



June 14, 2017

VIA FIRST CLASS MAIL AND EMAIL (cityclerk@concordnh.gov)

City of Concord City Council
41 Green Street
Concord, NH 03301

**RE: JDH Realty Holdings, LLC's Request to Release "Paper Street" at 52
Locke Road**

Dear Honorable Mayor Bouley and Members of the City Council,

I write on behalf of Laconia Best Warehousing and Distribution Corporation ("Laconia Best") in regards to JDH Realty Holdings, LLC's ("JDH") "Request to Release 'Paper Street' at 52 Locke Road." JDH requests that the City Council release and discharge from all public servitude the Phase III Roadway and terminate the City's interest in the portion of the Locke Road cul-de-sac located on the property identified as Map 40, Block Z, Lot 6 ("Lot 6"), subject to and effective upon final site plan approval of JDH's proposed development of the Lot. Laconia Best, as the parent corporation of Locke Road Group, LLC, the owner of the adjoining property identified at Map 40, Block Z, Lot 7 ("Lot 7"), opposes this Petition unless any such release also: includes the termination of the temporary cul-de-sac easement burdening Lot 7; and is subject to JDH permanently relocating the cul-de-sac off of Lot 7. For the reasons below, the City will wreak an unconstitutional taking upon Laconia Best if the City Council votes to grant the Petition without terminating the temporary cul-de-sac easement burdening Lot 7. Please make this letter a part of your record in this matter.

Overview of Request for Relocation of Temporary Cul-De-Sac

Laconia Best strongly supports further commercial development on Locke Road and hopes to be able to offer its enthusiastic endorsement of JDH's proposal to develop a long-underused lot at the terminus of Locke Road. Laconia Best also wishes to support the proposal to release from public servitude the "paper street" portion of Locke Road burdening Lot 6, which is not needed now that there is no longer any plan for a northerly extension of Locke Road.

However, Laconia Best cannot do so, and will exercise all reasonable and lawful options to firmly oppose the proposal and this Petition if the City does not also terminate the temporary cul-de-sac easement burdening Lot 7. As noted in its June 14, 2017, letter to the Planning Board regarding its consideration of JDH's Application for major site plan approval (2017-15), Laconia Best proposes the Planning Board require as conditions of approval that JDH: (1) relocate a permanent cul-de-sac off of Lot 7, presumably on the westerly side of and/or beyond the terminus of Locke Road; and (2) include in its Petition the release and discharge of the temporary cul-de-sac easement burdening Lot 7. This



would release both the bulk of the public servitude on Lot 6 and all of the public servitude on Lot 7, as originally anticipated by the parties when the temporary cul-de-sac easement was granted.

Laconia Best has tried diligently to work with JDH in an effort to mutually resolve this issue. However, JDH has resisted Laconia Best's efforts.

Accordingly, Laconia Best respectfully requests that the City Council grant the Petition subject to and effective upon obtaining site plan approval with the two conditions described above.

Legal Analysis: Planning Board Authorized to Require Such Conditions

The Planning Board would be well within its rights to require such conditions. Generally speaking, an unlawful "taking" occurs when a governmental entity, such as the Planning Board, requires a condition of approval that has no proportional relationship to and is not needed by a proposed development, and does so without providing both due process and just compensation. U.S. CONST. amends. V, X, and XI; N.H. CONST. pt. I, arts. 2 and 12; *see also* RSA 674:21, V(a)-(b) (requiring proportionality for impact fees). RSA 674:21, V(j) specifically authorizes requirement of off-site improvements.

Here, it is precisely the Application of JDH that causes the City to be without rights to maintain a needed cul-de-sac. Consequently, the City requiring JDH to relocate the cul-de-sac would be proportional to and needed because of the Application. It would not exceed the City's right to conditionally approve the Application; such a condition would be lawful.

Legal Analysis: Failing to Release Temporary Cul-De-Sac Easement Would Wreak an Unconstitutional Taking upon Laconia Best

With respect to Lot 7, without releasing from public servitude the temporary cul-de-sac, the City would wreak an unconstitutional taking upon Laconia Best. Not releasing it would exceed the scope of the intent and plain language of the easement and would be, therefore, illegal.

It is clear that the temporary cul-de-sac easement did not grant to the City rights to permanently maintain a cul-de-sac in that location. It is black letter law that when an express easement is granted, "its nature and extent are to be determined by the language of the deed, taken in connection with facts, usages, and the circumstances existing at the time of making it." 17-8 New Hampshire Practice: Real Estate § 8.02 (2016) (quoting *Abbott v. Stewartstown*, 47 N.H. 228, 229 (1866) (original emphasis deleted)). "When, however, the words of the deed are clear and their meanings unambiguous, there is neither a need to resort to extrinsic facts and circumstances to aid our determination . . .



nor a need to rely on . . . [the so-called] rule of reason.” *Lussier v. New Eng. Power Co.*, 133 N.H. 753, 756 (1990) (internal quotations and citations omitted).

The Easement Deed granting both the easement for the northerly extension of Locke Road and the easement for the temporary cul-de-sac contains clear and unambiguous language that limits the scope of the cul-de-sac easement to an easement that may burden the owner of Lot 6 only temporarily, until the northerly extension of Locke Road is completed. Specifically, it states in pertinent part:

Also conveying a temporary easement for a cul-de-sac . . . ; the said temporary easement to terminate upon the proposed northerly extension of Locke Road and its acceptance as a public highway by the City of Concord

Ex. A (Easement Deed, Bk 1837, Pg 1464). This Deed is, by its express language, temporary. The City, therefore, has no right to take any action that would make the cul-de-sac permanent.

Furthermore, because this language is clear, any arguments that the scope of the easement should be interpreted to acknowledge the changed circumstances and present needs of the City are meritless. Such arguments attempt to apply the rule of reason, which is not applicable when the easement’s express language is clear and unambiguous.

In the alternative, it is possible that the easement’s language may present an ambiguity with respect to when the temporary easement will be extinguished. The express language of the easement anticipates its termination upon the occurrence of two subsequent conditions: (1) the northerly extension of Locke Road; and (2) the City’s acceptance of the extended Locke Road as a public highway. *Id.* If the City releases from public servitude the “paper street” portion of Locke Road originally intended to serve as the northerly extension of Locke Road, the City will have made it, for all intents and purposes, impossible for either condition to occur, thereby making permanent the temporary cul-de-sac easement. This raises the question of when the cul-de-sac will be extinguished given that it is clearly only temporary in nature.

In such cases, extrinsic facts and circumstances should aid the determination and the rule of reason should be applied to interpret the scope of the easement. Here, the Grantor must have intended to convey only a temporary right with respect to the cul-de-sac. Within the same Easement Deed by which it conveyed the temporary cul-de-sac easement, the Grantor conveyed permanent easement rights. This demonstrates the Grantor’s ability and intent to distinguish between the conveyance of permanent and temporary rights. And with respect to Laconia Best, after doing its due diligence prior to purchase, and identifying the temporary cul-de-sac easement, it reasonably never expected its property to be burdened permanently by the cul-de-sac. Furthermore, it reasonably expected that upon any development on Lot 6, be it a further build out of



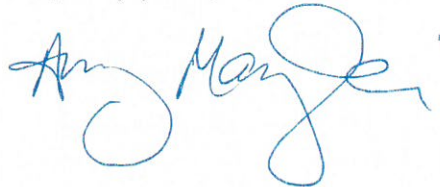
Locke Road or any other development, that the temporary cul-de-sac easement would be extinguished.

Thus, whether looking at the clear and unambiguous meaning of the word temporary, or applying the rule of reason and evaluating the present and past facts and circumstances, the City is not authorized to make the temporary cul-de-sac easement permanent. Should it attempt to do so, Laconia Best will exercise its right to exclude persons from using the cul-de-sac and seek to have the easement extinguished.

Rather than allow such a costly and burdensome scenario to unfold, Laconia Best urges City Council grant the relief requested above. Should City Council do so, Laconia Best will make all reasonable efforts to assist in the relocation of the cul-de-sac and would enthusiastically support JDH's project.

On behalf of Laconia Best, thank you for your attention to this matter. Please contact me with any questions.

Very truly yours,



Amy Manzelli, Esq.

cc: Client
JDH Realty Holdings, LLC (via email only to hastingsp@cwbp.com)



RECEIVED

127702

1990 MAY -8 PM 2:14

EASEMENT DEED

MERRIMACK COUNTY
REGISTRY OF DEEDS

KNOW ALL MEN BY THESE PRESENTS, that I, Kent D. Locke, Jr., Trustee of Keewaydin Realty Trust of 272 Union Avenue, Laconia, County of Belknap, State of New Hampshire, for consideration paid, grant to the City of Concord, a Municipal corporation duly chartered under the laws of the State of New Hampshire with a usual place of business at 41 Green Street, Concord, County of Merrimack, State of New Hampshire, a certain right-of-way or easement in perpetuity for the accommodation of a street known as Locke Road. The limits of said right-of-way are bounded and described as follows:

BK1837
PG1464

Beginning at a point on the easterly sideline of Locke Road, said point marks the limit of Phase I (so-called) of the Concord Business and Industrial Park, as accepted for maintenance by the City of Concord and is approximately at station 11+10;

Thence running along a curve to the right having a radius of 40.00 feet, a central angle of 65° 51' 08", for a distance of 45.97 feet to a point;

Thence running N 34° 32' 30" W for a distance of 694.16 feet to a point opposite station 18+45;

Thence running S 55° 27' 30" W for a distance of 80.00 feet to the westerly sideline of Locke Road;

Thence running southerly along the westerly sideline of Locke Road S 34° 32' 30" E for a distance of 735.00 feet to a point opposite station 11+10;

Thence running easterly to the point of beginning.

Also conveying a temporary easement for a cul-de-sac over Map No. 121, Tract No. 8207-G and Tract No. 8207, Lot 2, commencing at the northeasterly corner of the above-described easement and running on a curve to the right having a radius of 70 feet for a distance of 153.95 feet to a point;

Thence running on a curve to the left having a radius of 40 feet for a distance of 45.97 feet to the easterly sideline of said Locke Road;

Thence running N 34° 32' 30" W to the point of beginning; the said temporary easement to terminate upon the proposed northerly extension of Locke Road and its acceptance as a public highway by the City of Concord.

IN WITNESS WHEREOF, KENT D. LOCKE, JR. has caused his name to be subscribed hereto this 30 day of October, 1989.

Kent D. Locke, Jr.
KENT D. LOCKE, JR.

BK1837 PG1465

STATE OF NEW HAMPSHIRE
COUNTY OF

On this 30 day of October, 1989, before me, the undersigned officer, personally appeared KENT D. LOCKE, JR. as TRUSTEE, of KEEWAYDIN REALTY TRUST and acknowledged the execution of the foregoing to be the free act and deed of said Trust. Before me,

Maurice J. Lessard
~~Justice of the Peace~~
Notary Public

My Commission Expires April 14, 1992



"Attestation of Consideration and Tax Stamp Page"

City of Concord (Buyer's Name) and
Kent D. Locke, Jr. (Seller's Name)

agree and affirm that the full price or consideration paid for the
real estate transferred by this deed is \$1.00. The tax due upon
this transfer is calculated at \$ N/A per \$100 or any part thereof,
for an amount due of \$ N/A (computed to the nearest whole dollar).

BK1837 701466

Seller/s Signature/s
Kent D. Locke, Jr.
Kent D. Locke, Jr.

Buyer/s Signature/s
Paul Cavanaugh
City of Concord
Paul Cavanaugh, Solicitor

*The State of New Hampshire is exempt pursuant to RSA 78-B:10.

The foregoing instrument was acknowledged before me this 4th
day of May, 1990.

Maurice Lessard
Notary Public/Justice of the Peace



My commission expires My Commission Expires April 14, 1992

The tax stamps required by RSA 78-B has been attached below by buyer and
seller.

MERRIMACK COUNTY RECORDS
RECEIVED AND RECORDED
Kathi L. Gray
REGISTER