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February 22, 2024

**VIA E-MAIL**

William R. Shane, Town Manager  
Town of Cumberland  
290 Tuttle Road  
Cumberland, ME 04021

***Re: Drowne Farm Property***

Dear Bill:

We understand that the Town has requested and received a proposal for an affordable housing development to be located on an approximately 2.5 acre portion of a 105.9 acre parcel owned by the Town. This parcel is located at the intersection of Drowne Road and Tuttle Road, and is identified as Map R03, Lot 51-A on the Town's tax maps (the "Property").

The Property was originally conveyed to the Town by Elizabeth Drowne through her will dated July 22, 1891, an abstract of which is recorded in the Cumberland County Registry of Deeds in Book 589, Page 204. You have requested an opinion regarding the enforceability of certain restrictions with respect to the Property as enumerated in the will of Elizabeth Drowne; specifically whether such restrictions prevent the construction of residential dwelling units on the Property as the development proposal contemplates.

Part Tenth and Eleventh of Elizabeth Drowne's will provide as follows (a complete copy is enclosed for reference):

*Tenth. Upon the death of my husband the income of said farm, so given and bequeathed by me to my husband as above mentioned, I give and bequeath to the Inhabitants of the town of Cumberland Maine, said income to be used and expended for the cause of education, within its limits, by the officers of said town who have charge of the schools therein. Said income is to be expended annually by them or a majority of said officers in said cause, as they shall think is best and prudent.*

*Eleventh. Upon the death of my husband, and at the end of fifteen years from the probate of my will, I give and devise and bequeath unto the said Inhabitants of said town of Cumberland, said farm, house, buildings etc, situated upon said Tuttle Road in said*

*~ Over 70 Years of Service ~*

*town of Cumberland. The income of said farm, house, etc, is to be used and expended in the cause of education by those who have charge of the schools, within the limits of said town, in such manner as a majority of said officers shall judge and determine is best and wise. Said farm shall not be sold, and the income thereof is to be expended for the cause of education, as above mentioned, and for that cause alone.*

*Should said inhabitants refuse to accept said gift or fail to use and expend the income as I have directed, then, and in that case, if such failure should continue for more than eighteen months at any one time I give and bequeath said farm to the persons named in the sixth item of this my last will and testament and in the proportions therein mentioned. Should any of said persons have deceased the share he, she or they would have received if alive shall descend to the survivors in the same proportions as I have mentioned in said item.*

According to Part Eleventh of Elizabeth Drowne's will, the Town acquired title to the Property on March 1, 1907 (fifteen years from the date of the probate of her will) since her husband, Joseph Drowne, died in 1897.<sup>1</sup> There is no record to indicate that the Town refused to accept the gift of the Property or failed to use and expend the income from the Property as directed by the will for the cause of education.

In 1951, the Town constructed a school on the Property, which was used as a primary school for the Town of Cumberland (the "Drowne Road School"). The Drowne Road School was conveyed by the Town to MSAD 51 in 1966 when the SAD was formed. In 1984, MSAD 51 discontinued use of the Drowne Road School and conveyed it back to the Town to be used for municipal offices. The Town then constructed new Town Hall facilities at the current location in 1997 and leased the Drowne Road School back to MSAD 51. The Drowne Road School continued to be used as a primary school until 2010 and at the end of the lease term in 2013, MSAD 51 elected to terminate the lease. At that time, the Town entered into a long-term (99 years) lease agreement with Bateman Partners, LLC for the development of thirty-eight (38) senior housing rental units within the former Drowne Road School building.

The Property currently includes the Town Hall, which was constructed on approximately 2.6 acres; approximately 86.4 acres of natural forest with public trails; two fields used by the Cumberland North Yarmouth Little League on approximately 3.1 acres; and a senior housing complex in the former Drowne Road School on approximately 2.7 acres. For a period of time from approximately 1970 through the early 1990s, approximately 11.1 acres of the Property next to the Drowne Road School were also used as the Town's municipal solid waste disposal area. This landfill was formally closed in 1992 and approximately 2 acres of this portion of the Property now contain a solar array that was constructed in 2020.

When the former Drowne Road School was redeveloped into the existing senior housing project, the Town Council requested an opinion of our firm as it related to the use of the Property

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<sup>1</sup> An extract of the will of Joseph Drowne is dated April 29, 1897 and recorded in the Cumberland County Registry of Deeds in Book 649, Page 155.

February 22, 2024

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and the restrictions set forth in the will of Elizabeth Drowne. In a letter from Attorney Ken Cole dated August 23, 2011 (enclosed for reference), he opined that Elizabeth Drowne's will did not contain a specific reverter to her heirs and that the Town's use of the Property for quasi-public purposes such as senior housing was consistent with the original intent of the restriction as to the use of income from the farm in light of the change in circumstances over more than 100 years. Further, Attorney Cole cited *Mildram v. Town of Wells*, 611 A.2d 84 (Me. 1992), in which the Law Court held that when a conditional grant of property has no stated duration, the courts will infer a "reasonable" amount of time, after which the restrictions would lose any legal effect. *Id.* at 85. As Attorney Cole explained, in that case, the Town of Wells received a donation of property in 1906, subject to the perpetual condition that such property be used as a town hall. *Id.* at 84-85. In 1988, Wells constructed a new municipal office building elsewhere, but continued to use the donated property for other municipal functions, such as hosting Planning Board meetings and other large gatherings. Under those circumstances, the Law Court determined that over 80 years was more than a reasonable amount of time for the restrictions to remain in effect, and therefore, Wells owned the property free and clear of those restrictions. *Id.*

Here, over 115 years have passed since Elizabeth Drowne's bequest to the Town. The specific restriction of the will of Elizabeth Drowne relates only to the use of the income from the Property (at that time, being used as a farm) to be expended for the cause of education, and does not restrict the use of the Property itself. Setting aside the possible argument that the will did not in fact restrict the use of the Property to education, it is my opinion that a "reasonable" amount of time has passed and the condition imposed by Elizabeth Drowne's will on the use of the income from the Property is no longer enforceable under current conditions, which include the fact that the Property is no longer a working farm and the Town of Cumberland no longer operates its own school system. *See Mildram*, 611 A.2d at 85 (changing conditions affecting the practicality of grant restrictions further support the unenforceability of those restrictions).

In addition to the reasoning set forth above, I also call the Town's attention to a decision of the Law Court from 1957 related specifically to the Property, *Inhabitants of the Town of Cumberland v. True*. In this case, the Town brought suit against the named heirs of Elizabeth Drowne, seeking a declaration that the restrictions set forth in her will were invalid and no longer of any effect. In its decision, the Law Court held that: "title of [the Town] to said Drowne Farm Property in fee simple with full power of alienation is hereby declared and confirmed." The Law Court further concluded that the named heirs of Elizabeth Drowne were "perpetually restrained and enjoined from asserting or claiming any estate in or right, title, or interest in the [Drowne Farm] property." The 1957 decision clearly confirmed the Town's fee interest in the Property and precluded the heirs from asserting any such claim going forward.<sup>2</sup> The Law Court did not further address the restrictions on the use of the income from the Property. However, this question is clearly addressed by the holding in *Mildram* as discussed above.

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<sup>2</sup> I do not have direct knowledge of the facts giving rise to this case; however, I understand that the Town sold a roughly one acre portion of the Property along Tuttle Road to Gerald N. McCarty by deed dated October 24, 1957, recorded in the Cumberland County Registry of Deeds in Book 2385, Page 361, which may have precipitated the need for this action. This portion of the Property has since been further subdivided and is now referred to on the Town's tax maps as Map R3, Lot 52 and Lot 52A.

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Based on the holdings in *Mildram* and *True*, and the specific language of Elizabeth Drowne's will, we continue to be of the opinion that the Town has undisputed title to the Property as held in the *True* case and any restrictions attached to the use of the Property in 1892 or 1907 are no longer of legal effect according to the *Mildram* case. We therefore conclude that the Town may use a portion of the Property for an affordable housing development as proposed.

Notwithstanding the analysis set forth herein, we recognize and the Town should also be aware that this opinion does not preclude an individual with standing from challenging the Town's use of the Property. Although we cannot forecast the likelihood of litigation under these circumstances, it is our opinion that should litigation arise, the Town has a strong position that supports its ability to construct the proposed affordable housing development on the Property.

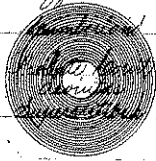
Please contact me if I can provide additional information. Thank you.

Sincerely,

A handwritten signature in blue ink that reads "Alyssa C. Tibbetts". The signature is written in a cursive, flowing style.

Alyssa C. Tibbetts, Esq.

and the residue to be equally divided between my son Stephen Longfellow and my daughter Phigab and their respective heirs.  
 Witness my hand and the Seal of the Probate Court for said County of Cumberland, the day and year first above written.



Edward L. Reynolds. Register

Received March 2, 1892 at 11h. - m, A. M. and recorded according to the original  
 Attest:

James M. Thompson Register

L. Drowne  
 To  
 Browne  
 Devise

Extract from the Will of  
 Elizabeth D. Drowne.  
 State of Maine.

Cumberland County,

Probate Office.

Portland, March 1<sup>st</sup> A. D. 1892.

I hereby certify, That the last Will and Testament of Elizabeth D. Drowne late of Portland in said County, deceased, was proved, approved and allowed by the Judge of Probate for said County, at a Court held at Portland, on the tenth day of February, 1892, and that the following is a true copy of so much of said Will as devises Real Estate in the County aforesaid:-

Copy.

I, Elizabeth D. Drowne, of Portland, in the County of Cumberland and State of Maine, do hereby make publish and declare this instrument to be my last will and testament, hereby revoking any and all other wills, by me heretofore made.

First: I give, devise and bequeath unto my niece Edith L. D. Browne of the City, County and State of New York, one third part share and proportion of whatever interest I now have, or which I, or my estate, may or shall at any time hereafter, have or acquire in and to the Underwood Spring Company (said spring and premises belonging to said Company are situated in the town of Falmouth, Maine) or in any property connected with, or that shall hereafter belong thereto and in which I, or my estate, can or shall have an interest, right or title therein.

I also give and bequeath unto the said Edith L. D. Browne all shares and interest I may own at my decease in and to the Boston and Maine Railroad Company. I also give and bequeath unto the said Edith L. D. Browne all the furniture I may own at my decease now in my homestead on State Street, in said

lara, and to Phillip Drowne Stewardant of Boston, Massachusetts the sum of Two hundred dollars.

Eighth. I give and bequeath to the following named persons, the following sums or amounts - the same to be paid by my Executors to said persons - when payment can be made conveniently and without injury to my estate, and of this my Executors are to be the sole judges, viz: To Mrs. Isabella C. Osgood of Boston, Massachusetts the sum of One thousand dollars. To Mary A. Battelle of Portland, Maine the sum of One thousand dollars. To Harriet C. Blanchard of Portland the sum of Five hundred Dollars. To Annie H. Blanchard of said Portland the sum of Five Hundred Dollars. To Mrs. Harriet P. McCallan of Portland, the sum of Four hundred dollars - this amount is to be used by the said Harriet P. McCallan for the benefit of Mary F. Bradford of Cumberland, Maine. To Mrs. Annie H. Folson of Exeter, New Hampshire, the sum of Two hundred dollars - and to Mrs. Eleanor A. May of said Portland the sum of One hundred dollars.

Ninth. I give and bequeath to my husband Joseph Drowne, for life, as herein set forth, the use and income of my said farm situated upon the Tuttle Road, in said town of Cumberland, but to John H. True of Portland I give the use and occupancy, for himself and family, of the house, garden, and such portions of the out buildings, as he may need upon said farm, on said Tuttle Road, in said town of Cumberland, free of rent and taxes, for the term of fifteen years from the date of the probate of my will, if he or his family desire so to use and occupy the same. If said John H. True and his family do not desire to use and occupy said house, garden, etc. then the same is to be devised to my husband Joseph Drowne during his life.

Tenth. Upon the death of my husband the income of said farm, so given and bequeathed by me to my husband as above mentioned, I give and bequeath to the Inhabitants of the town of Cumberland, Maine, said income to be used and expended for the cause of education, within its limits, by the officers of said town who have charge of the schools therein. Said income is to be expended annually by them or a majority of said officers, in said cause, as they shall think is best and prudent.

Eleventh. Upon the death of my husband and at the end of fifteen years from the probate of my will, I give and devise and bequeath unto the said Inhabitants of said town of Cum-

berland, said farm, house, buildings etc., situated upon said Tuttle Road in said town of Cumberland. The income of said farm, house etc., is to be used and expended in the cause of education by those who have charge of the schools, within the limits of said town, in such manner as a majority of said officers shall judge and determine is best and wise. Said farm shall not be sold, and the income thereof is to be expended for the cause of education, as above mentioned, and for that cause alone.

Should said inhabitants refuse to accept said gift or fail to use and expend the income as I have directed them, and in that case, if such failure should continue for more than eighteen months at any one time I give and bequeath said farm to the persons named in the sixth item of this my last will and testament, and in the proportions therein mentioned. Should any of said persons have deceased the share he, she or they would have received if alive shall descend to the survivors in the same proportions as I have mentioned in said item.

Twelfth. Should any Personal Estate remain after the payment of all debts, charges of administration and the aforesaid legacies I give and bequeath said rest, residue and remainder of said personal estate to my adopted daughter Mary Frances True, my nieces Edith L. D. Browne and Ella Christine Deake and to my nephew Charles Standish Deake share and share alike and to their heirs and assigns forever. This gift is not to take effect until the death of said Joseph Browne as he is to have the use and income of said residue during his life.

Thirteenth. All my wearing apparel, ornaments and jewelry and personal belongings I give and bequeath unto my adopted daughter Mary F. True and my niece Edith L. D. Browne; they to keep the same, or dispose of the same, in the manner they should judge to be in accordance with my wishes.

Fourteenth. I appoint my husband Joseph Browne and Frederick Fox or the survivor, both of said Portland, Executors of this my last will and testament, and I request the Judge of Probate to grant letters testamentary to them, or the survivor, without requiring bonds or sureties of them, or either of them. And in witness whereof that this instrument is my last will and testament I have hereunto set my hand and seal upon this the twenty-second 22<sup>d</sup> day of July in the year of our Lord one thousand eight hundred and ninety one.

(July 22, 1891).

Elizabeth J. Browne.

> Seal.



*Attorneys at Law*

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SUZANNE R. SCOTT  
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August 23, 2011

**Via E-Mail & U.S. First-Class Mail**

William R. Shane, Town Manager  
Town of Cumberland  
290 Tuttle Road  
Cumberland, ME 04021

***Re: Drowne Road School***

Dear Bill:

I understand that a question has arisen in regard to the original terms of the conveyance of the Drowne Road School property and whether those terms would prohibit redevelopment of that School into a senior housing project.

As you and I have discussed, the actual original conveyance to the Town is by virtue of Elizabeth Drowne's Will from 1891. That Will had a specific clause in it stating that if the Town failed to use the property for educational purposes longer than 18 months at anyone time, the property would go to her heirs. The question imposed by long-time former Councilor Harland Storey is based on his recollection of that Will. I enclose a copy of the abstract of the Will. The Registry of Probate burned in the early 1900s so only the abstract is available. You can see from review of the marked area, the condition is not a specific reverter, but rather a direction that if the Town failed to accept the property or failed to comply with her direction, the property should go to others named in the Will.

~ Over 50 Years of Service ~



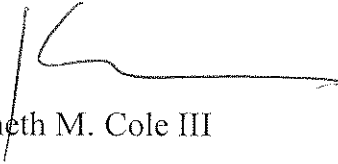
Jensen Baird  
Gardner Henry

August 23, 2011  
Page 2

This is not an uncommon circumstance. I call your attention to the case of Mildram v. Town of Wells, 611 A.2d 84 (Me. 1992). In that case, the Town of Wells had been deeded property in 1905 along Route 1 that was to be used for a Town house and, if it failed to be used as such, it was supposed to revert to the heirs of that Grantor. The Town had grown substantially and wanted to relocate its offices. The Maine Supreme Court held that "the continued use of the Mildram property for municipal purposes constitutes sufficient observance of the condition in light of these changing circumstances." In this instance, the changed circumstance is that Cumberland alone is not a school department and the SAD has determined that it no longer has any use for the School. The Town is redeveloping it in a quasi-public manner by attempting to provide housing for senior citizens in the Town, so the Court's general holding in the Mildram case and in earlier cases is controlling: "When a fee on condition subsequent is created by a deed or Will stating no time during which the condition must remain satisfied, a reasonable time will be implied." *Id.* at 85. In the Mildram case, it was 82 years and in the Town of Cumberland's case, it is 120 years.

If you need anything further from me, please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read "K. Cole III", with a long horizontal stroke extending to the right.

Kenneth M. Cole III

KMC/lts  
Enclosures

STATE OF MAINE  
CUMBERLAND, ss SUPREME JUDICIAL  
COURT IN EQUITY

INHABITANTS OF THE TOWN OF CUMBERLAND

vs.

ELWIN STANLEY TRUE, ET AL

DOCKET NO. 7807

DATE OF HEARING October , 1957

True  
&  
to  
Cumber-  
land  
Town of  
--  
Decree

FINAL DECREE

IN THE SUPREME JUDICIAL COURT IN EQUITY:

This cause came on to be heard this day upon bill and answer of the Defendant Ernest S. Hill and amended answer of the Defendant Marguerite A. Kott, and was argued by Counsel, the Plaintiffs' Bill having been taken pro confesso against all Defendants save the said Ernest S. Hill and the said Marguerite A. Kott by decree of this Court on the tenth day of October, 1957, for want of appearance and ten days having elapsed since the entering of said decree without motion to reopen the same;

And, thereupon, upon consideration thereof the Plaintiffs' Bill is sustained without costs and it is

ORDERED, ADJUDGED, AND DECREED as follows, viz:

FIRST: The true construction of the Will of Elizabeth I. Drowne, and particularly of Items 10th and 11th thereof, is

- (a) That said Items and Will do not create or constitute a Trust of the Drowne Farm Property, described in the Plaintiffs' Bill.
- (b) That Item 10th of said Will gave to the Plaintiffs a right to the income of said Drowne Farm, to be expended in the manner therein set forth, during the period between the death of

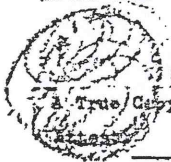
Joseph Drowne in 1897 and the expiration of fifteen years from the date of probate of said Will, to wit, 1905;

- (c) That Item 11th of said Will gave the Plaintiffs, subject to be a life estate in said Joseph Drowne and to the fifteen year term in John H. True, a fee simple in said Drowne Farm, and on the happening of events therein specified, an executory interest to those persons named in said Item 11th;
- (d) That the executory interest set forth in said Item 11th is invalid under the Rule against Perpetuities.
- (e) That the prohibition against sale of said property is an invalid restraint against alienation of property.

**SECOND:** That the title of the Plaintiffs to said Drowne Farm Property in fee simple with full power of alienation is hereby declared and confirmed; and

**THIRD:** That the Defendants, Edwin Stanley True, Sidney John True, Marguerite A. Kott, Ernest S. Hill, and all persons claiming as heirs of or by, through, or under Mary Frances True, late of Portland, Maine, and persons claiming as heirs of, or by, through, or under Elizabeth I. Drowne, late of Portland, Maine, or any of them, are perpetually restrained and enjoined from asserting or claiming any estate in or right, title, or interest to the premises described in the Plaintiffs' Bill under the terms of said Will of Elizabeth I. Drowne, or from casting a cloud upon the Plaintiffs' title to said premises or setting up an adverse claim to the same or interfering with the Plaintiffs' possession thereof, or the possession thereof by any person now or hereafter claiming as Grantee of the Plaintiffs, or as heirs or assigns of such Grantee.

Dated this 21st day of October, 1957.



A True Copy of Final Decree.

*Isabel Woodward*  
Clerk of said Supreme Judicial Court

Francis W. Sullivan  
JUSTICE, SUPREME JUDICIAL COURT

STATE OF MAINE  
CUMBERLAND, ss. REGISTRY OF DEEDS  
Received at 10 H 30 M A M on OCT 22 1957 and recorded in  
Book 2379 Page 429 ATTEST  
*George J. Williams* Registrar