



July 23, 2020

Via Email

Michael J. Tully
Interim Town Administrator
Town of North Hampton
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Re: Proposed Access to the New Library on the Homestead Property

Dear Michael:

You asked me to provide opinions on (1) whether or not the North Hampton Public Library Board of Trustees (“Trustees”) have the authority to use funds approved to build a new library on the Homestead property to build an access area on the existing library property; and (2) whether or not permission from the Town of North Hampton Select Board (“Select Board”) is necessary for the Trustees to access one piece of Town property from another.

As I stated in my January 13, 2020 letter to the Select Board, the Trustees have no more power than what is granted to them under RSA 202-A. Pursuant to RSA 202-A:6, the Trustees “have the entire custody and management of the public library and all of the property of the town relating thereto.” The “property” under the Trustees’ custody and management includes the existing library parking lot—or at least a portion or some extent of the lot, as the lot is shared with municipal occupants of and visitors to the stone building. Given the shared nature of the parking lot and the lack of a document setting forth exactly what portion of the parking lot is for library use and what portion is for stone building use, the precise dimensions of the Trustee’s custody and management of the parking lot are not clear. However, I need not resolve that matter to provide the opinions herein. Suffice to say it is a shared lot.

The Trustees’ powers are further enumerated in RSA 202-A:11. These powers include (I) adopting bylaws, rules and regulations; (II) preparing an annual budget; (III) expending moneys raised and appropriated by the Town to the library; (IV) expending income from trust funds; (V) and appointing a librarian. None of these powers appear to confer upon the Trustees the power to encumber Town property by granting an access easement to neighboring property. “Custody and management” is broad, but likely does

not reach that far, as nowhere are the Trustees given “ownership” of real estate or the right to dispose of property rights, as granting an access easement would be.

The only power enumerated in RSA 202-A:11 that is arguably connected to whether the Trustees have the authority to construct an access area on the existing library property is at (III), expending moneys raised and appropriated by the Town to the library. Here, Article 9 appropriated money “for the purpose of design and construction of a new North Hampton Public Library on the Homestead property.” Article 9 does not provide that access to the new library will be through the existing library’s shared parking lot. With the absence of any mention of the existing library property in Article 9, it is my opinion that it is implicit in the language of Article 9 that the new library would be fully contained within the Homestead property, including the entire accessway. Also, the power to “design” the new library does not logically include designing it to attach to the current lot without some other grant of power to do so.

By proposing to use the existing library parking lot as the accessway to the new library’s parking lot on the homestead property, the Trustees propose to essentially grant itself (or the new library) an easement over the current library property. However, it is my opinion that this is beyond the scope of the Trustees’ authority for several reasons. First, if the Homestead property were being developed by some other entity, I do not think there is any question that the Trustees would lack the authority to grant an easement or allow that entity to use the existing shared parking lot as an accessway for the Homestead property. That would exceed the Trustees’ RSA 202-A authority (which does not include ownership of the library real estate) and contravene the Select Board’s “authority to manage all real property owned by the town and to regulate its use” under RSA 41:11-a, I. I do not see how the result is different simply because the new library (under the custody and management of the Trustees) is the entity that will be using the Homestead property. Second, once the new library is constructed, the existing parking lot will no longer be used for library purposes and, therefore, will be beyond the custody and management of the Trustees. Nothing in Article 9 suggests that the Trustees will continue to use the existing library property after the new library opens. Third, the Trustees do not even have exclusive use of the existing parking lot. Fourth, the Trustees’ proposed use of the existing library property to access the Homestead property is tantamount to an easement over the existing library property, and the Trustees do not have the authority to encumber Town property with an easement. An easement is an interest in real estate. Only the “Town” (under RSA 31:3) or the Select Board (under RSA 41:14-a) are authorized to convey real estate.

In short, it is my opinion that the Trustees do not have the authority to use funds appropriated through Warrant Article 9 to build an access area for the new library on the existing library property without permission of the Select Board or the voters.

Permission of the Select Board

You also requested an opinion on whether permission from the Select Board is necessary for the Trustees to access one piece of Town property from another. I do think that permission is necessary, as the Select Board has, under RSA 41:11-a, I, the “authority to manage all real property owned by the town and to regulate its use.” If the Select Board considers granting permission to access the Homestead property via the existing library property, the Board should carefully consider the form of such permission. The “permission” may, *possibly*, be in the form of easement, contract, or license.

As I stated above, the proposed use of the existing library property to access the Homestead property is akin to an easement (or right-of-way). The Select Board could grant an easement by going through the process set forth in RSA 41:14-a, which includes two public hearings.

Alternatively, it *may* be possible for the Select Board to enter into a contract with the Trustees under RSA 31:3 to provide the access if the access is “necessary and convenient for the transaction of the public business of the town.” It is not clear that such an access contract would qualify as such. While RSA 31:3 does not expressly confer this contractual power to the Select Board, a combination of (1) RSA 41:8’s authority that the Select Board “shall manage the prudential affairs of the town and perform the duties by law prescribed”; (2) the Select Board’s RSA 41:11-a, I, “authority to manage all real property owned by the town and to regulate its use”; and (3) *Blood v. Manchester Elec. Light Co.*, 68 N.H. 340 (1895)—which may extend the contractual power to select boards and/or city managers—, *might* allow the Select Board to enter into such a contract. I advise additional research and significant consideration if the Select Board considers this approach.

It may be possible for the Select Board to grant a license using its authority under RSA 41:8 and RSA 41:14-a, I. However, licenses are generally for temporary and/or transient use. Using its license authority to grant permission to the Trustees for an apparently permanent (at least long-term) is questionable, especially when the use granted resembles an easement because of the construction of a permanent connection to the current lot and the apparent lack of other access to the new library from another street, and there is the RSA 41:14-a process available for an easement. Granting a license,

while legally temporary, would potentially open the Town up to legal challenges that it used the wrong process. Also, if the Select Board tried to revoke the temporary license, the Trustees could argue that they detrimentally relied on the license in its construction, the Select Board should be estopped from saying the license was not permanent, and/or that the course of performance allowing permanent construction all show that the license was actually a non-revocable easement or something functionally similar. Such an approach would also be inconsistent with RSA 41:11-a, which limits the Select Board's authority to rent or lease Town property to no more than one year without a vote of the Town.

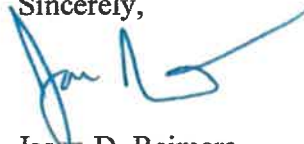
Conclusion

In sum, it is my opinion that the Trustees do not have the authority to construct an accessway for the new library on the existing library property. My primary reasons are that (1) Article 9 did not appropriate funds for use on the existing library property; and (2) this action would be beyond the scope of the Trustees' powers.

While the Select Board has, under RSA 41:11-a, I, the "authority to manage all real property owned by the town and to regulate its use," the Select Board does not have unfettered discretion to grant permission to the Trustees for the proposed use of constructing an accessway on the existing library property. Because the accessway is tantamount to an easement, the most transparent way for the Select Board to give "permission" would be to grant an easement through the RSA 41:14-a process.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Jason D. Reimers