



TOWN OF DURHAM
8 NEWMARKET ROAD
DURHAM, NH 03824
Tel: 603/868-5555
Fax: 603/868-1858

11D

AGENDA ITEM:
DATE: September 17, 2018

COUNCIL COMMUNICATION

INITIATED BY: Todd I. Selig, Administrator

AGENDA ITEM: SHALL THE TOWN COUNCIL ADOPT THE PROVISIONS
CONTAINED WITHIN NEW HAMPSHIRE REVISED STATUTES
ANNOTATED (RSA) 36-A:4-A "OPTIONAL POWERS"

CC PREPARED BY: Jennie Berry, Administrative Assistant

PRESENTED BY: Todd I. Selig, Administrator

AGENDA DESCRIPTION:

The Town was recently contacted by Jan McClure, Land Protection Director at The Nature Conservancy in Concord, indicating that the Conservancy is pursuing a grant for two projects in Durham: off Dame Road and along the Lamprey River. The grant is under the Aquatic Resource Mitigation fund (ARM) run by the New Hampshire Department of Environmental Services.

The Conservancy is fundraising for the projects at this time and asked if Durham might be interested in contributing funds.

Land Stewardship Coordinator, Ellen Snyder, said that she has discussed the projects with Ms. McClure and both are important conservation lands. The Dick Lord property is on the south side of the Lamprey River just below Packers Falls. It sits on a high point and is visible from across the river on Bennett Road. It abuts other Nature Conservancy land and is upstream from Doe Farm. The Walker property on Dame Road is part of the Lubberland Creek/Crommet Creek complex and is a key remaining parcel near the Sweet Trail and abuts the Town's Willey property.

The total cost for the two projects is likely to be \$450,000-\$500,000. Given that the Town Conservation Fund is limited at this time (around \$57,000 is in the Conservation Fund at this time) and that the Town is committed to stewardship of existing properties, Ms. Snyder does not believe Durham would be able to contribute sizably to these projects. However, she feels that a donation from the

Town in support of these two projects would be a positive statement of support and would help The Nature Conservancy secure large grants to complete these projects as grant funders like to see some level of support from the community. Ms. McClure has suggested a Town donation of \$5,000-\$10,000 for each project.

Ms. Snyder does not think it is beneficial or necessary for the Town to hold any interest in these two parcels, believing that it would only add to the stewardship burden, and the properties would be well cared for by conservation entities. If the Town were able to provide a small, but important contribution, she hoped it could do so without requiring an interest in the properties.

If, however, the Conservation Commission was interested in having the Town hold any interest in these two parcels, the Town would first have to adopt the provisions outlined in Revised Statutes Annotated (RSA) 36-A:4-a "Optional Powers". (See "Legal Authority" below). If there is no legal interest in the parcels, however, the Conservation Commission would be able to contribute funds to an in-Town project without further action of the Council, which would be a significant change.

At this time, the Administrator recommends that the Town Council consider the above provisions so that they are in place in the event the Conservation Commission votes to contribute funds toward the above-noted parcels, as well as any other projects that may be presented in the future.

NOTE: *This item was placed on the Town Council's August 20, 2018 for action, but was not taken up due to the lateness of the hour.*

LEGAL AUTHORITY:

RSA 36-A:4-a "Optional Powers":

- I. The legislative body of a city or town may vote at an annual meeting to authorize the conservation commission to:
 - (a) Expend funds for the purchase of interests in land outside the boundaries of the municipality, subject to the approval of the local governing body; and
 - (b) Expend funds for contributions to "qualified organizations," as defined in section 170(h)(3) of the Internal Revenue Code of 1986, for the purchase of property interests or facilitating transactions relative thereto to be held by the qualified organization, when such purchase carries out the purposes of this chapter. Because such contributions further the protection of the state's natural resources, they are hereby declared to be a public purpose.
- II. A vote under this section may be taken simultaneously with the adoption of this chapter or any time thereafter. If the vote is taken simultaneously with the adoption of this chapter, a separate question shall be placed on the warrant.
 - (a) The wording of the question under subparagraph I(a) shall be: "Shall the town vote to adopt the provisions of RSA 36-A:4-a, I(a) to authorize the conservation

Re: Adopt Provisions of RSA 36-A:4-a "Optional Powers" Pertaining to the Conservation Commission

commission to expend funds to purchase interests in land outside the boundaries of our municipality, subject to the approval of the local governing body?"

- (b) The wording of the question under subparagraph I(b) shall be: "Shall the town vote to adopt the provisions of RSA 36-A:4-a, I(b) to authorize the conservation commission to expend funds for contributions to 'qualified organizations' for the purchase of property interests, or facilitating transactions related thereto, where the property interest is to be held by the qualified organization and the town will retain no interest in the property?"

III. The provisions of this section may be rescinded by vote of the legislative body.

LEGAL OPINION:

N/A

FINANCIAL DETAILS:

N/A

SUGGESTED ACTION OR RECOMMENDATIONS:

MOTION 1:

The Durham Town Council does hereby adopt the provisions of RSA 36-A:4-a, I(a) to authorize the Conservation Commission to expend funds to purchase interests in land outside the boundaries of the municipality.

MOTION 2:

The Durham Town Council does hereby adopt the provisions of RSA 36-A:4-a, I(b) to authorize the Conservation Commission to expend funds for contributions to "qualified organizations" for the purchase of property interests, or facilitating transactions related thereto, where the property interest is to be held by the qualified organization and the Town will retain no interest in the property.

Chair Marple MOVED that the Durham Town Council does hereby authorize the Administrator to ACCEPT a land donation on behalf of the Town from Dennis Meadows, Director and Treasurer of LaTaillede/USA, a non-profit corporation incorporated in the State of New Hampshire to the Town of Durham, said parcel being 5.3 acres of open space land located at 30 Newmarket Road (Tax Map 6, Lot 9-6-1), provided that the title search is deemed acceptable by both the Administrator and Town Attorney. Councilor Rotner SECONDED the motion and it PASSED unanimously 9-0.

- C. Receive update regarding a Memorandum of Understanding between the Oyster River Youth Association and the Town of Durham for the management of Woodridge Park

Councilor Howland explained that he and Councilor Rotner had been working on a facilities policy for the Oyster River School District. He provided some background on this, and how this had informed the development of an MOU between ORYA and the Town for the management of Woodridge Park. It was noted that the Town Attorney had said the MOU was good to go. Councilor Welsh said the MOU was great and was very specific. He said it was good to have it, and spoke further on this.

There was further discussion, and it was noted that there was no rush to get this done and that it was important to get input on what was proposed.

- D. Shall the Town Council adopt the provisions contained within New Hampshire Revised Statutes Annotated (RSA) 36-A:4-a "Optional Powers" relative to the Conservation Commission?

Administrator Selig explained that there are provisions within the state statues which give municipalities the option to acquire conservation land in another municipality and also to acquire conservation land within a municipality by expending public funds without having a legal interest in the parcel.

He said historically, Durham has always required that it have a legal interest in the parcel. The town established a Conservation Fund, funded through the Land Use Change Tax (LUCT) tax penalty, which goes into the Conservation Fund and the Conservation Commission has the sole authority to decide how those monies will be spent. He said, however, there has been a safeguard regarding the expenditure of those monies to acquire land, because in that case, the Durham Town Council, as the governing and legislative body of the town, has to also give its approval. He said that works well in terms of checks and balances, but what the town has found is that there is no "free lunch" any more when acquiring conservation land because when the town owns conservation parcels, it has to maintain and manage them and care for the properties. He said in the case of owning an easement, the town needs be sure the land is being managed in accordance with the restrictions the town is relying on. He said if the town adopted the provisions of RSA 36-A:4-a, I(b) noted in Motion 2 of the Council Communication, the Council would really be reliant on the Conservation Commission to decide whether or not it is in the town's interest to expend Conservation Fund money on land without the town owning interest in the land.

In terms of spending monies on conservation land outside of the boundaries of the municipality, Administrator Selig said one might ask why a municipality would do that. He said an example might be perhaps if there is a parcel in Barrington that would help protect the Oyster River aquifer, which indirectly protects the town's and UNH's drinking water and natural resources coming to Durham, it might make sense to expend monies in that manner.

Administrator Selig said both of the provisions noted in Motion 1 and Motion 2 are available to communities in the state law and the conversation around the two Nature Conservancy proposals in Durham where the town is not being asked to have an interest in the parcel, but being asked to donate \$5,000 toward each, would require the Town Council to adopt Motion 2 (RSA 36-A:4-a, I(b)).

He said this was an opportunity for the town and said that the Nature Conservancy request has prompted the town to take a look at it.

Chair Marple said she supported passing Motion 2 in order to help the Nature Conservancy fundraiser so that the two parcels could be placed in conservation land without the town having to hold any interest in the land.

Councilor Lawson said his understanding is that currently, if the Conservation Commission decides to spend money on a project, it has to be approved by the Town Council. He asked Administrator Selig if in the case of both Motion 1 and Motion 2, would the Town Council still have that final approval or do the motions authorize the Conservation Commission to expend monies from the Conservation Fund without those checks and balances.

Administrator Selig responded that both Motion 1 and Motion 2 would allow the Conservation Commission to expend monies from the Conservation Fund without those checks and balances. He said that with respect to checks and balances, while on a specific project the Conservation Commission would be able to do that once, if it did that and the Council felt it was not done responsibly, the Council could presumably rescind these authorities or change the allocation of the monies that fund the Conservation Fund going forward, so there are things that could be done longer term to address a "rogue" Conservation Commission.

Chair Marple asked why the Town Council is even considering these motions if the Conservation Commission doesn't need to come before the Council for approval anyway.

Administrator Selig replied that technically right now the Conservation Commission would need to come to the Town Council because it would not be allowed to expend the \$5,000 on each of the land acquisitions without the town also holding a legal interest in the parcel, and only the Town Council can vote to accept legal interest in the parcel. He said the Guidelines for Acquiring Legal Interest in Conservation/Open Space Land originally adopted by Town Council on May 3, 2004 and revised on May 19, 2008 that are currently in place are all predicated around the current legal structure. Adopting the

two provisions would create the opportunity for the Conservation Commission to simply act on its own.

Chair Pro Tem Rotner said when Jan McClure from the Nature Conservancy came to the Land Stewardship Subcommittee concerning this matter, he got the impression there may be a time issue relating to their fundraising efforts. Administrator Selig said that he thought the Nature Conservancy wanted to move forward with its fundraising outreach, and it's helpful as part of that outreach to be able to say the host community is also contributing money.

Councilor Lawson said he was comfortable with Motion 2 because if it was going to be a large expenditure by the Conservation Commission it's likely the town would have to have some interest in it and it would have to come back to the Town Council for approval. He said the Conservation Commission and the groups it works with have done an extraordinary job in doing their homework. Councilor Lawson said, however, if money is going to go outside the community from LUCT taxes that were generated in the community, he was generally not comfortable with that. He said he would be supportive of Motion 2, but not Motion 1.

Councilor Corrow concurred with Councilor Lawson and added that the Conservation Commission did not recommend Motion 1, but only recommended Motion 2. Councilor Welsh asked if Motion 2 were accepted, would that mean that the funds would have to be for land within the Town of Durham. Administrator Selig responded in the affirmative.

Chair Pro Tem Rotner MOVED to adopt the provisions of RSA 36-A:4-a, I(b) to authorize the Conservation Commission to expend funds for contributions to "qualified organizations" for the purchase of property interests, or facilitating transactions related thereto, where the property interest is to be held by the qualified organization and the Town will retain no interest in the property. The motion was SECONDED by Councilor Tobias.

The motion PASSED unanimously, 9-0.

Administrator Selig said it was important to note that for a long period of time the Conservation Fund was viewed as a way to amass money to acquire open space. However, over time the town has been using the Conservation Fund to fund projects that take care of the conservation parcels already acquired by the town and to manage them responsibly. He said he envisions longer term the funds will continue to shift in that direction so that a good portion of the proceeds will really be needed and used to effectively manage existing properties and that the town will not simply continue to hold the funds in order to acquire additional parcels that will be a further burden for the town to maintain.