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BY FACSIMILE - (413) 259-2405

Mr. David Ziomek
Director of Conservation and Development
Amherst Town Hall
4 Boltwood Avenue
Amherst, MA 01002

Re: Puffer's Pond

Dear Mr. Ziomek:

You have requested an opinion on various issues pertaining to the public's use of Puffer's Pond, a pond located on Town-owned conservation property (the "Property").[1] You have informed me that approximately 500-600 members of the public use the Property and the pond for recreational purposes in the summer per day, with less traffic during the other months. The Town is aware that people dive off surrounding ledges into the pond, and that, over the years, there have been several deaths resulting from drowning in the pond. There is no lifeguard on duty. The Town has a trail on the Property leading to the beach, has installed a guard-rail along the trail leading to the water, and otherwise maintains the Property without ever charging a fee for its use. Since the Property is heavily used, the cost of such maintenance is expensive. The Town has formed a 2020 Puffer's Pond Committee (the "Committee") to consider options for the use, restoration, beautification, and preservation of the Property. The Committee has asked a number of specific questions pertaining to the public's use of the Property, including whether the Town may charge members of a public a fee for the use of the Property and what the Town may do to promote public safety and limit its liability for injuries or death occurring on the Property. I address each of the Committee's questions below.

1. What laws, statutes, regulations govern the care and control of Puffer's Pond?

Since you have informed me that the Property is held by the Conservation Commission, G.L. c. 40, § 8C governs the care, custody, and control of the Property. Under Section 8C, the Conservation Commission has the authority to "adopt rules and regulations governing the use of land and waters under its control" and impose a penalty (not exceeding $100) for a violation of such rules and regulations. Thus, the Conservation Commission can regulate the hours and/or days when the Property may be used by the public, post signs on and make other alterations to the Property

[1] You have informed me that Puffer's Pond does not constitute a great pond, as it is does not contain 10 acres.

(provided such alterations are, of course, consistent with the conservation values of the Property), and, if it deems necessary or convenient, prohibit members of the public from using the Property temporarily or permanently.

2. What is the Town's liability for injuries/deaths at the pond?

Under common law, a landowner owes all visitors lawfully present on the owner's property a duty of reasonable care, which means that the owner is liable if the visitor is harmed by the owner's negligent acts or omissions. However, G.L. c. 21, § 17C, the so-called "Recreational Use Statute," which applies to governmental entities to the same extent as to private landowners, lowers the duty of care with respect to recreational land and provides that a landowner is liable to lawful visitors only if the visitor is harmed by the owner's reckless acts or omissions. Specifically, Section 17C states, in relevant part, that:

> "Any person having an interest in land...including without limitation... rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological research, religious, or charitable purposes without imposing a charge or fee therefore... shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of willful, wanton, or reckless conduct by such person. Such permission shall not confer upon any member of the public using said land, including without limitation a minor, the status of an invitee or licensee to whom any duty would be owed by said person" (emphasis added).

In my opinion, the use of the Property, including the pond, by members of the public clearly constitutes a "recreational" use that is covered by the Recreational Use Statute. Since the Town does not charge a fee for the use of the Property, it is my opinion that the Town will not be liable for non-fatal injuries occurring at the Property even if such injuries are caused by the Town's negligence. However, the Town will be liable for injuries that are caused by the Town's willful, wanton, or reckless actions or omissions. As discussed below, the Recreational Use Statute does not limit the Town's liability for wrongful death claims.

Since the Town's liability under the Recreational Use Statute for non-fatal injuries depends on whether its conduct is negligent or reckless, it is important to distinguish between those standards. Willful, wanton, or reckless conduct is conduct that is more egregious than "mere" negligence. A person is negligent when the person knew or should have known that his actions or omissions would have a reasonable likelihood of causing injury or harm and ignores the risk. Willful, wanton, or reckless conduct, on the other hand, is different in kind and degree. As the Supreme Judicial Court noted in Sandler v. Commonwealth, 419 Mass. 334, 336 (1995), a reckless act or a "reckless failure to act involves an intentional or unreasonable disregard of a risk that

presents a high degree of probability that substantial harm will result to another.... The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run that risk or his failure reasonably to recognize it" (internal citations omitted) (emphasis added). Thus, so long as non-fatal injuries at the Property are not caused by the Town's willful, wanton, or reckless conduct, the Town will not be liable for such injuries.

The following are examples of cases in which courts held that the municipality's actions did not constitute willful, wanton, or reckless conduct, and were thus protected under the Recreational Use Statute:[2]

Ali v. Boston, 441 Mass. 233, 239 (2004): plaintiff riding bicycle through bicycle path in Franklin Park at night collided into a large metal gate blocking the middle of the path, which gate was installed by City two months prior to injury. There were similar gates at other parts of the park, but no signs, lights or other warnings of the new gate. Supreme Judicial Court held that the City was protected under the Recreational Use Statute. Although installation of a gate blocking the middle of a path poses risk that a passenger will not see the gate and injure himself, and the City could have lowered risk by adding lighting or posting a warning, City did not act "reckless in expecting that the public would take particular care in navigating after dark on roads in a park, as the plaintiff well knew, [that] contained traffic gates."

Sandler v. Commonwealth, 419 Mass. 334, 338 (1995): plaintiff riding bicycle at night through unlit bike tunnel injured because of an uncovered 8-inch drain. Although vandals frequently removed drain cover and made lights in tunnel inoperative, and the Metropolitan District Commission ("MDC") was aware of the dangers posed by such chronic problems, the MDC did not inspect property or take any actions to address problems or warn of their danger. Expert testimony showed that feasible alternatives were available at reasonable costs. Court found that MDC's inactions did not constitute recklessness. It held that "this case, which involves a persistent failure to remedy defects in a tunnel on a traveled bikeway, simply does not present a level of dangerousness that warrants liability" under the Recreational Use Statute.

Smith v. Plymouth, 61 Mass.App.Ct. 1107 (2004): child seriously injured when worn swing seat on Town-owned playground gave away. Swing had cracks and showed signs of significant wear. Appeals Court held that was Plymouth not liable for injuries because "the risk that the defective seat posed to someone using the swing did not entail a high degree of probability that death or serious bodily injury would result were the risk disregarded."

Stewart v. Hudson, 12 Mass. L.Rptr. 499 (2000): person injured when tripped over knee-height wire stretching across path on Town park. Town did not illuminate wire or install warning

[2] In none of these cases was a fee charged for the use of the recreational property.

signs. Court held that Town not liable, as risk of injury from tripping on wire "does not rise to the level of dangerousness that warrants a finding that the Town was reckless within the meaning of the [Recreational Use] statute."

The following are examples of cases in which courts suggested that the municipality's actions may constitute willful, wanton, or reckless conduct, as such terms are used in the Recreational Use Statute:

Dean v. Fitchburg, 19 Mass.L.Rptr. 315 (2005): child fell over defective metal fence near baseball field at City park and sustained serious fractures. The City had inspected the fence and was aware of its defective condition, but failed to take any action. The Superior Court held that the City's inactions may be reckless, as fence was "deformed and jutting inward toward a pathway near the baseball field where it would be reasonably foreseeable that children would be playing, including running, and that constituted a high risk of serious harm."

Forbush v. Lynn, 35 Mass.App.Ct. 696 (1994): child slid down broken swing chain and became impaled on a large hook at the end of the chain. A month prior to the accident, the City's playground instructor had inspected condition of playground and filed report with department charged with repairing and replacing damaged playground equipment, which report noted, among other unsafe conditions, the defective swing that caused the injury. Lower court held, and the Appeals Court did not dispute, that plaintiff had sufficiently alleged that City acted willfully, wantonly or recklessly with respect to defective swing.

The Recreational Use Statute, as quoted above, limits a landowner's liability for "personal injuries or property damage." Since the statute does not expressly mention the word "death," it is our opinion that the Recreational Use Statute does not limit the Town's liability for deaths that are caused on recreational land; the Town would be responsible if the death is caused by the Town's willful, wanton, or reckless acts or by its negligence. In McCarthy v. Hamilton, 11 Mass.L.Rptr. 347 (2000), the Superior Court, in considering whether the Town of Hamilton was liable for the death of a person who drowned while swimming at Chebacco Lake, stated that "nothing in the wording of G.L. c. 21, § 17C [the Recreational Use Statute] indicates that the statute also protects the town from liability for wrongful death claims." While there are no appellate-level cases on this issue, it is our opinion that the Appellate Court or the Supreme Judicial Court would reach this same conclusion.

If the Town's willful, wanton, or reckless misconduct causes injury or damage to persons using the Property or if a person dies because of the Town's negligence or willful, wanton, or reckless misconduct, and the Town cannot avail itself of the protections of the Recreational Use Statute, the Town's liability is nevertheless limited by G.L. c. 258, the Massachusetts Tort Claims Act ("MTCA"), to $100,000. Section 2 of the MTCA provides, in relevant part, that "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the

negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of one hundred thousand dollars."

Some of the kinds of claims that could be brought against the Town for injuries or deaths occurring at the Property could relate to the Town's alleged failure to: provide lifeguards, install warning signs, install a barricade preventing use of the embankments, prevent use of the pond altogether, take measures to prevent or diminish the harmful consequences of swimming or jumping in the pond, among others claims. Even if the Town were to install barricades and/or signs or take other preventative measures, claims could be brought against the Town if the Town were to fail to maintain public property or be negligent in maintaining such barricades or warning signs.[3]

Note, however, that Section 10(b) of the MTCA exempts the Town for liability for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." To avail itself of this defense, the Town must show that the Town had discretion in determining whether to hire lifeguards, install signs, and/or take preventative measures, and that the Town's decision not to take certain actions was "characterized by a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." Patrazza v. Commonwealth, 398 Mass. 464, 467 (1986). For example, in Barnett v. Lynn, 433 Mass. 662 (2001), the Supreme Judicial Court held that the City of Lynn was not negligent for failing to shovel snow and ice from playground steps and installing a fence or barricade around icy patches when the City showed that its decision not to take the foregoing acts was based on determination of how best to use the City's limited resources. The Court recognized that "[t]he city has discretion in deciding how best to expend its resources in order to provide safe and secure conditions. A decision not to erect a barrier at this location [and to shovel snow and ice from the playground steps] falls within that discretion." Id. at 664. There are other defenses available under the MTCA, other statutes, and common law (such as the defense that the dangers of the pond are open and obvious), which I do not discuss here.

3. Who controls what happens (parking, signs, one-way, changes to) on the streets around Puffer's Pond?

The Town's control over streets around the Property depends on whether such streets are Town ways, state highways, or private ways.

[3] This letter does not contain an exhaustive list of the kinds of actions or claims that can be brought against the Town.

Under G.L. c. 40, § 22 and Section 3.244 of the Town Government Act, the Select Board has control of Town ways, subject to certain limitations. For example, while the Select Board has the authority under G.L. c. 85, § 2 to erect and maintain signs, traffic control signals, traffic devices, school zones, parking meters or markings (all of which I refer to as "Traffic Control Devices") on Town ways, such Traffic Control Devices must conform to regulations promulgated by Massachusetts Department of Highways (the "Department"). In addition, the Select Board must obtain the Department's approval before it: installs Traffic Control Devices at the intersection of public ways and state highways, installs signs excluding heavy commercial vehicles from any way, or excludes traffic on Town ways leading to other municipalities, among others acts that require the Department's approval under G.L. c. 85, § 2. The Select Board may regulate the speed of motor vehicles on Town ways, exclude traffic from certain Town ways, install stop signs, and take other actions, provided it follows the procedures set forth in G.L. c. 90, § 18.

The Select Board's authority over ways that are not within the Board's control – that is, state highways and private ways – is limited. The Department has the authority to install Traffic Control Devices and regulate the speed of traffic on state highways. As to private ways, G.L. c. 90, §18 provides, in relevant part, that:

> "Any person, corporation, firm, or trust owning a private parking area or owning land on or abutting a private way, or any person, corporation, firm or trust controlling such land or parking area, with the written consent of the owner, may apply in writing to the...board of selectmen...to make special regulations as to the speed of motor vehicles and as to the use of such vehicles upon the particular private way or parking area, and...the board of selectmen...may make such special regulations with respect to said private way or parking area to the same extent as to ways within their control shall not be subject to approval by the department or the registrar; provided, however, that any traffic signs, signals, markings or devices used to implement such special regulations shall conform in size, shape and color to the most current manual on uniform traffic control devices"

Thus, the Town may regulate the speed of traffic and install signs on private ways if a person who owns land on or abutting the private way makes such a request to the Select Board.

4. <u>If the Town were sued over a death/injury and lost, where would the funds come from?</u>

If the Town were sued over a death/injury and lost, the funds would likely come from the Town's insurer, depending on the type and amount of coverage carried by the Town. I recommend that you consult with the Town's insurer as to whether the Town's policies provide coverage for injuries at the Property, and what special endorsements or affirmative coverage the Town can obtain to further protect itself from liability. If a claim is not covered by insurance, the funds would usually

come from the Town's general fund. The MTCA states that "public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment." Creditors cannot, therefore, force the sale of Town property. Note that under G.L. c. 59, § 23, amounts required to pay final judgments rendered prior to the fixing of the tax rate can be added to tax levy without appropriation by Town Meeting. If a judgment is rendered after the tax rate is set, the Town may, under G.L. c. 44, § 31 and with the Department of Revenue's consent, make such payments from any available funds, provided that such funds are added to the next subsequent annual tax rate.

5. How would instituting a fee for swimming, general use or parking (including a pass-system differentiating between residents and non-residents) change our liability at the pond?

As the Supreme Judicial Court stated in Ali v. Boston, 441 Mass. 233, 238 (2004), the legislature's goal in enacting the Recreational Use Statute was to encourage "landowners to permit broad, public, free use of land for recreational purposes by limiting their obligations to lawful visitors under the common law." The Town's liability is limited for injuries occurring on the Property if and only if the Town does not charge a fee for the use of the Property. If the Town charges a general admission fee to enter and use the Property, it is my opinion that the Town would lose the protections of the Recreational Use Statute and be liable for injuries caused by the Town's mere negligence, whereas, if the Town did not charge such a fee, the Town would be liable only for injuries caused by Town's willful, wanton, or reckless misconduct. As discussed above, recklessness is a substantially higher standard than negligence.

On the other hand, since the Recreational Use Statute states that a landowner's liability is limited if he or she does not charge a fee for the use of the Property, it is arguable that a landowner can retain the protections of the statute if the owner charges a fee that is not related to the use of the recreational land. Since the pond is the primary attraction of the Property, it is my opinion that a court would most likely find that a swimming fee constitutes a fee for the use of the Property, and that the Town owes the swimmers (if not every person using the Property) a duty to protect them from harm resulting from the Town's negligence.

In my opinion, the Town may retain the protections of the Recreational Use Statute if it charges a reasonable parking fee, provided that the Town take steps to make it clear that the purpose of the fee is solely to reimburse the Town for the cost of maintaining the parking area, and that members of the public can otherwise use the Property free of charge. The Town could, for example, post signs for parking only at the entrance to the parking lot, post signs elsewhere that admission to the Property is free, and state on the ticket that the fees reimburse the Town's parking area maintenance costs. The Town's ability to charge a parking fee would be bolstered if on-street parking is available, and the Property is accessible by walking, bicycle, or by public transportation, so that parking on the Property is optional. In Dios v. Massachusetts Executive Office of

Environmental Affairs, 23 Mass.L.Rptr. 565 (2008), the Superior Court considered whether a fee of $2.00 charged by the state for parking at a state park constituted a parking fee or a fee for the use of the park. The Superior Court noted that the parking ticket issued to the injured plaintiff stated, at the top, "$2.00 Day Use Ticket" and that the remainder of the ticket contained a series of questions designed to allow the visitor to evaluate the park. The Court also noted that "[n]owhere on the ticket is there a reference to the fee being a parking fee." Thus, should the Town wish to impose a parking fee, care should be taken to ensure that the public knows that the fees relate solely to parking.[4]

Since courts are likely to scrutinize the parking fee to ensure that it relates to the use of the parking area, and not a fee for the use of the Property, the parking fee must be reasonably related to the Town's cost of maintaining the parking area.[5] Such costs could include the cost of paving and striping the parking area, cleaning the parking area, capital costs in clearing and providing new parking areas, administrative expenses, salary and benefits of persons cleaning or otherwise maintaining the parking area (pro rated to the time spent in so maintaining the parking area), towing costs, and reserves for maintenance, among others. If funds generated from the parking fee are used to pay for maintaining and/or improving other portions of the Property, it can argued that the fee is for the use of the Property, leaving the Town ineligible for the protections of the Recreational Use Statute. The Town could counter that argument by pointing out that a person who did not park a vehicle on the Property could use the Property free of charge. For an example of a court's willingness to closely examine such fees, see Hunt v. Newton, 3 Mass.L.Rptr. 148 (1994).

If the Town charges a parking fee, there is a risk, in my opinion, that a court may carve out an exception to the Recreational Use Statute for persons parking on the Property, such that the Town could be liable for injuries that are caused by the Town's negligence with respect to the parking area (for example, if the Town is negligent in maintaining the parking area).

6. In your experience, how have other towns/cities in MA dealt with legal issues around natural swimming areas in MA?

In our experience, other towns/cities have dealt with legal issues around natural swimming areas in a variety of ways. Some municipalities limit the public's use of such swimming areas or prohibit it entirety; some hire lifeguards; many allow members of the public full use of such swimming areas, but post warning signs; some allow full public access without hiring any lifeguards

[4] Note that the Town may legitimately charge non-residents more than the parking fee charged to Town residents. Such distinctions have been upheld by the courts as long as there is a rational basis for the distinction. For example, a town may restrict local shellfish licenses to residents [Barlow v. Town of Wareham, 401 Mass. 408 (1983)], and a municipality may prohibit parking on public ways in a particular neighborhood without a resident parking sticker [Commonwealth v. Petralia, 372 Mass. 452, 456 (1977), noting that "the reduction of traffic congestion and air pollution and the encouragement of the use of public transportation are legitimate [governmental] purposes".

[5] See Emerson College v. Boston, 391 Mass. 415 (1984).

or taking other affirmative measures. As to fees, several towns charge a fee for parking on town-owned recreational land.

7. Who would be liable if a third party (i.e. Friends of Puffer's Pond) raised money and paid for a lifeguard or equipment? Or, if this third party were to lease land for certain activities?

In my opinion, if the Town uses money donated to the Town for the purpose of hiring a life guard and/or purchasing equipment, the Town's liability would remain unchanged. The Town's liability stems from the fact that the Town owns the Property; the fact that the Town uses gift funds, and not Town funds, to hire a life guard or purchase equipment does not change the fact that the Town owns the Property and the Town's liability for injuries/death occurring on the Property.

If the Town were to lease the Property or portions thereof to a third party, it is my opinion that the Town would retain the protections of the Recreational Use Statute so long as the lessee was a nonprofit corporation and did not charge the public a fee for the use of the Property. The Recreational Use Statute states, in relevant part, that: "Any person having an interest in land...who leases such land for said purposes to...any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of willful, wanton, or reckless conduct by such person."

As a threshold matter, note that the Town cannot lease property acquired for conservation purposes without Town Meeting authorization and the approval of two-thirds of each house of the state legislature. It may, however, grant a nonprofit organization a license to use such property or portions thereof so long as the use of the property is not changed. Since a license is, by definition, revocable at will and thus does not grant the licensee a property interest, neither Town Meeting authorization nor Article 97 approval is necessary for the Town to grant a license. Although the Town may obtain a license fee from the licensee, the Town must ensure that the licensee does not charge a fee for the use of the Property. In Crowley v. Orange, 23 Mass.L.Rptr. 473 (2008), the Town of Orange obtained weekly rent in the amount of $125 from a charitable organization that leased recreational land. The organization held public skating sessions at the property, for which it charged both an admission fee and a skate rental fee, which in turn was used, in part, to pay the rent to the Town. When Town of Orange was named in a suit for injury occurring at the leased property, Orange claimed that it was exempt from liability under the Recreational Use Statute because the Town itself did not charge a fee for the use of the property. The Superior Court disagreed and held that because the lessee charged a fee for the use of the property, the Town was not immune from liability simply because it did not itself charge the fee.

KOPELMAN AND PAIGE, P.C.

8. Can the Town charge a fee for the Property, whether for parking or other use, if the purchase of the Property was funded in part by a Self-Help grant?

The regulations governing the Self-Help Program (301 CMR 5.00 et seq.) prohibit municipalities from charging a fee for the use of property acquired with Self-Help funds under G.L. c. 132A, § 11. Specifically, 301 CMR 5.08(3)(a) states that: "Discrimination on the basis of residence, including preferential reservation, membership or annual permit systems, or user fees is prohibited on the Project site unless this provision is waived by the Secretary [of the Executive Office of Energy and Environmental Affairs]." It is my opinion that the Town cannot charge a fee for the use of the Property (such as an admissions fee) unless it has first obtained the approval of the Executive Office of Energy and Environmental Affairs ("EOEEA"). However, the EOEEA may permit the Town to charge a fee unrelated to the use of the Property. I recommend that the Town consult with EOEEA prior to imposing any such fee.

Please contact me if you have any further questions on this matter.

Very truly yours,

Shirin Everett

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SE/jmt
cc: Town Manager
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