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M E M O R A N D U M

TO: Town of Nahant

FROM: Nahant Preservation Trust

RE: Northeastern’s Dedication of East Point for Public Use and the Public’s Acceptance

DATE: February 8, 2019

The historical record of Northeastern University’s (“NEU”) property at East Point and NEU’s interactions with both the U.S. government and the Town of Nahant, establish that NEU unequivocally intended to dedicate the land on top of and to the east of Murphy Bunker to the public as a public ecological/wildlife preserve. NEU’s dedication was accepted by the public, and the people of Nahant and the general public have relied on that dedication for half a century. Thus, an implied easement of rights to that park for the public has been created such that NEU cannot now withdraw that dedication to construct a facility or alter the public’s use of that easement.

In the fall of 2017, the Supreme Judicial Court expressly reaffirmed that the common law “dedication of public use doctrine” is alive and well as a means to designate and protect land for conservation purposes through an easement of rights to the public. See Smith v. City of Westfield, 478 Mass. 49, 58 (2017). In Smith, the court observed that “[t]he dedication may spring from oral declarations or statements by the dedicator, or by those authorized to act in his behalf, made to persons with whom he deals and who rely upon them; or it may consist

of declarations addressed directly to the public.” Id. at 59, quoting Attorney Gen. v. Onset Bay Grove Ass'n, 221 Mass. 342, 348 (1915). Moreover, the dedication “also may be manifested by the owner's acts from which such an intention can be inferred.” Id.

The History of NEU’s Dedication and the Public’s Acceptance and Reliance

In or around 1961, the Nike missile battery at East Point was decommissioned, ending twenty years of the U.S. military’s use there. The U.S. government retained ownership of East Point, twenty plus acres went to Government Services Administration (GSA) for disposition, while the Navy retained (but did not use) 7 to 8 acres which later became Lodge Park. The year following the decommission, the Nahant Planning Board zoned East Point as Zone R-1 residential district, restricting East Point to uses such as single-family homes, churches, libraries, museums, parish houses, parks and playgrounds. A 1962 Planning Board report observed that 35 acres of land at East Point “can tentatively be added as open space as they are in the process of being abandoned by the U.S. Army.” The 1962 Report further suggested as part of its future land use pattern, that “[s]ince military purposes no longer require this land, it is recommended that it should be retained for public park purposes” and that “Nahant should consider acquisition of the site for public park use.”

Nahant’s 1963 Annual Report included the Conservation Commission’s identification of the disposition of the East Point property as having “immediate importance”. Although Town Meeting votes to raise or allocate money to purchase the site from the government failed, the 1964 Annual Report mentioned that the Town was negotiating with the GSA and the U.S. Navy to retain its right to walk the scenic pathway on the property. Moreover, the Finance Committee noted that the 28 acre parcel being offered for disposition by the GSA was conditional: “The condition of the sale would restrict its usage to education, recreation or park

and allow entrance to any citizen of the United States. It cannot be developed as a private park or recreational areas for Nahanters alone.”

In 1965, the GSA solicited offers from several universities for acquisition of the property. NEU quickly became the lone seriously interested party. The Conservation Commission supported NEU’s acquisition plan because it would provide the “scenic and geologic advantage of leaving the area unspoiled” and that “[i]t is in the interest of the town to have the property pass to an educational institution . . . particularly if there were reserved to the townspeople the right to walk along a pathway on the coastal edge of the upland.” 1965 Newspaper article (emphasis added). The chair of the Conservation Commission at the time, Ruth Alexander, wrote a letter to the GSA on behalf of the Conservation Commission expressing its support for NEU’s acquisition of the property, presumably for the reasons cited above. We have not yet obtained a copy of that letter.

In June 1965, NEU submitted its proposal to GSA, setting forth its intended uses of the property. A draft of that proposal, consistent with GSA’s condition of sale, stated that “[t]he **University seeks to acquire the whole of East Point in order to make it a wildlife preserve.** Only in this way can the unusual littoral and benthonic faunas be protected adequately.” (emphasis added). The month prior to officially submitting its proposal, NEU attended a public hearing for the people of Nahant. At that meeting, “there was a rising vote of welcome to Nahant extended to NEU by those present”; “there were several speeches made as to the advantage Nahant might derive from having the property taken over and developed by NEU”; and NEU, through its President, Asa Knowles, “**further assured them we would work with the town in the development of a walkway through the property which could be used by citizens and others to view the ocean and the cliffs.** In this way the town would still have

the benefit from a utilitarian standpoint.” May 17, 1965 Knowles letter (emphasis added). In other words, the Town’s ability to view ocean and cliffs and to enjoy the benefits of the wildlife preserve would be protected by NEU.

On February 23, 1966, the property was deeded to NEU and the deed included a covenant that for a period of twenty (20) years, the property “shall be utilized continuously in the manner and for the educational purposes set forth in the approved program and plan contained in the application of NEU, dated June 16, 1965, and for no other purpose.” NEU paid no money for the acquisition of the property. The 20-year covenant was the only consideration. The intent of this covenant was to obligate NEU not to abandon the property for at least 20 years, rather than to allow them to abandon the wildlife preserve after 20 years which they had promised to maintain for the benefit of the public. In fact, as discussed herein, NEU could not then, or at any point since, change that use.

The public continued to use and enjoy the property that NEU maintained as public wildlife preserve. Three years after the transfer of ownership, at the 1969 dedication of the Edwards Marine Science Center, the moderator, local Nahanter John Lowell, declared that “[w]hen NEU acquired [East Point], the property had been abandoned by the Army for some time and was both an eyesore and a public nuisance. Nahanters are most grateful to NEU for restoring the area’s natural beauty and those of us who live close by are especially appreciative of the supervision being given to the property by the University. Truly, NEU has proven to be a good neighbor.”

By 1970, the Navy was no longer interested in retaining ownership of the remaining 7 to 8 acres. NEU sought to acquire this tract and in its proposal, NEU assured the Navy that it would expand the ecological preserve to include the full site: “[i]f given control of both sites,

Northeastern will request that the entire area be designated a marine wild life preserve”

noting also that, “[b]ecause it is away from interfering light sources, the Nike site is valuable for related research in astronomy, air glow, and other light studies.” (emphasis added). NEU did not ultimately acquire that parcel, instead the Town of Nahant purchased the property from the Navy in 1976 and that site eventually became Lodge Park.

In 1986, the Planning Board published a report on Nahant’s land use and open spaces. The Development Policy section recommended “[p]rotection rather than change”, that the people of Nahant “like living on or near the ocean, and like the way in which geography and the ocean combine to give the Town a unique sense of place.” The Planning Board advised that “[d]evelopment which increases and encourages coastal access will best serve local objective [and] [s]cenic views from public ways and existing developments should be treated considerately in the location and design of new development.” Indeed, “[t]he environmental impacts of new development should be positive, not negative [and] [w]etlands, open areas important for wildlife habitat, valuable trees, unusual geologic features, and other natural assets should be preserved.”

Nahant treated and considered the entire property on top of and to the east of Murphy Bunker, combined with the Town’s parcel, as one continuous public preserve/park for active and passive recreation. In 1988, the Town approved an article to fund a plan to “develop [] a passive recreation area at East Point.” Consistent with NEU’s public dedication and the Town’s continued reliance and use thereof, Nahant’s Open Space Committee released its Open Space Plan in 1989. It included in its open space inventory Lodge Park and NEU’s property. The Open Space Plan recommended that the Town take action to further protect these areas as open space/recreation, whether by establishing a special zoning classification, placing

conservation restrictions on them, or some other measure. The following year, Nahant adopted its current version of its zoning bylaw, establishing a Natural Resource District, to which East Point, in its entirety, was added in 1991.

The Conservation Commission, with NEU's Marine Science Center Director Joseph Ayers as the Chair, issued a Request for Proposals ("RFP") for development of Lodge Park in 1989. At the time the RFP was written, the Lodge Park site still paved over and still had the missile silo bunkers. The RFP described the adjoining property, which NEU acquired in 1967: **"the northeast portion of [NEU's] property and the rocky coast are maintained as a wildlife sanctuary and ecological study area."** The objective of the RFP was **"to return East Point to the character it possessed prior to WWII [. . .] it is quite feasible to reestablish the flora and scenic character"**, and to "reestablish the natural plant material such as trees, rosa rugose, beach grass, beach plum, bay berry, asters, goldenrods, tanzies, etc." (emphasis added). The natural plants described are consistent with those of a Maritime Shrubland, a Priority Vegetative Community and consistent with what is now found there. The RFP noted the sensitivities of the wildlife preserve on NEU's property: "Due to its position in the migration pathways, East Point attracts a broad variety of endemic sea and migratory birds. Bird watching is a major activity at the Point and we would like to maximize vistas for this activity without disrupting the activities of the fauna." Again, these recreational and ecological activities occurred on top of and to the east of the bunker, not at the paved missile site. The RFP made clear the recreational uses of the preserve prior to the renovation of the missile silo site: **"At present the major forms of recreation are walking, jogging, sitting (several benches with vistas are provided), photography, painting, sunning, fishing, nature study, star gazing, and bird watching."** One of the benefits of restoring the former Nike site would

be that “[t]he elevated Nike site provides excellent viewing areas **of the wildlife sanctuary maintained by Northeastern[.]**” (emphasis added).

After more than thirty years of consistency on its intention to dedicate the land for public use, as of 1999, NEU’s Marine Science Center website declared that “[t]he **northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary and ecological study area. Numerous projects at the laboratory focus on the biology of intertidal and benthic organisms as well as their interactions with sea birds.**” (emphasis added).

Nahant’s 2000 Open Space and Recreation Plan noted that NEU maintains much of the land as an “undeveloped ecological study area” and that “[r]esidents and visitors come to the site regularly for walking, jogging, birdwatching, and viewing the magnificent scenery—the ‘passive recreation’ for which this area is now being maintained, and for which a specific Management Plan was created by the Open Space Committee in 1998.” (p.23). Indeed, “East Point is a vital resource, both as a natural habitat for wild plants and migrating birds and as a passive recreational area for all of the Townspeople.” (p.24). The following year, the Town of Nahant, at a Town Meeting, approved the Open Space and Recreation Plan which noted that as of 1986, NEU’s property was “**committed to open space use**”. (emphasis added).

NEU’s Marine Science Center website recently read that “[b]ehind the bunker is a thriving meadow, once used for research on bees and plant pollination. Special considerations related to the maintenance of the grassy meadow atop Lodge Park are outlined [sic] municipal Open Space Plan, and many wildflower species thrive there. East Point is well known as a location where migratory birds such as warblers, vireos and thrushes stop to rest[.]” NEU has

additionally welcomed the public with a self-guided audio tour of the entire East Point and opened its property to decades of a wide variety of public recreation.

For 50 years, NEU has dedicated and maintained its property as a public wildlife preserve and the public has used it as such.

Northeastern Cannot Now Withdraw its Dedication

“When the intent to dedicate is declared or made manifest, and such dedication is accepted, the land becomes subject to the easement of a public way. No specific length of time is necessary; the acts of the parties to the dedication when once established complete it . . . When the way is accepted, the owner cannot withdraw his dedication.” Hayden v. Stone, 112 Mass. 346, 349–50 (1873) (internal citations omitted). Hayden arose through the context of dedication of a public way, but the analysis is the same with respect to the dedication of a public park or preserve. See Smith 78 Mass. at 58 (favorably citing the Hayden standard in a parkland context).

To illustrate the doctrine, in Attorney Gen. v. Onset Bay Grove Ass'n, 221 Mass. 342 (1915), the Attorney General, on behalf of the people of Onset, sought to establish the rights of the public to shore fronts, groves and parks. A private association which owned much of a subdivisions’ property sought to sell common parcels which were included on a subdivision plan, but was enjoined from “obstructing, selling, conveying, leasing or otherwise disposing of any part of the parks, squares, groves, shore fronts and beaches, as shown on the plan, so as to interfere with the public use and easement.” Id. at 350. There, after the court easily answered the acceptance prong by observing that “an uninterrupted general public use had continued for more than twenty years”, it looked next for evidence of the intent to dedicate the land as such. Id. at 347. The court began

this inquiry with the well settled law that “[n]o formalities were necessary”, indeed, [i]t is settled common law that the dedication need not be in writing.” Id. at 348. Helpful for our purposes, the court elaborated, dedication “may spring from oral declarations or statements by the dedicator, or by those authorized to act in his behalf, made to persons with whom he deals and who rely upon them; or it may consist of declarations addressed directly to the public.” Id. In fact, it can even “be manifested by the owner’s acts from which such intention can be inferred.” Id. In Onset Bay, the court found that the association dedicated parcels as parks, squares, groves and unobstructed frontage on the water through the inclusion of the same in circulars and annual reports as well as the sale of other lots consistent with the plan. Id. Notably, there was never a formal vote of dedication by the association nor any formal vote of acceptance by the town.

Here, NEU’s dedication of public use has been clear and consistent over decades, beginning even prior to its initial proposal to GSA. The dedication was included in the proposal to acquire the land, it was a condition of the acquisition and it was declared to the Town in a variety of venues and ways, including at a public meeting by NEU’s President. Moreover, from NEU’s actions of the past half century, such a dedication could be inferred even if there were not the previous express statements. The Town’s acceptance is just as evident. The Town supported NEU’s acquisition in reliance on the dedication, it has included the property as committed open space in Town’s planning documents, it has adopted the protection of the property as open space by vote at a Town Meeting and it has designated the preserve as a Natural Resource District by a Town Meeting vote. Critically, the Town and the general public have relied on and enjoyed the professed public purpose for 50 years. The public has used the wildlife preserve on top

of and to the east of Murphy Bunker for active and passive recreation including, walking, rock climbing, rock diving, picnicking, bird-watching, wildlife observation and astronomy.

Further, the purpose of dedication and use by the public is not limited to physical occupation and as observed in Onset Bay, the doctrine of dedication of public use is not limited to roadways or parks. In Attorney Gen. v. Vineyard Grove Co., 181 Mass. 507, 510 (1902), the defendant was ordered to remove so much of a building that rose above a bluff because there had been found a dedication of the view of the sea to the public and the building obstructed that public view. There can be no doubt that “[t]he right to have land unbuilt upon within reasonable limits, for purposes of light, air and prospect can be acquired by grant . . . and dedication stands on the principles of grant, not on those of prescription.” Id. at 75-76. Exactly as is the case with the beauty and nature of East Point, “[i]f it ever is consistent with public policy to have the individual appropriation of land thus restricted there can be few objects which offer such strong reasons for encouraging the restriction as does that of keeping open the line of the shore and the view of the sea for all.” Id. As President Knowles assured the Town in 1965, even before applying for the acquisition, NEU would develop a walkway through the property, which was included in the deed through an easement, “which could be used by citizens and others to view the ocean and the cliffs.”

For “Nahant itself is a town which owes much of its population to its attractiveness for other purposes than business or profit. The passing from place to place is a rightful object of public provision in itself; and the occasions for it are as extensive as

the pursuits of life. Pleasure travel may be accommodated as well as business travel.”

Higginson v. Inhabitants of Town of Nahant, 93 Mass. 530, 535 (1866).

The conservation efforts of Northeastern and the Town, together and in reliance on the public easement, have successfully rehabilitated East Point and its Maritime Shrubland. The wildlife preserve is invaluable and the rights to the wildlife preserve lie with the public, not Northeastern. That public easement cannot now be rescinded.

An additional consequence of this public easement is that because the public already possesses rights to this easement, the property should already be so valued and a potential taking by conservation easement would either be unnecessary or at essentially no cost.