

**REVISED SELECT BOARD MEETING MINUTES
TUESDAY, MAY 3, 2022, 6:00 p.m.**

Those attending in person: Mike Hogan, Fred Ducharme, R. D. Eno, Skip Bothfeld, Michelle Leclerc, Frank Kampf, Richard Hourihan, Connie Hourihan, Larry Gochey, via zoom: Chris Schmitt, Ian Ackermann, Gary Gulka, Bobby Searles, Dana Glazier, Roland Payne, Jr., Dawn Andrews, Brittany Butler, Jeanne Johnson, Peg Hough, Jenn Miner

1. Call meeting to order – the meeting was called to order at 6:00 p.m.
2. Approve Agenda – a motion was made by Fred with a second by R.D. Motion carried.
3. Approve Minutes from Minutes from April 19, 2022 (one from visit at Common/Pavilion and regular SB Meeting) – a motion was made by Skip with a second by Mike, motion carried with R.D. abstained from the minutes on the Common.
4. Public Comment – Frank – re road grading is McKinstry Road. The plan is to do Class 4 after they finish up the Class 3 road, he also wanted to know regarding the Dog Ordinance – re clarification of the section 4 – Nuisances, Item #D regarding dog barking. Mike would have to look at it. We will put it on the next meeting to discuss it.
5. Emergency Management Update – Jenn stated that the Covid numbers are on the uptick. The State is looking at an increase in hospital patients. Washington County is considered a hot spot. She was very pleased with the clinic of last week. In regards to the PC, May 5 at 6:00 p.m. This meeting in conjunction with PC, SB, and DRB, and CVRPC – benefits of the Village Center Designation and if we wanted to apply. We want to find out what is the best benefit for the Town of Cabot. We encourage all to attend.
6. ARPA – Funding request from Conservation Committee – Discussion-continuation of natural community study – Gary read from a one page handout -with a request of \$20,000 for covering the cost of consulting ecologist. Timeframe to complete the work by December, 2023. Calais, Plainfield have done this and Marshfield is in the process. R.D. how much did the grant? Gary said that it was about \$27,000. The amount would be a total of \$50,000. RD moved that we commit \$20,000 from the ARPA fund for the completion of this consulting engineer. RD want to know when they needed. Gary did not have an exact time. We have around \$130,000 left with the ARPA money. Mike recommended that we go careful with the ARPA money. Motion was carried. Mike wanted to make sure that we have a paper trail of the engineering status. Gary agreed,
7. Trails Grant – Gary Gulka – This will be on the next SB meeting for signature. They received about \$60,000. They are working on Apple Orchard Trail, Cross VT Trail, Old Center Road, and making improvements on Town Forest. Fred wanted to know if we are hooking to the Rails Trails. We are working on that, combination of private and class 3 roads. The other part of the grant is purchasing equipment.
8. Lease for Baseball Field – Discussion/Decision – Mike received a lease agreement from Jennifer Gochey – annual lease agreement. They are asking for a rental fee of \$600.00. Larry believes it is insurance expense. Would like to wait until the next meeting. RD wants to know what has changed. We will invite them to the next meeting.
9. Ash Borer Plan – Roland Payne – Discussion/Decision – Mike thanked Roland for the detailed plan. Mike had a question about some trees on Blodgett Road, and Jug Brook Road – it seems to be the worse one. Are we planning on taking them down. We are looking at an 8 year plan. Some of the trees are on the Town Highway. RD wanted to know if they are update. GMP assuming that will be taking down the ones on 215. Roland has not accounted for everything. He has accounted for some, but not all. Over a period of 10 years it would cost around \$250,000. We have not allocated for this in the upcoming budget. The highway crew could possibly take down 200 trees/every two years. Hopefully the electric companies can help with this. We will make a note of putting money in the budget for upcoming years. Ian would like to defer until we review this. Gary said that all of the Ash Trees will die. We may be able to make some adjustments over time. It is urgent that we get started on this moving target. Skip – how do you get on a list to get some of the wood. We have to notify the landowner, if the landowner doesn't want it you can ask for it. Richard Hourihan – is in current use and the logger would take them down but they said nothing smaller than 16". What does he do in a case like this. Roland said that he should discuss this with his forester. He also wanted to know what the blue dot is for on the trees. Blue dot is the electric company mark for them to take down. Very few will survive. Larry wants to know if the State is putting any money. There is no money right now from the state or feds. We can't transport them very far, but will have to check on this.
10. Further discussion on Bandstand on Common or Rec Field – Mike stated we had some discussion on the Common and the Rec Field. We asked Mike Tarrant to look at the deed to see if it was allowable to have something on the Common. Board can decide. After discussion about the emails, RD moved that we have this correspondence in the minutes with a second by Fred. Motion carried. Mike Tarrant said it was a deed and a trust – from Dana to Osgood in 1822 giving the Common to the Cabot. Mike Tarrant said there is great risk for putting something on the Common. Mike Hogan stated that he is not in favor of this, but he wanted to state that he loves bandstands. RD offer another perspective – is accurate as far as this goes. What about the

structure – the monument. We need to look at this under adverse possession. At some point now or in the future to ask Mike Tarrant about the statute. RD moved to endorse the location of the bandstand on the Common but added that if the Selectoard is not ready to make a decision, he would move to table the motion, assuming it is seconded. He feels the Common is the best place, if it was out of sight it could be damaged. He is against it at the Rec Field and would like to have a committee of village residences to go over the policies. He would like to know if the bandstand would have an impact on the VCD. He proposes to endorse a bandstand on the Common and if at some time a resolution to make it official with a second by Fred. Skip said that we would then have the control. Jenn – I am not pro or against the bandstand – if we are going to renewing VCD how does the structure impact that. We need to check into the historic impact. She also has a question – grant deadline – what happens – grant were going to come before the SB. The PC hasn't seen anything of the grant. RD stated that this a group of private citizens not the Town doing the grant. Jenn said yes that the policy – prudent to come by PC and after the review of the PC, it goes before the SB. RD will make a project to see that this comes as done. Fred – we ought to spend a little bit more money regarding the Statute and fence and get it settled what we can or can't do and need to dig into this to get it resolved. If we have the bandstand there then wouldn't other people want to do something. It is Town property. RD said that we are talking about a slippery slope. Richie said that he is going to start a petition. Mike stated you have a right to have a petition. There can be other things, Mike is looking for precedent and trying to clarify the definitions. Connie read an article that Irene Kampf wanted to have a farmer's market. She was denied to have it on the Common as it would have been a permanent structure. Fence was put up to help preserve the Common. We need to have clear parameters as to the need. Richie stated that Dana is going to have a bigger festival later in the year and they are going to have it at the rec field. It seems that one man is making a decision. Dana is not getting paid. Ian has a question – we should have a special meeting with everyone – some do want and some do. Maybe we should listen to them. Peg – just want to be in the record – bandstands are historically in the center of town. Maintain the vitality of the village – not just a few people. Some were not at the Common walk – we needed a larger meeting to find out what we can do. Ian – what about a vote. For the record that Ian does not have a problem with the bandstand. He is concerned about the people in town. Brittany what about the motion just made about the Common. RD is going to table the motion he just made. Common historic evaluation and to see if there is anything hazardous on the Common. Brittany noted that it was once a frog pond. RD point of information – historic evaluation that does not have to do this. RD moved and Fred seconded that we table this. We will talk further with Mike Tarrant. (The emails from Mike Tarrant are attached.) Motion to table was passed.

11. Replacement of Trees on the Common – Trees on the Common – He took down the Elm Tree. Two recommendation – disease free of Chestnut and Cherry Trees (they are a short-lived of 20-25 years.) If we fill it with top soil, will it just enhance the problem. We should try to get drainage. New trees will just drown if we don't do anything for drainage. Larry wants to know why the trees are in the ball field area. It has always been around the edge of the trees. Cherry Trees will not get very big. If we don't do something now, we have to go to the fall. Let Roland to pick the best types of trees. He does not have a cost, but possibly around \$100 per trees. He will run it by the Conservation Commission. We should check into the drainage and see what it would cost to drain the Common. Biggest drainage area is around the Danville Hill. We will have the road crew look at this.
12. Water/Wastewater
 - a. Other Business –We have the pump that will be installed on Elm Street and need to have them check out the Cabot General Store's pump.
13. Highway
 - a. Other business – Ian – roads are getting better. Grader broke down – throwing some electrical codes. Taken care of. We are checking about quotes for the aprons. There is a 3' culvert on Jug Brook Road. Did the crack sealing today. Village sidewalk – edging stones are edging away. Can we get this sealed up? Ian said that he will take a look at them. They will be pouring concrete at the entrance way to the Willey Building soon. Roads are looking good, however the roads are still sweating. Replaced culvert on Danville Hill.
14. Town Clerk's Office
 - a. Orders
 - b. Other business – gave an update on the Spencer property. It is being cleaned up.
15. Other Business – There was no other business.
16. Adjourn – A motion was made by Fred with a second by Skip, motion carried. We adjourned at 7:39 p.m.

Respectfully submitted,
Betty Ritter, Clerk/Treasurer

This is a Word Document of all the correspondence with the Town Attorney, Michael Tarrant. (latest first through March 28.) Mike Tarrant was out of the office for two weeks and that is why there is a delay in receiving the answers in April.

April 28, 2022 – Mike Tarrant

I understand, no problem. It's not a clear issue, certainly, and I think I could spend a solid few days researching the legal question to understand how VT addresses deeds like this one. It's complicated to be sure.

April 27 From Betty to Mike Tarrant

Mike, I am trying to get some history on the monument. I am attaching a picture of it from the Cabot History Book. It also shows the Church, but that is not on the Common. There is a road in between the Common and the Church. I am hoping to get a better picture, even if I have to go out and take one for you.

April 27 from Mike Tarrant

Can you describe the monument? I don't know if sure a thing would constitute a building or inherently be in conflict with the trust, which calls for military parades etc. It may be an odd splitting of hairs, but it may be meaningful. It also may indicate that there are issues which could/should be investigated, like if it did void 150 years ago, does the town own it now by virtue of adverse possession? We'd have to look into it.

April 27 from Betty to Mike Tarrant

I am not sure if you remember that we have a monument on the Common. Here is his question:

But I wonder if the SB will allow me to put a question to Mike Tarrant, pertaining to the current status of the trust in light of the fact that at least one permanent structure was erected on the Common, the monument, 150 years ago. If the conveyance was not voided then, or if it was but the property did not revert to the Dana heirs, why should it be voided by a bandstand, and if it were, would any Dana heirs still be able to reclaim the property?

I actually thought of this question and chose not to ask it as it seems like a totally different item on the Common, but I guess it must be addressed after all.

From Betty to Mike Tarrant

Mike, thank you very much. I agree with you completely on this and the risk is great to put a bandstand there. We are not only hampering the area, but there are houses in very close proximity of the Common that could interfere with their privacy. The bandstand would be similar to a Pavilion type building. It would be permanent and would personally I am afraid to attract the wrong kind of happenings when not in use. Also, who would be responsible for trash, etc. as it is on Town Property.

We did propose to have it up at our rec field, which we are proposing to do some type of construction, get electricity, and the parking it much better there than right in the middle of the Town.

Given all this, I do need one more question answered. Is it the Treasurer's position or who? It seems that I have had jurisdiction over it (by mean of the office) and now the SB is taking it upon themselves to take control. I know this can be a political thing in a town, but along with this I just need to know whose responsibility it is. Can you give me some direction on this last point.

April 27 From Mike Tarrant – Re who is in charge of Common (this was a verbal phone call with Mike Tarrant)

I would think, generically, the Town could decide. It said the treasurer or successor. In a bigger town, it could be a town manager or administrator. But the SB should decide.

For what it's worth, Montpelier has a structure up on a lot just next to the art store and the shaws in town. A variety of transients and homeless individuals hangout there every day, and even sleep there. Drinking and being generally loud and belligerent. I would advise against any structure that could provide shelter.

April 27 - From Mike Tarrant

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Attorney-Client Privilege / Attorney Work Product

(The privilege is the Town's, and if it wishes to waive it, it may)

Betty:

To continue from what I wrote in my previous e-mail. Any language quoted is from the type-written "transcription" of the original hand-written deed.

What the Town received was both a deed and a trust. It's necessary to determine precisely what nature of estate the Town received under the deed.

Here, the land was deeded from John W. Dana to Thomas Osgood, the then-treasurer for the Town of Cabot, "to have and to hold all the above mentioned and described piece of land together with all the privileges thereto belonging unto him the said Osgood and his successor in the said treasurer office forever in trust for the benefit of the inhabitants of the said Town of Cabot." It further provides, toward the end of the deed, that "the said John W. Dana for myself heirs executors & administrators covenant with the said Thomas and his successors in said treasurer office that I have a good right and lawful authority to convey the same as above written that they are free and of all every encumbrance -that I will warrant and defend the same against all lawfull claims of any person or person."

Other than the trust provisions, which contain terms and conditions on the use of the conveyed land, the language of the conveyance is not subject to any qualification until the very end. The conditions and terms all are part of the trust instrument portion of the deed. However, at the very end of the deed, it provides that should certain of the trust provisions not be complied with, the deed will be "void."

Here, the "trust" terms provide the following obligations on the Town:

- "Shall open clear or cause to be opened" the land and "keep clear of all and every encumbrance for a Common that any person or persons may pass and repass on any part of said Common with or without team, carriage of any every description and to be kept free for Military Companies to Parade and Exercise upon"
- "Every person to have an equal privilege to said Common"
- And, in "further trust and confidence," the trustee "will never erect build or suffer to be built by any person or persons any house barn outhouse shed merchants or merchants shop or any other building of any description that will in any manner hinder any person or team from driving or walking on any part or place" on the Common

In my view, the language of the Dana to Cabot deed most likely makes the conveyance to the town one of fee simple determinable—the town's ownership is in "fee" in that it may continue forever, but it is determinable in that it may end on the happening of an event. See Collette v. Town of Charlotte, 114 Vt. 357, 359–60, 45 A.2d 203, 205 (1946) ("A determinable or qualified fee, as that term is now generally used, is a fee simple limited to a person and his heirs with a qualification annexed to it by which it is provided that it must determine whenever the qualification is at an end. Because the estate may last forever it is a fee and because it may end upon the happening of the specified event it is what is usually called a qualified or determinable fee."). I render this opinion on "most likely" grounds, based on the research I've been able to do. It may well be, if we're able to dedicate more time to scouring older case law, that there is something to suggest that this is a conveyance of another nature. But, at this juncture, I believe this deed is mostly likely to be interpreted as a fee determinable.

In a determinable fee, upon the occurrence of the event, "the estate reverts at once on the occurrence of the event by which it is limited." Id. In the Collette case, the deed used the words: "to be used by said Town for school purposes, but when said Town fails to use it for said school purposes it shall **revert** to said Scofield, his heirs and assigns, but the Town shall have the right to remove all buildings located thereon. The Town shall not have the right to use the premises for other than school purposes." Id. at 358. The Supreme Court said that "to be used by said Town for school purposes" together with the "shall revert" language rendered the deed determinable, and concluded that when the Town stopped, it reverted to the heirs. The same result in the case of Dickerman v. Town of Pittsford, 116 Vt. 563 (1951), where the town received a deed for school purposes but if it were to cease that use, then the deed terminated and the land reverted to the grantor or his heirs.

I found a similar MA case, Harrison v. Marcus, 396 Mass. 424, 486 N.E.2d 710 (1985), which reached a different result, but did so because of different language. That case held that the conveyance was of fee simple absolute, subject only to terms of a trust, because:

As we read the 1936 instrument, the deed portion begins with the description of the property and ends with the sentence of conveyance, "to have and to hold all and singular the above granted premises unto the said Harold E. Hallett, Fred M. Angus, and Hervey L. Small, and their successors forever, but in Trust NEVERTHELESS, and to and for the purposes herein declared." The portion of the instrument following that sentence constitutes the declaration of trust. Under this construction, there is no question but that the deed conveyed the property in fee simple absolute to the trustees. All the terms and conditions are in the trust instrument. The words of the deed convey a fee simple absolute.

Harrison, 396 Mass. at 428–29. The court rejected an argument that the words in the Harrison deed of "so long as" created a determinable

fee, because there were express trust conditions, which required trustees to make appointments and record them, charged the trustees with determining breaches in their sole discretion, and should they determine a breach to affirmatively convey. Thus, the MA Court said:

By these provisions, Taylor sought to eliminate any uncertainty in the chain of title. Title would always be in the trustees until, in their sole discretion, they determined that the charitable trust had failed, and then the trustees would convey the property to the heirs. This elaborate mechanism is inconsistent with an estate in fee simple determinable in which a breach of conditions would cause title automatically to revert to the heirs, without any action of the trustees. Thus, we conclude that the trustees took title in fee simple absolute.

Harrison, 396 Mass. at 430–31 (footnotes omitted).

From my read of our deed and these cases, then, Cabot has a fee simple determinable. I admit the word “void,” without more, is not as robust as phrases such as “shall **revert** to said Scofield, his heirs and assigns,” but I think the intent is clear enough. Deeds are interpreted to give effect to the intent of the parties. See Kipp v. Est. of Chips, 169 Vt. 102, 105, 732 A.2d 127, 129 (1999) (explaining that the “master rule for the construction of deeds is that the intention of the parties, when ascertainable from the entire instrument, prevails over technical terms or their formal arrangement” and that we must “read the entire written instrument as a whole, giving effect to every part so as to understand the words in the context of the full deed” and further that we must “construe the various clauses of the document, wherever possible, so that the deed has a consistent, or harmonious, meaning” (internal citations and quotation marks omitted)). Looking to the Dana to Cabot deed with trust provisions as a whole, it appears to me that although there are indeed both conveyance and trust provisions within the singular instrument, ultimately, the conveyance portion, i.e., the deed portion, is determinable on failure to comply with certain of the trust provisions. Unlike Harrison, where the trustees were expressly tasked under the trust itself, and more like Collette and Dickerson, where the failure to comply with the terms resulted in a reversion.

The last question, of course, is the million dollar question. Can the Town place the bandstand?

The deed provides that it will be “void” if “the said Osgood or his successor or successors in said town treasurers office shall erect build or cause to erected or built any house barn shed out house Merchant or Merchants shop or store or any other building or suffer any to be erected or remain on said granted premises contrary from the trust [unclear] in him” Interestingly, this language does not precisely track the trust provisions, which are more robust, and just includes some of the trust provisions. One possible read of this is that not all trust provision violations would void the conveyance. Another way to read it would be that this was simply an effort at succinctly restating the trust provisions and that a violation of any of them would violate the deed.

Ultimately, though, I wonder what the nature of this bandstand is. Is it permanent in nature? Can it be erected and deconstructed? My image is of a sort of pavilion, permanent in nature, with a roof. Is that accurate? That would certainly seem to qualify as a building. If it is placed in the ground, it would seem to be erected there. But perhaps it could be mobile? Or portable? It could be there when it needs to be, and moved to a non-Common location when it’s not in use?

This also raises a fundamental next question: What would happen if the town did this? If I’m correct that it’s a determinable fee, and it was violated, it would revert to the heirs of Dana. That may be difficult to ascertain. We may also, like the case involving grant funds to the church, be subject to a citizen suit. Whether there’s merit to anything, I couldn’t speculate at this time.

Ultimately, there’s great risk in placing a structure on the Common land.

Happy to dig deeper, or discuss more.

Mike

March 28 - From Mike Tarrant

Subject: RE: The Common Deed

Betty,

I’ve spent some time on this, but what I’ve discovered is that this is more complicated than a quick, off the cuff review can do justice. Because of that, my recommendation is not to take any risk with the Town’s property interest at this time. I’m not sure what you mean by close, but we should talk.

Here’s my thought process. I don’t think this is a typical deed. I think this is a deed and declaration of trust, for the benefit of the townspeople, under the trusteeship of the town.

This land was given:

To have and to hold all the above mentioned and described piece of land together with all the privileges thereto belonging unto him the said Osgood and his successor in the said treasurer office forever in trust for the benefit of the inhabitants of the said Town of Cabot that he the said Osgood and his successor in said town treasurer office shall open clear or cause to be opened said granted premises and keep clear of all and every encumbrance for a Common that any person or persons may pass and repass on any part of said Common with or without team, carriage of any every description and to be kept free for Military Companies to Parade and Exercise upon and every person to have an equal privilege to said Common and in further trust and confidence that he the said Osgood and his successor in office will never erect build or suffer to be built by any person or persons any house barn outhouse shead^o merchants or merchants shop or any other building of any description that will in any manner hinder any person or team from driving or walking on any part or place on Said common or granted premises

Note that it was to the treasurer "forever in trust for the benefit of the inhabitants of the said Town of Cabot" and provides that the treasure shall do certain things and limits the trustee from building.

Then, after the common language about lawful authority to convey and warranting and defending title, he says, starting with "Provided nevertheless":

set my hand and seal the 8th day of April AD 1822-Provided nevertheless if the said Osgood or his successor or successors in said town treasurer office shall erect build or cause to erected or built any house barn shead^o out house Merchant or Merchants shop or store or any other building or suffer any to be erected or built or remain on said granted premises contrary from the trust [] in him and his successors in said treasurers office by the above deed of conveyance then this and the above deed to be void-otherwise to be and remain in full force and virtue in Law.* ^{raise}

From this, though, there are clearly issues. The trust terms, as limited as they are, appear to clearly require the land to be kept clear, but there is a qualifier about not hindering access. But it also talks about access to "any part of said Common." The real questions are what title would the trust have over the property, and where would it go if the trustees messed up.

I haven't found a VT case on point, but I will look further if you wish. I have found a MA case, and it suggests, in a similar yet different fact patter, that where a deed of trust was given to people for the benefit of boy scouts, that the trustees took title in fee simple absolute. But that was based on the facts of that deed, and from what I can tell, it had more elaborate trust provisions than our deed.

This is all to say, what I've found doesn't actually address anything as to the ultimate question you want answered, but I think it starts to point us in the right direction.

If you're interested, I can continue to hunt this down, but I wanted to let you know what I found at this point, given the time. A closing tomorrow seems unwise...

Mike

From Betty to Mike Tarrant March 28

Mike, that was stupid of me not to explain the reason. The reason is that the Cabot Arts wishes to place a bandstand on the Common. In the deed down at the bottom is states that no building is to be placed ever on the Common. People are in quite an uproar for this and it does border houses and they are concerned about the upkeep, because it is on Town property and they want to know who will do the upkeep? Again, I apologize. I just came in and had this dropped on my lap.

From Mike Tarrant to Betty, March 28

Hi Betty—what do you need to know about this deed?

Mike, here is a deed that we need your opinion. They are having a meeting tomorrow night and our SB would like to have a definitive answer if possible by tomorrow before we close. I know that is short notice, but I just was asked this morning to do this. Sorry for the short notice.