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October 13, 2016

Michael K. McGovern, Town Manager
TOWN OF CAPE ELIZABETH
320 Ocean House Road
P.O. Box 6260
Cape Elizabeth, Maine 04107

Re: Thomas Memorial Library – Old Structure

Dear Mike:

You asked us to research whether a use restriction in a deed conveying a parcel of land to the Town in 1919 encumbers an existing building currently located at 6 Scott Dyer Road in Cape Elizabeth. Although it is possible that the heirs of the grantor in such deed have potential rights in the building, as discussed in further detail below, our opinion is that the restriction itself does not currently apply to the building.

FACTS

As you are aware, the former Thomas Memorial Library building (the “**Building**”) has a long and interesting history (see attached **Exhibit A** - history page from the Thomas Memorial Library website, found at <http://www.thomasmemoriamlibrary.org/history/>.) The facts most relevant to our analysis are as follows:

- On April 14, 1919, William Widgery Thomas, Jr. (“**Thomas**”) deeded an ¼ acre parcel of land located on the easterly side of so-called “Bowery Beach Road,” (the “**Thomas Property**”) by way of a deed recorded in the Cumberland County Registry of Deeds in Book 1024, Page 254, attached hereto as **Exhibit B** (the “**Thomas Deed**”).
- The Building, at that time an approximately 26’x36’ structure, and its contents (e.g. shelves, books, and furniture) were conveyed along with the land.

- The Thomas Deed conveyed the parcel in fee simple, subject to “conditions and reservations,” primarily that the “said lot of land, and the buildings from time to time thereon standing, shall always be held, occupied and used by the [Town], for the purposes of forever maintaining thereon a free Public Library . . . to be forever known as the ‘Thomas Memorial Library’ in memory of the Grantor” The Thomas Deed also provided “[t]hat upon the failure of said Grantee . . . to occupy and use to a reasonably [sic] extent for the purposes herein provided, or to perform and abide by all conditions, restrictions and reservations herein contained, including said contents, said premises, as they shall be at the time of said failure, shall revert to the Grantor, his heirs or assigns.”
- According to the Thomas Memorial Library website, in 1943 the Town, as a result of the waning population in the Spurwink area and transportation difficulties getting to the Thomas Property, voted to move the Building to the school grounds located at or near its present location at 6 Scott Dyer Road. The move occurred in 1944. Since that time, the Building has been renovated several times and eventually, with the construction and opening of a new and separate Thomas Memorial Library, was no longer needed for library purposes.

Members of the Town committee tasked with determining a use for the Building now that there is a new library facility have queried whether the restriction in the Thomas Deed—that the property be used for library purposes only—applies to the Building.

RESEARCH/ANALYSIS

Two questions arise from a review of the relevant facts: 1) What is the current status of the real estate conveyed by Thomas; and 2) Does the restriction in the Thomas Deed currently apply to the Building?

Location of Thomas Property

As the Thomas Property was conveyed subject to a reversionary interest to Thomas and his heirs (as discussed in more detail below), it was necessary to locate the real estate itself in order to ensure that the land was not currently being utilized by the Town or part of a larger Town owned parcel. While a full survey would likely be required to pinpoint the exact location of the Thomas Property, our title research indicates that the parcel is located on the easterly side of Bowery Beach Road, south of Fowler Road, and can be found within Lot 29 as it appears on Tax Map R06.¹ Our preliminary search also indicates that the Thomas Property was never

¹ The references used in the Thomas Deed which may be used to locate the parcel are: “Bowery Beach Road” and “the dwelling house occupied by said Pomeroy W. Jordan and Emma D. Jordan”. Without a survey the exact location cannot be pinpointed using these references alone. We were able to locate the general location in our title search by discovering a later out-conveyance by the former owner, Emma D. Jordan, to Sprague Corp (Book 1315, Page 464), which references and excepts the property conveyed to Thomas by Emma D. Jordan (i.e. the Thomas Property). As such, we are confident that the parcel is

conveyed by the Town to Sprague Corp., or any other grantee. As such, it appears that the ownership of the lot is uncertain at this time. That is, the Town appears to be the record owner of the lot despite the fact that the tax maps and the history of use indicate that Sprague Corp. has held the property, paid taxes on the property, and likely believes it owns the property. Whatever the case, we are satisfied that a reversion of the Thomas Property would not adversely affect the Town's currently owned/utilized buildings and real estate holdings.

Restrictions in the Thomas Deed

The conveyance to the Town in the Thomas Deed created what is referred to as a *defeasible fee*. A defeasible fee is a conveyance in fee simple followed by a condition or a special limitation (here, that the Thomas Property be used solely to provide a free public library). There are two types of defeasible fees that are relevant to our analysis: 1) a fee simple determinable; and 2) a fee simple subject to a condition subsequent. The primary difference between the two estates is that with a fee simple determinable the estate conveyed reverts back to the Grantor or his heirs *automatically* on the happening or non-happening of a specified event, while with a fee simple subject to a condition subsequent the reversion is not automatic, and the grantor retains the right (called a right of re-entry) to terminate the estate upon the occurrence or non-occurrence of the event. So, if the Thomas Deed conveyed a fee simple determinable then the title to the property automatically reverted to the heirs of Thomas once the Thomas Property was no longer used as a library in 1944. Conversely, if the Thomas Deed conveyed a fee simple subject to a condition subsequent, then the heirs of Thomas have the *right* to re-enter the property as a result of the breach, but the reversion did not automatically occur and the heirs must take affirmative steps (i.e., a court action) to take back the Thomas Property.

Based on the language in the Thomas Deed, it is our opinion that the Thomas Property was conveyed in *fee simple subject to a condition subsequent*, with the result that legal title to the Thomas Property did not automatically revert to the heirs in 1944 (or on whatever date the Thomas Property was no longer used to support a free public library), but that the heirs of Thomas may have a right to re-enter the property, subject to any available defenses. We reach this conclusion by reviewing closely the language of the deed which does not contain the "magic" words normally associated with a conveyance in fee simple determinable.² Further, if there is any ambiguity in the deed as to which estate was conveyed, a court is likely to find that the less restrictive estate was conveyed as courts have consistently "exercised the traditional

located within that larger piece of property conveyed in that later deed to, and currently owned by, Sprague Corp., which is located within Tax Map R06, Lot29. Later survey work done by Sprague Corp. in that area fails to show the Town-owned parcel. It appears that the parcel is likely subject to a Maine DOT easement given by Sprague Corp.

² "Such words such as 'so long as,' 'until,' or 'during,' followed by words of reverter, are appropriate to create a fee simple determinable, whereas such words as 'upon condition that' are the usual indicators of an estate upon condition subsequent." Babb v. Rand, 345 A.2d 496, 499 (1975) (see also Blomquist v. Krah, 1997 Me. Super. LEXIS 45). The Thomas Deed does not include the "magic" words, but rather grants the property in fee "subject to the . . . conditions" stated therein.

preference for a construction of uncertain language that avoids forfeiture instead of one that brings it about.” Independent Congregational Soc. v. Davenport, 381 A.2d 1137, 1140 (Me. 1978). “The rule is also in accord with the traditional bias in favor of grantees in the construction of deeds: in the absence of controlling factors to the contrary, doubtful language in a conveyance is to be treated as transferring the larger or less restricted estate rather than the smaller or more restricted.” *Id.* (citing C. Company v. City of Westbrook, Me. 269 A.2d 307 (1970)). As such, we are reasonably confident that a court would find that the property did not automatically revert back to the Thomas heirs in 1944 (or on whatever date the Thomas Property was no longer used to support a free public library).

This distinction is significant for several reasons. First, if the Thomas heirs do have rights to the Thomas Property, they are required to take affirmative action to enforce those rights. Second, if the heirs take action to recover the Thomas Property there are defenses available to the Town, such as waiver and equitable estoppel, which may be asserted to prevent the reversion from occurring. More significantly, it is our contention that the restriction in the Thomas Deed no longer applies to the Building itself (if it ever applied to the Building).

The Building

Assuming the restriction in the Thomas Deed and the right of reversion applied to the Building, it is our opinion that once the Building was removed from the conveyed real estate the restriction no longer applied.

The restriction in the Thomas Deed provides that “the said lot of land, and the building **from time to time thereon standing** shall always be held, occupied and used by the Inhabitants of the Town of Cape Elizabeth, for the purpose forever maintaining **thereon** a free Public Library” (emphasis added.) The conveyance requires that the real estate and any buildings *thereon* shall forever be used for the purposes of a free public library. Significantly, the deed contemplates the loss, damage, or reconstruction of the Building, as well as the erection of replacement and/or additional buildings on the lot. This indicates that the land itself was the focal point of the restriction in the deed, and that the Building itself did not have any particular importance to the grantor.³ Further, the reverter language refers to the reversion of the “premises, as they shall be at the time of [the breach of the condition to maintain the property as a library].” While it is likely that the condition in the Thomas Deed was breached in 1944, the Building is no longer “standing” on the restricted parcel. It follows that that any rights of reversion the Thomas

³ In State v. Rand, 366 A.2d 183 (Me. 1976), the Law Court noted that in order to interpret charitable conveyances such as the Thomas conveyance, courts must often “seek out the intention of the particular donor as objectively manifested in all the circumstances legally admissible for consideration and uniquely relevant to the transaction under scrutiny.” We believe that the language in the deed, contemplating the growth and/or potential destruction of the library building, along with the circumstances of the conveyance, would influence a court to find that the savvy and sophisticated Mr. Thomas did not intend for the restriction in the deed to encumber buildings located on the real estate once they were no longer located on the property.

heirs had or presently might have apply to the real estate and not to the Building. Assuming that the Thomas heirs presently have a right of re-entry under the Thomas Deed, that right would, if enforceable, apply only to the Thomas Property as it now stands.

Even if a court were to hold that the Building is subject to reversion despite its relocation, the Town has a strong argument that the Thomas heirs, by neglecting to re-enter the property since the breach occurred (probably in 1944), have waived any rights they have in the Building (as well as in the Thomas Property). Similarly, the Town may argue that the heirs should be estopped from asserting any rights in the Building as the Town has expended funds in moving, renovating and maintaining the Building and, as such, it would be unjust for the Building to revert to the heirs.

As far as the current use of the Building is concerned, whether or not the restriction applied or currently applies to the Building, and whether or not the Thomas heirs have any continuing rights to the Building, the condition in the Thomas Deed has been breached, and short of returning the Building to the Thomas Property and using it for a free public library, that breach cannot be repaired.⁴ In other words, whether or not the restriction applied to the Building, it is clear that, as a result of the breach, the restriction no longer applies and the Town may choose to use the Building as it sees fit; as discussed above, the only question that remains is whether the heirs have any continuing rights in the Building.

OPTIONS

While it is our opinion both that the Building did not automatically revert to the Thomas heirs and that the Building is not subject to continuing rights of reversion, there are two options the Town could take to clear the title to the Building and the Thomas Property. First, the Town could attempt to locate and contact all of the Thomas heirs so that they may disclaim and/or convey to the Town any rights they have in the Thomas Property and/or the Building. If we are unable to locate all of the Thomas heirs, and/or if some of the heirs do not wish to release these potential rights, the Town would need to file either a declaratory judgment or a quiet title action, thereby requesting a court to determine the ownership of the Thomas Property and the Building. Note that, in either scenario, the Town would be required to make an effort to locate and communicate with the Thomas heirs, which we estimate would cost between \$10,000.00-\$15,000.00. If a quiet title action is necessary, we estimate an additional \$15,000.00 in fees and costs.

Alternatively, the Town could continue using the Building as it sees fit despite the uncertainty described above, taking into account and relying upon the following factors:

- Our opinion that the Building is likely not subject to reversion;

⁴ Even if the Building is moved back to the Thomas Property and used as a library, the breach might be irreparable.

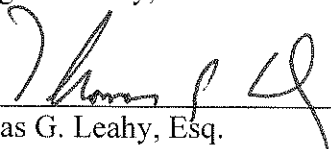
- The low likelihood that any of the Thomas heirs will seek reversion of the Building, especially taking into account the passage of time, evidence suggesting that the heirs either explicitly or implicitly agreed to the relocation of the Building in 1944 and renovations made thereafter, and the fact that a newer and much larger “Thomas Memorial Library” exists, which fulfills the ‘spirit’ of Thomas’ conveyance;
- Defenses that exist (e.g. waiver, equitable estoppel, abandonment) and the preference that the courts have against forfeiture of property, especially when there is any ambiguity in the conveyance

Again, it is our opinion that the Building is not subject to the restriction in the Thomas Deed of use for a “free public library” or to the potential for a reversion of the Building to the heirs. Therefore, using the Building as a library or a related purpose will neither strengthen nor diminish a claim in the Building by either the Town or the Thomas heirs.

Best regards,

Monaghan Leahy, LLP

By:

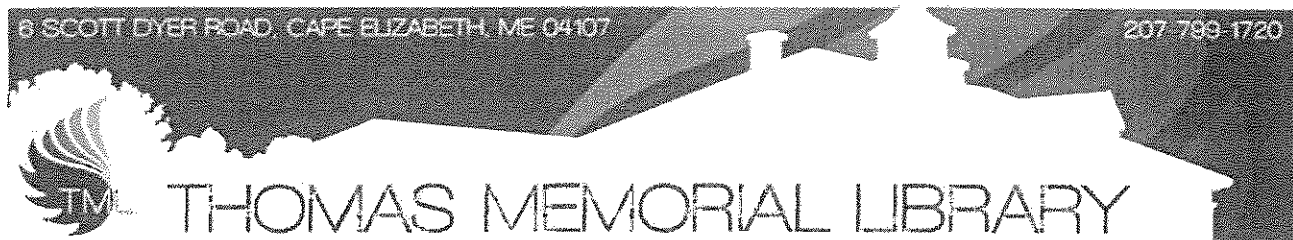


Thomas G. Leahy, Esq.

Enclosures

EXHIBIT A

Thomas Memorial Library



HISTORY

The original structure of what was to become the Thomas Memorial Library was built in 1849 as a one-room school house on Bowery Beach Road, about a quarter mile from the intersection of Fowler Road. Among its early instructors was William Widgery Thomas, Jr. who was employed for the winter term of 1857 for a stipend of \$122.50.

In 1877, this yellow clapboard schoolhouse was repaired and relocated to Fowler Road near the Spurwink Grange Hall. A decline in pupils led to the school's closing in 1913 and three years later the building was purchased for \$150.00 by Phineas Sprague. Mr. Sprague moved the 26×36 structure to land near the farm of Pomroy Jordan on Spurwink Avenue apparently planning to convert it into a pigsty.

William Widgery Thomas Jr. purchased the building in 1917 and by 1919 moved it back to its original site on land that was donated to Thomas by Pomroy Jordan. On February 7, 1919, Thomas wrote to the Town Selectmen offering to the Town as a free gift the library lot, the library building thereon, books, furnishings and equipment. After repairs funded by Mr. Thomas were completed, the Thomas Memorial Library was dedicated on Tuesday, April 22, 1919.

After an active start, use of the library waned in the 1930's as the population of the Spurwink area of Cape Elizabeth declined. By 1942, the library was especially quiet as gas rationing discouraged citizens in many areas of the Town from traveling to it. Consequently, in December 1943, the Town meeting unanimously voted to appropriate \$2500.00 to move the building to the school grounds although there had been objections to placing "so small a building...on the school grounds." On July 5, 1944, the original building was moved to the present site, and on October 17, 1944 it reopened.

In 1957, the town meeting appropriated \$9250.00 for a 46×30 addition to house additional stack space, a children's room and a reference area. \$2000 for the project was donated by both the Sprague and Thomas Memorial Foundations and an additional \$5000 was approved by the Town in 1958. On October 10, 1958, the expanded facility was opened.

By 1967, the Thomas Memorial Library again needed more space. An entry way was added and a new children's room was developed in the basement. The Cape Elizabeth Lion's Club funded this work with an \$11,000 contribution.

Library Trustees in 1978 noted that once again the library was in need of space. An addition was designed in 1980 but was not funded as the Town Council wished to consider use of school space. In 1981, a special committee unanimously agreed that a combined School/Town library would not be feasible. Also in 1981, the Town Council considered razing the Pond Cove School Annex and constructing a new building on its site. In June 1981, the Council put plans on hold and asked for a study of all community facilities. This report called for additional library space and for reuse of the Pond Cove School Annex. In 1983, the Town Council formed a committee to study the Annex and this committee recommended in June 1984 that the former Annex and the library should be connected and utilized as a library and Community Center. On August 13, 1984, the Town Council approved the expenditure of up to \$590,000 for the proposed work.

Subsequently, local citizens donated over \$67,000 to provide for furnishing for the "new" Thomas Memorial Library. The new facilities were designed by Portland Design Team, with the guidance of an active building committee, and were constructed by Donbury, Inc. The former Annex section was opened as the adult section of the Thomas Memorial Library on December 2, 1985. The Children's Library relocated on the first floor of the original building with its additions on December 30, 1985. A community room in the basement of the original building was completed in January 1986. The rededication of the Thomas Memorial Library took place February 9, 1986.

Timeline

1849 The original library structure was built as a one-room school house on Bowery Beach Road.

1857 William Widgery Thomas, Jr. taught the winter term for a stipend of \$122.50.

1877 This yellow clapboard schoolhouse was repaired and relocated to Fowler Road, near the Spurwink Grange Hall.

1913 A decline in enrollment led to the school's closing.

1916 The 24 x 36 school building was purchased for \$150 by Phineas Sprague. It was moved to land near the farm of Pomroy Jordan on Spurwink Avenue apparently planning to convert it to a pigsty.

1917 William Widgery Thomas, Jr. purchased the building and by 1919 moved it back to its original site on land that was donated to Mr. Thomas by Pomroy Jordan.

1919 Mr. Thomas wrote the Town Selectmen offering to the town: the library lot, the library building thereon, books, furnishings and equipment. After repairs funded by Mr. Thomas were completed, the Thomas Memorial Library was dedicated on as a gift to the town on April 22.

1930's The library had an active start, however, its use waned in the 30's as the population of the Spurwink area declined.

1944 By now, the library was especially quiet as gas rationing discouraged citizens of the town from traveling to it. The town decided to move the building to the "school grounds" at a cost of \$2,500. It was reopened on October 17 at its present site.

1958 The library was expanded by a 46 x 30 addition to house additional stack space, a children's room and a reference area.

1967 By this time, more space was need. An Entry way was added and a new children's room was developed in the basement.

1978 Again, it was determined that the library was in need of more space. Over the next 5 years, alternatives were carefully considered.

1983 The Town Council formed a committee to study the reuse of the Pond Cove School Annex as additional library space. The committee recommended that the former Annex and the library be connected and utilized as a library and Community Center.

1984 A combination of public and private funds were used to construct the connector as well as provide new furnishings. The connector also accommodates the checkout desk and gallery space.

1985 As a result of the earnest efforts of town officials and active citizens, the former Annex was opened as the adult section, and the children's library relocated in the original building and its addition by the end of the year.

1986 A rededication ceremony was held on February 9, 1986.

(Extracted from: "History of the Thomas Memorial Library Building", in the February 9, 1986 rededication booklet.)

singular the conditions, and reservations herein contained, do hereby give, grant, bargain, sell and convey unto said the Inhabitants of The Town of Cape Elizabeth and its successors forever, a certain lot of land, with the buildings thereon, lying in said Cape Elizabeth, on the easterly side of the road leading from the dwelling house now occupied by Pomeroy W. Jordan and his wife, Emma D. Jordan, to Bowery Beach, bounded and described as follows:

Beginning at a point in the easterly line of the road leading from the dwelling house occupied by said Pomeroy W. Jordan, and Emma D. Jordan, to Bowery Beach, said point of beginning being fifty-four and three tenths (54.3) feet from the south-westerly corner of the concrete foundation of the building now standing on the lot hereby conveyed and seventy-one and seven tenths (71.7) feet from the northwesterly corner of said foundation; thence running north twenty degrees (20°) and thirty minutes (30') west following the said easterly line of said Bowery Beach road ninety (90) feet to a stake; thence deflecting to the right ninety-five degrees (95°) and twenty minutes (20') and running northeasterly one hundred twenty-two (122) feet to a stake; thence deflecting to the right eighty-four degrees (84°) and forty minutes (40') and running southeasterly parallel with said Bowery Beach Road ninety (90) feet to a stake; thence deflecting to the right ninety-five degrees (95°) and twenty minutes (20') and running southwesterly one hundred twenty-two (122) feet to the point of beginning; containing one quarter (1/4) of an acre of land.

Being the same lot of land conveyed to me by said Emma D. Jordan, wife of said Pomeroy W. Jordan by her deed dated the seventeenth day of March, A. D. 1919 and recorded in Cumberland Registry of Deeds, Book 1017, Page 191.

And I have also granted, bargained and sold, and by these presents do grant, bargain and sell unto said the Inhabitants of Cape Elizabeth and its successors, all the contents of said building, that is to say, all shelves, books, furniture and other goods and chattels now in said building.

This conveyance is made however, subject to the following conditions and reservations, to wit:

That the said lot of land, and the buildings from time to time thereon standing, shall always be held, occupied and used by said the Inhabitants of the Town of Cape Elizabeth, for the purpose of forever maintaining thereon a Free Public Library, for the benefit of said the Inhabitants of the Town of Cape Elizabeth, to be forever known as the "Thomas Memorial Library" in memory of the Grantor herein, and that the same shall be forever reasonably maintained and cared for as a free Public Library, by funds to be annually raised by taxation, the amount thereof in any year hereafter to be at least the sum of two hundred (200) dollars, and paid by the Grantee herein, and by such funds, or from the income thereof, as are now or may from time to time be donated to the Grantee herein therefor:

That the said Grantee shall keep insured in a reasonably sufficient sum against loss or damage by fire or other cause the building now on said lot of land and such building or buildings as may from time to time be erected in replacement of or in substitution for said building now upon said lot; and that the said Grantee will

also keep insured in a reasonably sufficient sum against loss or damage by fire or other cause, the contents of said building, viz: the shelves, books, Furniture and other property which may now or from time to time hereafter be in said building now on said lot or in any building or buildings which may be from time to time hereafter erected on said lot in replacement of or in substitution for said building now upon said lot.

That in case of loss or damage to said building now on said lot, or to any building or buildings upon said lot from time to time hereafter erected as aforesaid, the proceeds of all policies of insurance upon said building or buildings shall be devoted and expended in each instance of loss or damage, to the reconstruction, if necessary, or to the repair of such building or buildings, and the proceeds of all policies of insurance upon the said contents of the building, now upon said lot, or upon the said contents of the building, now upon said lot, or upon the contents aforesaid of any building or buildings from time to time erected upon said lot as aforesaid, shall be devoted to and expended in such instance of loss or damage, for the replacement of said contents:

That upon the failure of said Grantee, said the Inhabitants of the Town of Cape Elizabeth, to occupy and use to a reasonably extent for the purposes herein provided, or to perform and abide by all the conditions, restrictions and reservations herein contained, including said contents, said premises, as they shall be at the time of said failure, shall revert to the Grantor, his heirs or assigns;

TO HAVE AND TO HOLD the aforegranted premises with all the privileges and appurtenances thereof, to said the Inhabitants of the Town of Cape Elizabeth and its successors to their use and behoof forever, subject nevertheless, to all the conditions and restrictions herein contained.

And I do covenant with the said Grantee and its successors that I am lawfully seized in fee of the premises; that they are free of all incumbrances made or suffered by me; and that I and my heirs shall and will warrant and defend the same to the said Grantee and its successors forever against the lawful claims and demands of all persons claiming by through or under me, subject however, to all the conditions and restrictions herein contained.

IN WITNESS WHEREOF, I said William W. Thomas and I, Aina Thomas wife of said William W. Thomas, joining in this as Grantor, and relinquishing and conveying my right by descent and all other rights in the above described premises, have hereunto set our hands and seals this fourteenth day of April in the year of our Lord one thousand nine hundred and nineteen.

Signed, Sealed and Delivered in presence of

Geo. E. Bird

W. W. Thomas,
Aina Thomas,

Seal.
Seal.

State of Maine. Cumberland, ss. Portland, Maine, April 14, 1919. Then personally appeared the above named William W. Thomas and acknowledged the foregoing instrument to be his free act and deed.

Before me, Ralph M. Magalls, Justice of the Peace.

Received June 6, 1919, at 9h, 50m, A.M. and recorded according to the original.