

February 10, 2015

To Whom It May Concern:

I have reviewed the copy of the Donation Agreement for Sherman's Amusement Park between Balboa Land Development and the Town of Caroga. I believe that there are several problems with this agreement.

To begin with, the agreement in its current form is void in that it violates the Rule Against Perpetuities. Simply put, a gift cannot be legally made as long as it is encumbered by conditions and restrictions which forever limit the recipient's ability to exercise the rights of ownership. The town cannot be told it can never sell the property, nor can it be required to, at all times, maintain the property to the highest of standards. Elimination of the restrictive provisions that violate the Rule Against Perpetuities would render the agreement no longer void for that reason, but there are other serious problems with the agreement that need to be addressed.

The agreement repeatedly references parcels of land shown on Exhibit 1. No such exhibit is attached to the copy of the Donation Agreement with which I have been provided. If this exhibit is not attached to the agreement, then the agreement is not a complete contract. There is no way of knowing exactly what property is referenced in the agreement without being able to review the exhibit. There is no way of knowing the location of the 20' right of way referenced in paragraph 1. D. There is no way of ascertaining the location of the 20' of beach referenced in paragraph 1. E.

There is no basis established for the appraised value of the property as set forth in the agreement. There is no appraisal attached to the agreement. Did the donor acquire an appraisal? If so, when? Did the town acquire its own independent

appraisal? If not, has the town reviewed the appraisal acquired by the donor? To establish the value of the property solely upon the representation of the donor is not in the town's best interest, as they may be agreeing to set the value of the property at a level far greater than its actual worth.

The agreement requires the town to prepare a property line survey. It is an excellent idea for the town to acquire a survey, and to do that prior to accepting the gift of the property. Those of us who have owned property in the town for decades are aware of how inconsistent the property lines around the lake can be, and how frequently surveys show that buildings are partially on another owner's property. If the property to be gifted is not properly surveyed, then the town will have no idea what it is that will be acquired, and may be opening itself up for lawsuits by adjoining property owners down the line.

When a property is purchased, it is standard practice for the purchaser to have the right to inspect the property before the closing. To fail to undertake the inspection is foolish, as the inspection will reveal any structural, water, grading, septic, and utility problems, and may have a significant effect on the purchase price and/or value of the property. To accept a gift of property without inspecting said property is equally foolish, especially when the value of the property is reputed to be in the millions. Sherman's is a very old facility, and, although the donor did indeed spend a lot of time and money to revitalize it, it has not been operational for some time. We already know that there is no water available to the facility as a result of the town breaking the water main to the park when it was resurfacing the road two years ago. There is no information on the viability of the septic system, the condition of the buildings, the condition of the kitchen and bars, the condition of the rides, and the condition of the electrical system and any other utilities. The agreement states that the donor is donating the property "as is", which means that the donor cannot be held responsible by the town for

the condition of the property. Without having an inspection of the property before accepting ownership thereof, the town will be getting the proverbial "pig in a poke".

The donor is dictating other conditions of the gift that are not reasonable, and which may force the town to spend money that it does not have in order to comply with said conditions. In paragraph 4. A. 9., the town is required to "maintain, to the best of its abilities, the existing windows in the Pavilion and the Carousel buildings." In paragraph 4. A. 4., the donor requires the town, "to the best of its ability, to open and make available to the public the beach along West Caroga Lake... and to maintain the Beach...". I have no idea who it is who can determine whether the town is accomplishing this dictate to the best of its ability. The opening and maintenance of the beach will require staffing the beach with lifeguards, testing the water, provision of expensive liability insurance, and compliance with innumerable regulations. It is a responsibility and expense that the town may not be in a position to assume. The town is further required by the donor to provide access to West Caroga Lake from properties identified on the missing Exhibit 1. The type of access is also not identified. There may be liability insurance issues associated with that provision as well, but the provision itself appears to be so vague as to be unenforceable.

The donor reserves to itself the right to use two of the parcels which it is giving to the town "for any and all lawful uses including but not limited to a Recreational Vehicle Camp/Park", and is reserving the right to have access to and use the Wastewater Treatment System" which it is donating to the town. The town "shall make capacity available in the System to any future use of the two parcels...", and the donor "reserves the right to use the existing groundwater well and electrical system located in the Blue Building on the north side of NYS Route 10 for any future development of the parcels...". It appears that the donor will have the absolute freedom to build and/or develop anything on those

parcels of property (which he will NOT own) for pretty much anything he wants at any time as long as the town zoning ordinances and the APA regulations allow. Further, the town must allow the donor to use the groundwater well and electrical system belonging to the town for this development forever at no cost whatsoever to the donor, and must also not only allow the donor to use the wastewater treatment system belonging to the town at no expense to the donor, but must also assume the cost of any expansion in said system required by the donor's development of the property. By accepting these conditions of the gift (which also may violate the Rule Against Perpetuities), the town may be giving the donor free reign to develop that property without paying for it, to utilize the utilities owned by the town without paying for them, and to utilize, and demand expansion of, the wastewater treatment system without paying for it. The town has no idea what this may cost down the road, and opens itself to substantial liability if a development over which it has no control is built on land which it owns. These provisions appear to benefit the donor substantially and the town not at all.

I do not practice in the area of municipal law. However, I have consulted some colleagues who are familiar with that practice. I have been advised that a town supervisor does not have unilateral authority to enter into a contract such as this. I would defer to your town attorney to know the proper procedure for the town board to follow in a matter such as this. I

will note that Attorney Jung has approved the Donation Agreement as to form, but that does not mean that the town has requested his legal advice on the validity of the content.

I hope that this analysis has been helpful. Please feel free to call if you have any questions.

Very truly yours,

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