confuse the staff of MNCPPC with regard to this particular property, staff who very well may not know the history of this particular property, as opposed to other "Legacy Open Space" property that MNCPPC may own outright, which could and would be treated much differently than the unique status of the Meadow. "Legacy Open Space" refers to a County to program to identify and usually **acquire outright** certain properties identified of significance for any number of reasons. So, in this correspondence I will refer to it as the "Meadow", and I suggest the Town make a concerted effort to do so as well in future dealings with MNCPPC, because the Meadow does not fall into the normal category of "LOS" property owned outright by MNCPPC or the County.

Real Property Rights: A Basic Primer

Second, this correspondence necessarily entails a discussion of real property terms, so allow me to provide a basic primer. I think this understanding of basic property law will be important in the future and the Town's future dealings with MNCPPC regarding the Meadow.

Many people think of a parcel of real property as a two-dimensional plane, when, in fact, in order to understand what is often legally referred to as the "bundle of rights" that come with real property, it is more appropriate to think of it as at least a three dimensional box. If I own a parcel of land outright with no encumbrances whatsoever, I own all of the area above it [until it interferes with federally-controlled air space], and all of the property below it, in theory extending to the center of the earth. And my use and enjoyment of the property is unlimited, subject only to lawful regulations that may have been adopted by the government, such as zoning restrictions.

In addition to the ground plane, the airspace and the ground beneath that I own, however, there is actually what could be characterized as a fourth dimension to the ownership of property, and those comprise intangible rights that accompany the ownership of real property in addition to the subsurface, surface and air space. They include, for example, uses. You can't touch tangibly touch them as you could timber, a building, the soil or groundwater, but they nevertheless exist and can always be bargained away.

Lawyers and judges often refer to real property in terms of a "bundle of rights". That "bundle" can be split up in various and potentially unlimited fashions. There are any number of interests that can be given/sold/transferred to another person or another organization in property which one may own. And, of course, if one purchases property subject to an existing encumbrance, then that encumbrance, so long as it is recorded in the Land Records, continues as an encumbrance against the real property.

In the examples I give below, I will utilize the best example I can think of that might resonate with lay people-- an improved residential lot in a subdivision.

The simplest interest that one can give in their property to another is a bare "**license**". As an example, if someone asks to enter upon the property to park their car while they are at a party down the street, and they are granted permission to do so, then they have a "license" to enter upon the property for a certain temporary period of time.

The property owner owes no duty of care to a mere licensee, other than not to go out of their way to harm the licensee while on the property.

Above that is an "**invitee**". If a property owner invites someone to dinner, they are an invitee, and the standard of care increases to include liability for negligence. But invitees enjoy no specific or exclusive rights in the property.

Above the minimal mere licensee or invitee is one who holds a "**lease**" of real property. For example, the residence could be leased to someone by the owner for a specific period time for certain compensation and for a certain use. The lease could involve any myriad of restrictions, such as the number of occupants, etc. The property owner cannot interfere with the lessee's peaceful use and enjoyment of the property so long as the lessee is not in breach of the lease.

Some interests are more significant, and of the nature to be recorded in the Land Records and encumber real property and are said to "run with the land". In other words, any subsequent property owner takes title to the property subject to some prior existing rights of another.

For example, there are interests in property known as "**equitable servitudes**", commonly referred to in lay terms as "covenants". One will often see those in subdivisions restricting certain uses. Montgomery Village and its prohibition of parking commercial vehicles on lots is a prime example. Equitable servitudes are usually enforceable by other property owners and/or some private governing body, such as a home owners association. It is a legally enforceable right in another party, part of the property owner's "bundle of rights" bestowed in another, and is a prime example of one of those 4th dimensional aspects of real property that I referred to above.

The next step up is in terms of an "**easement**" which also encumbers real property and is typically recorded in the land records if it is intended to bind future owners of the property and bind the property should it change ownership. An easement can be either temporary or in perpetuity. The best example of a temporary easement is in cases where a roadway is being widened and the local jurisdiction requires access to adjacent private property for the purposes of slope stabilization, etc. during the construction process. Normally, a temporary easement for construction is acquired for the specific purpose for a specific term and it expires at the end thereof. Other easements often are not restricted in time and exist in perpetuity.

Easements are characterized as either "appurtenant" or "in gross". Using the example of the subdivided residential lot, oftentimes, especially of late, you are likely to see a lot with a driveway traversing it to serve another lot behind it. That usually involves a recorded easement for ingress/egress which appertains to an adjoining property; ergo, the term "easement appurtenant" in favor of an adjoining property.

An "easement in gross", on the other hand, is an interest in property granted to some party who does not own adjoining property. In other words, the easement does not attach and is not appurtenant to adjoining property owned by the easement holder. In the case of our example of an improved residential lot, if the property was of historic significance, then the Maryland Historic Trust [MHT] might purchase a historic preservation easement to protect and preserve the appearance and setting of the structure. The property owner would still own it and have exclusive enjoyment of it, but demolition, alteration, etc. would be limited by the terms of the easement, which could involve any myriad of restrictions. And that is precisely what another of my municipal clients, the Commissioner of Barnesville, agreed to with MHT in connection with the renovation of their Town Hall. They still own it and have exclusive use of it, but they gave up certain of their "bundle of rights" in the form of an easement (in return for state grant money) not to alter the exterior appearance of the structure in the future without MHT's consent. Another example of that 4th dimension, so to speak, of property rights than can be bargained away.

That's a very basic primer as to the "bundle of rights" I referred to above. But to fully understand the background here, there are some important additional points to keep in mind.

First, in connection with any parting of a portion of the bundle of rights in property held by the owner, the underlying property, what lawyers refer to as the "fee simple" interest, is always in the property owner, not the licensee, lessee, or easement holder.

A second defining characteristic is that easements, at least all that I can think of, are always defined in terms of a specific use. For example, if I grant someone a perpetual easement for a driveway across my property which I own in fee simple, they may use it for ingress and egress, but they may not build on that strip of land. If they attempted to do so, then I would have a cause of action to prevent misuse of that easement area. Similarly, I could not lawfully block the easement area to prevent their use for express purpose of ingress and egress. The easement holder can utilize for the specific purpose, but it is still MY property.

Third, and this is important in the context of understanding the history of the litigation regarding the Meadow, is the concept of the doctrine of "**merger**" of property interests. If a holder of one of the limited interests in real property discussed above thereafter acquires fee simple interest in the property, then the totality of the combined interests are considered "merged". That "bundle of rights" has been vested in one owner, and the property is thereafter free of the easement and any restrictions that may have been imposed by the easement.

And that only makes sense when one thinks about it—you can't have an easement or lease in favor of yourself in your own property.

History

You have informed me that you have reviewed the relevant documents, and, of course, every document generated in connection with the litigation should be in the Town's files. Therefore, in the interests of economy, I will not be reciting specific chapter and verse or attaching documents to this correspondence, but rather speaking in terms of the facts I can recite off the top of my head, which I can assure you are all correct. While I have closed my files on the litigation, I have not closed my memory in that regard.[1]

In June or July of 2005, the Montgomery County Planning Board approved a preliminary plan of subdivision for the Piedmont Crossing subdivision. One of the enumerated conditions of that approval was the dedication of the Meadow for the express purpose of protecting the historic setting of the Town of Washington Grove, as requested by representative of the Town in hearings before the Planning Board.

The protection of the Meadow was not for the purpose of serving the subdivision. It was not for the purpose of active recreational use, ball fields, or anything of that ilk. It was a protection of the Meadow in order to preserve the historic setting of the Town of Washington Grove. That's what was plainly stated.

Thereafter, in December of 2005, the Town initiated condemnation proceedings to acquire the Meadow. The developer had done nothing to further the plan of subdivision, which might never have come to fruition, and the Meadow was publicly being discussed

[1] This recitation of the history is by no means meant to be a complete chronology of all that transpired in the 5+ year time frame, but rather to document the important circumstances relative to the question posed; that is, the respective rights of the Town and MNCPPC with regard to the Meadow at this time and for future reference.

as a possible school site. In addition, staff of MNCPPC was also floating ideas of active recreational use of the Meadow. The Town Council felt that acquiring the Meadow by purchase or condemnation was the best way to protect it. The Town made an offer to the property owner. The offer of purchase was rejected by the property owner, so the Town filed suit to condemn, which it was authorized to do by state law.

On April 19, 2007, Toll Brothers [by then the property owner] executed and delivered to MNCPPC a document entitled "Deed of Dedication". It is unfortunate and no doubt confusing for some that the documents was entitled "Deed", because for some that might imply that there was a transfer of Toll's fee simple interest in the property to MNCPPC. That was not the case. The Town did not seek to prevent that, for it recited that which the Town sought; that is, preservation of the Meadow to preserve the historic setting of the Town.

If one examines that document carefully, it grants an easement to MNCPPC for the Meadow to be utilized in accordance with the rules and regulations governing Legacy Open Space property. The problem with that is there are no published rules and regulations regarding Legacy Open Space property. However, one need not rely on that essentially meaningless language, because the "Deed of Dedication" also said more specifically that it was for the express purpose of complying with the condition imposed at the time of approval of the preliminary plan of subdivision. And, as set forth above, that condition was a dedication of the Meadow for the express purpose of maintaining and protecting the Town's historic setting, nothing more, nothing less.

Lest there be any doubt that it was simply a transfer of an easement interest, that fact was confirmed by both counsel for Toll Brothers and counsel for MNCPPC in open court thereafter. Both counsel admitted that, if MNCPPC's use of the property were to be substantially changed in the future, away from its original intent, then Toll Brothers could either prevent that or be entitled to compensation. Of course, MNCPPC also had the authority to condemn Toll's retained fee simple interest.

In addition, further buttressing the above opinion of the attorneys for both Toll and MNCPPC, is the fact that, when Toll prepared and filed the final plat of subdivision covering the Meadow property, it showed that Toll would execute a deed transferring its previously retained fee simple interest in the Meadow to MNCPPC. The Town, through its counsel, objected and appeared before the Planning Board, together with other representatives of the Town, and the Planning Board removed the provision that they would receive the underlying fee simple interest in the property as part of the record plat process.

However, during the course of that hearing, the Chairman of the Planning Board was quick to point out that Toll could always "voluntarily give" the underlying fee simple interest to MNCPPC, separate and apart from the record plat approval process.

That remark set off all sorts of alarm bells in my head, and in consultation with Mr. Chen, we decided to immediately seek an injunction from the presiding judge in the pending condemnation case to prevent Toll Brothers and MNCPPC attempting to undermine the Town's condemnation case. While both Mr. Chen and I were of the opinion that the case could have proceeded even if the fee simple title had been transferred to MNCPPC, it certainly would have resulted in much more protracted litigation and, quite likely, additional appeals, all to the financial detriment of the Town.

During the course of the hearing on our request for an injunction, it was revealed, for the first time, that in fact Toll and MNCPPC had been working to do exactly that, and that Toll had already delivered a deed for the underlying fee simple interest to MNCPPC, even before the hearing on the record plat. It had not, however, been recorded. Very conveniently, that was never disclosed during the course of the hearing before the Planning Board. The judge immediately entered an injunction preventing the transfer of Toll's fee simple interest in the Meadow and further ordered that the deed be returned unless and until the condemnation case was resolved.

Remember, under the doctrine of merger explained above, had MNCPPC acquired that fee simple interest, then it would have owned the entire bundle of rights; and the previous "Deed of Dedication" would have been rendered essentially **meaningless** in terms of what MNCPPC could do with the Meadow in the future. The "Deed of Dedication" would have had no legal significance whatsoever.

Of course, as you know, the litigation eventually was resolved by the Town of Washington Grove purchasing the underlying fee simple interest from Toll, which alleviated the necessity for a long and expensive trial. And you are correct that the deed to the Town from Toll states that it is subject to the prior "Deed of Dedication" from Toll to MNCPPC dating back to April of 2007.

The Town simply did not trust MNCPPC to protect the Meadow for its stated purpose in perpetuity if it acquired the entire bundle of rights in the property. And that position was taken with good reason, I believe.

By the same token, and I don't fault them, MNCPPC obviously did not trust the Town to do the same thing in the future if it owned the entire bundle of rights to the property outright with no restrictions. As an extreme example, suppose the Town had a major fiscal crisis in the future and could solve that by selling off a portion of the Meadow for development? Or, even worse, borrow money against the Meadow only to lose it in foreclosure? That's happened to many municipalities across the country. Agreed, it would be highly improbable for Washington Grove, but not beyond the realm of the possible.

So, the ultimate resolution was that the Town purchased the fee simple interest and MNCPPC has an easement for a specific purpose. Nothing more, nothing less. Some might refer to it as sort of a "Mexican Stand Off" where neither party trusts the other. I, on the other hand, think it is a good example of "checks and balances". Other than the stated purpose, the property cannot be devoted to any other use without the mutual consent of both parties.

When one steps back and looks at the big picture, the resolution was good for the Town in the respect that the Meadow is there for the protection of the Town, no one will ever be tempted to sell any of it off (it's not saleable with the easement in place) or borrow money against it (no lender is going to loan against such property), and the entire costs of maintenance are solely that of MNCPPC, unless and MNCPPC it decides to abandon or surrender the easement, which I doubt.

And I would be remiss if I didn't note that final resolution is exactly what was repeatedly offered by the Town but rejected by MNCPPC, rejections that ended up costing both parties a lot of time and expense, only to come to the same result.

Respective Rights of the Parties

On the basis of the foregoing, it is my professional opinion, and I am sure Mr. Chen agrees, that the Town owns the property. MNCPPC merely has an easement in gross for a specific purpose, and that is the purpose enumerated in the Planning Board's approval of the preliminary plan in 2005; e.g., the preservation of the Meadow as a Meadow in order to protect the historic setting of the Town of Washington Grove. And that is why I think it would be prudent in the future to refer to the property as the "Meadow" and not "the LOS", because that could be misinterpreted, especially by Park and Planning staff who may not have the benefit of all of this background information.

I want to make this perfectly clear: MNCPPC has a perpetual easement interest in the Meadow for a specific purpose, while the Town of Washington Grove actually owns the fee simple interest in the property. If MNCPPC goes beyond the bounds of the specific purpose of the easement, then the Town should be able to prevent any attempted bastardization of that use. And to refer to it as the "LOS" property, I believe can be misleading, if not a misnomer, in the first instance.

Future Guidance in dealing with MNCPPC Staff

You have informed me that these questions came up as a result of discussions concerning the removal of certain trees, etc. from the Meadow.

The bottom line is this: The Meadow should be used and maintained as the Meadow for the express purpose of protecting the historic setting of the Town. Whether removing certain trees or certain species or planting other species is good or bad or right or wrong, I frankly am not in a position to say without much further information. And that probably is not a legal question, but rather one of good conservation and land stewardship.

I would suggest that the Town let this be their guide: Whatever MNCPPC staff proposes should always be examined in the context of the purpose of the easement in the first instance. Reasonable people may disagree as to whether removal of certain trees or planting of other species, or the frequency of mowing, etc. achieves that purpose or not. My greater concern would be, and the Town's great concern should be as well, if MNCPPC proposed, for example, ball fields or some other sort of active recreational area. That clearly would not fulfill, indeed it would violate, the purposes of the easement for protection of the Meadow as the Meadow, for the ultimate protection of the "historic setting" of the Town of Washington Grove. If it doesn't further that purpose, then it exceeds the limits of MNCPPC's easement for that specific purpose. And the Town, as the property owner, has a right to object to anything beyond the purposes of the easement and, if necessary, to seek court intervention.

I trust this is responsive to your request, and I apologize it has taken me longer than I anticipated to get this out to you. I decided to provide more detail than I initially anticipated, in order that the Town can have this correspondence for future historic reference the next time MNCPPC staff should suggest, and I am sure they will, that their organization "owns" the Meadow.

Don't get me wrong, I an not attributing any nefarious motive to the staff. I suspect they are approaching the Meadow as they approach other "LOS" property MNCPPC owns outright. The fact is the Meadow is, I think, relatively unique, in the sense that it is actually owned by the Town and MNCPPC has merely an easement for one specific purpose. Staff that labors under the assumption that MNCPPC owns the Meadow as LOS property, I would suspect, approaches discussions with the Town as a mere courtesy, the same as they would neighborhood groups regarding a local park. But the Town's participation in what does and does not happen to the Meadow is more than a mere courtesy. It is a legal necessity. And, I suspect, as staff turns over and changes in the years to come and as Town Mayors and Council Members change, this issue will come up again . . . . and again.

Should you have any questions or require any additional information, please do not hesitate to contact me.

With best regards, I remain,

Sincerely yours,

William J. Roberts
Town Attorney

WJR:dhg

Original Via First Class Mail