

**Frequently Asked Questions –Environmental Investigation and Land Purchase
Simeone-Caouette Property, Stow and Maple Streets, Acton, Massachusetts
October 4, 2010**

Town’s Payment Obligations

Why is the Town proposing to buy the Simeone-Caouette property?

At the 2010 Annual Town Meeting, the Town unanimously voted under Article 24 to authorize and direct the Selectmen to acquire the Simeone-Caouette property. The Town had been presented with the opportunity to buy the property by virtue of its 120-day right of first refusal under Chapter 61A to match a written offer by a developer who sought to buy the land for development purposes. The Town determined to exercise its option and place the property under agreement to:

- preserve the land in agricultural use now and in the future,
- conserve the land in perpetuity as an important open space, conservation and recreational resource available to current and future generations of the Town forever,
- improve the recreational and open space value of the Town-owned Assabet River Rail Trail corridor which abuts the land,
- protect this historic farm land and open space from being forever lost to development,
- improve the quality of life for current and future residents of Acton, and
- do all this leveraging Community Preservation Funds to the maximum extent allowable.

How much has the Town agreed to pay for the Simeone-Caouette property?

The purchase price for the Property under the Town’s Purchase & Sale Agreement is one million dollars (\$1,000,000). This is the same purchase price which a prospective developer had offered for the purchase of the property prior to the Town’s involvement; which the Town offered to match under its chapter 61A right of first refusal; which the Community Preservation Commission recommended to the 2010 Annual Town Meeting; and which that Town Meeting voted to appropriate for the purchase of the property under Articles 24 and 25.

Has the Town agreed to pay any other amounts with respect to the property?

Yes.

The Town’s obligations under the P&S Agreement are contingent on the Town being satisfied with the results of its environmental due diligence investigations of the property. The Town has undertaken three rounds of environmental due diligence investigations pursuant to procurement procedures under chapter 30B.

To date, the Town has expended \$34,000 on the environmental due diligence investigations.

While those investigations proceeded, the Town was required to pay for successive extensions of the closing on the purchase of the property. The original closing date was scheduled for June 21, 2010. During the investigations, the closing date has been extended several times, most recently to October 26, 2010, with the potential for one additional 30 day extension provided certain conditions are met. To date, the Town's extension payments have totaled \$17,500. If the final extension option is exercised, an additional extension payment of \$5,000 is required.

In the P&S Agreement, as amended, the Board of Selectmen undertook to place before the upcoming Special Town Meeting a warrant article for the approval of the appropriation of up to \$200,000 to pay for future environmental assessment, containment, removal and/or remedial actions at the property, if required. If the Special Town Meeting approves that appropriation (along with related appropriations for additional environmental testing and extensions of the closing date as set forth in the warrant) and the Town proceeds to purchase the property, the Town would be responsible for up to the first \$200,000 of any future environmental assessment, containment, removal and/or remedial actions at the property. At the same time, if Special Town Meeting fails to approve the appropriation of those funds, the Board of Selectmen is entitled to terminate the P&S Agreement.

The Town has also incurred counsel fees, title search expenses, survey expenses, and other expenses related to this transaction.

Land Valuation Issues

Has the Town had the property appraised?

Yes. The Town has conducted two appraisals of the property, both by Avery Associates of Acton. As set forth below, the Town has asked the appraiser for a further supplemental appraisal report which is expected to be issued shortly.

The first appraisal was conducted before the 2010 Annual Town Meeting. It evaluated various aspects of the property. Without limitation, as of February 1, 2010, the report appraised the value of the entire property (15.7± acres) at \$1.13 million and the value of an 11.7± acre portion of the property with 55' of frontage on Stow Street as \$1.08 million.

As the Town performed its due diligence title search of the property, the Town determined that the property actually consisted of less acreage than previously understood because the property line did not encompass the entire Mill Pond but rather extended only to the middle of Mill Pond. As a result, the Town

commissioned a supplemental appraisal of the property. Taking into account the corrected acreage of the property, adjusted infrastructure costs, and the improved and stabilized residential real estate market conditions since the date of the original appraisal, the supplemental appraisal concluded that as of September 1, 2010, the value of the entire property is \$1.04 million.

The Town has asked the appraiser to provide a further supplemental appraisal report of the portion of the property to be acquired and retained by the Town, including the effect on the value of the property of the reduced acreage, the recently confirmed contamination, and the estimated clean-up costs. This supplemental appraisal report is expected to confirm a reduction in the appraised value of this portion of the property taking these factors into account. It is anticipated that this report will be available shortly.

Do the appraisals take into account the environmental issues and clean up costs?

At the time of the initial appraisal, environmental investigations of the property had not yet been undertaken, the recognized environmental condition had not been identified, and the potential remediation costs had not been quantified. The appraiser indicated the following (emphasis original):

Unless otherwise stated in this report, the existence of hazardous substances, including without limitation asbestos, polychlorinated biphenyls, petroleum leakage, agricultural chemicals or urea formaldehyde foam insulation, which may or may not be present on the property, were not called to the attention of nor did the appraiser become aware of such during inspection. The appraiser has no knowledge of the existence of such materials on or in the property unless otherwise stated. The appraiser, however, is not qualified to test for such substances. Since the presence of such hazardous substances may significantly affect the value of the property, the value as estimated herein is predicated on the assumption that no such hazardous substances exist on or in the property or in such proximity thereto which would cause a loss in value. If such substances do exist, then the value as estimated herein will vary dependent on the extent of contamination and the costs of remediation.

The subject property is not currently included on the **List of Confirmed Disposal Sites and Locations To Be Investigated** (dated January 12, 2010), as published on their website by the Bureau of Waste Site Cleanup, Department of Environmental Protection, Commonwealth of Massachusetts. However, if the subject site is found to be contaminated, the value estimate contained herein may change.

At the time of the supplemental appraisal, the recognized environmental condition had been identified but the potential remediation costs had not yet been quantified. The appraiser indicated the following (emphasis original):

Further onsite testing and analysis by a Licensed Site Professional (LSP) is required to determine the level of contamination and the costs of remediation – if required. This supplemental valuation analysis is based on the **hypothetical condition** that the property is not contaminated and remediation is not required. When confirmed, the degree of contamination and the costs of remediation may affect the value conclusions contained herein.

As set forth above, now that the potential remediation costs have been quantified, the Town has asked the appraiser to provide supplemental information specifically as to the effect of the recently confirmed contamination on the value of the property. As discussed above, it is anticipated that this report will be available shortly.

Environmental Clean-Up Costs

What are the estimated costs for future environmental assessment, containment, removal and/or remedial actions at the property?

The Town has caused three stages of environmental due diligence investigations to be completed on the property: (a) an initial investigation to determine if any recognized environmental conditions exist on the property, (2) sampling, testing and analysis of soil, sediment and groundwater conditions at the former factory area recognized by the first stage as an environmental condition on the property, and (3) further sampling, testing and analysis of environmental conditions at the site and quantification of the estimated costs to remediate the contamination problems identified.

Based on the due diligence information available through the most recent environmental report dated September 29, 2010, the Town's Licensed Site Professional estimated that it would cost between \$101,000 and \$200,000 to achieve a Response Action Outcome demonstrating that a "Condition of No Significant Risk" has been reached at the property (the end point under the governing environmental regulations). The lower estimate applied if the contaminated soils could be removed and disposed of as non-hazardous wastes at a facility in New Hampshire. The higher estimate applied based on the worst case assumption that the contaminated soils constitute a hazardous waste and must be removed for disposal of at a licensed hazardous waste treatment, storage or disposal facility.

After the report was submitted, the Town's Licensed Site Professional caused additional tests (called TCLP tests) to be performed on samples of the contaminated soils. These additional tests demonstrate that the contaminated material is not characteristically hazardous and can be removed and disposed of as non-hazardous waste at the lower price.

Also after the report dated September 29, 2010 was submitted, responding to a call for even more testing in the field, the Town's Licensed Site Professional has caused 20 additional shallow soil samples to be collected for laboratory analysis. When available, these results will provide additional information on conditions at and in the vicinity of the former factory building on the property. Those test results have been expedited at the laboratory and are expected shortly.

Now that the estimated costs for future environmental assessment, containment, removal and/or remedial actions at the property have been quantified, isn't it fair to say that the value of the property was reduced by the contamination?

Yes.

As the appraiser has previously indicated, "[w]hen confirmed, the degree of contamination and the costs of remediation may affect the value conclusions contained herein." The appraiser has been asked to specifically evaluate this effect on value now that the contamination has been confirmed and the clean-up costs have been estimated. That evaluation is expected shortly.

In the interim, the Supreme Judicial Court and the Massachusetts Appeals Court have consistently recognized that, where property is affected by contamination which can be cleaned up, the diminution in value of the property is temporary and is measured by the cost of remediation. See *Guaranty-First Trust Co. v. Textron*, 416 Mass. 332, 336-337 (1993)("where damage to real property is not permanent, the measure of recovery is the reasonable expense of repairing the injury plus the intervening loss of rental value for the period reasonably needed to repair the injury."); *Black v. Coastal Oil New England Inc.*, 45 Mass. App. Ct. 461, 466 (1998)("The rationale for the distinction between temporary and permanent injury has particular validity in contamination cases, since remediation essentially results in the restoration of the property to its predamage value."); *Clean Harbors Environmental Services, Inc. v. Boston Basement Technologies, Inc.*, 75 Mass. App. Ct. 709, 715 (2009)(applying *Guaranty First Trust* and *Black* and noting, "[i]n cases involving common-law recovery for damage caused to property by pollution, this court has observed that the cost of restoring the property may be the more appropriate measure of damages").

Given the limitation that Community Preservation Act funds cannot be spent to buy property for more than it is worth, doesn't the diminution of value of the property from the contamination mean that Community Preservation Act funds cannot be used to buy this property?

No.

Under the Community Preservation Act, G.L. c. 44B, § 5(f), "no ... real property, or interest therein, shall be acquired by any ... town [using CPA funds] for a price

exceeding the value of the property as determined by such ... town through procedures customarily accepted by the appraising profession as valid.” At the same time, however, as the cases cited above make clear, remediation that is both funded and effectuated would essentially result in the restoration of contaminated property to its pre-damage value (adjusted by the appraiser for market timing issues and the like as appraisal standards may require).

In the present case, the purchase price does not reflect a reduction in the value of the property on account of the contamination that has been discovered and quantified on the property. The reason for this is simple. If the Town acquires the property, it expects to remediate the contamination using the appropriation requested from the Special Town Meeting. As a result, if the Special Town Meeting appropriates from general revenues funds sufficient to remediate the contamination, and if those funds are in fact used to remediate the contamination, then under the applicable case law the Town would have essentially achieved restoration of the contaminated property to its pre-damage value. As such, CPA funds could be used to acquire the property for its value “as if clean” as only non-CPA funds would be used for the remediation.

In any event, the appraiser’s supplemental report, expected shortly, will quantify the effect on the value of the property of the reduced acreage, the recently confirmed contamination, and the estimated clean-up costs, so that appropriate judgments can be made as to the maximum allowable use of CPA funds for this transaction under CPA § 5(f).

Why didn't the Selectmen simply “walk away” from the deal as soon as they learned that more study would be needed and that there were possible environmental risks on the site?

Under Article 25 of the 2010 Annual Town Meeting, the Town had both authorized and directed the Board of Selectmen and the Town Manager to acquire all or any portion of the property, the majority of which is currently classified as agricultural land under Massachusetts General Laws Chapter 61A, “on such terms and conditions as the Selectmen may determine.” Town Meeting overwhelmingly voted in favor of Article 25 as well as the CPA funding for the purchase under Article 24.

The Selectmen undertook a logical sequence of competitively bid environmental due diligence investigations to determine the appropriateness of proceeding with the purchase. At each step of the investigations the Selectmen balanced the costs and benefits of proceeding further with the due diligence investigations and the advantages and disadvantages of proceeding with the purchase or terminating the transaction. These investigations have resulted in important information concerning the environmental condition of the property. The Selectmen called the Special Town Meeting for guidance as to whether or not the Town wants to appropriate a substantial amount of general revenues to conclude this transaction (in addition to the CPA funds previously authorized to purchase this property).

How will we know if we need to remove the contamination rather than capping it to prevent exposure to people? Who makes that decision? What uses are allowed without any remediation being done? Would you advise removing it anyway?

Two legitimate remediation options under the governing environmental regulations are to remove the contaminated soil or to cap it in place to prevent exposure to people. The Selectmen, in consultation with the Town's Licensed Site Professional, would make that decision as to what remedy to implement. While it would likely be less expensive to cap the soils in place and/or to impose an activity and use limitation restricting certain uses on the property, the Special Town Meeting warrant article requests funds sufficient to remove the contaminated soil from the property.

Pesticides are often used on farms. Will this create an environmental problem if the town becomes the owner of the property? Will the town get reports on what pesticides and fertilizers are being used?

Under Massachusetts environmental law, Chapter 21E, the definition of a "release" of oil or hazardous materials does not include "the application of pesticides consistent with their labeling." So liability would not attach to the Town under Chapter 21E in the event of any past or future application of pesticides consistent with their labeling.

In the event the Town proceeds with the purchase of the property, Town Meeting has authorized a lease of the farm land back to the seller for continued agricultural use. Under the terms of the proposed Farm Lease, the Tenant "shall utilize only pesticides and herbicides that have been approved for use in accordance with applicable law. The rate and location of application shall not exceed that permitted for the specific crops being planted and pesticide or herbicide being used. All other label restrictions and guidelines shall be strictly observed."

Why didn't the Town test the whole property? What if future "hot spots" are found on the farm or elsewhere on the property?

Under the guidance of qualified licensed site professionals, the Town conducted three rounds of environmental due diligence investigations consistent with recognized professional standards for conducting such investigations. The Town's extensive sampling and analysis have focused on the recognized environmental condition (a former factory/industrial use of a portion of the property in the past) discovered during the due diligence investigations. It would be prohibitively expensive for the Town to test the whole property before purchasing it. That is one reason that the standards governing environmental due diligence investigations follow the iterative approach used by the Town here.

If future "hot spots" are found after the Town has purchased the property, the Town would need to follow the law, address the issue, and determine if other potentially responsible parties should contribute to the solution to the problem.

How do we know for sure that some time in the future the rules won't change and we will have the liability of the cost of remediating whatever that is? How do we know this clean up won't reveal more problems and become a multi million dollar cost?

We cannot predict the future – let alone predict it with absolute certainty. And there is always a risk that the law will change or that – despite appropriate due diligence investigations having been undertaken – additional problems may be discovered and the Town's potential financial exposure may increase. Based on the investigations performed to date and the advice of the Town's environmental professionals, the Selectmen consider the latter risk to be small compared to the significant environmental benefits of preserving this important open space resource for future generations.

The report says there was one test done on the land that the town already owns. What does this mean for the town?

Despite the specific limitations on the scope of its work, the Town's second environmental consultant (selected through a competitive bidding process) did incorrectly install one sampling point (MW-4) on property later identified by the Town's current environmental consultant as being on the former MBTA property currently owned by the Town. The sample contained a reportable condition. The Town has reported the matter to the DEP which has assigned a release tracking number to the reportable condition. The Town intends to address this situation under the governing regulations (the MCP) and DEP's Best Management Practices for Controlling Exposure to Soil during the Development of Rail Trails.

Future Uses of the Land to be Purchased

Why are we buying this farm? Will it be used for farming only or will future uses include sports fields and community gardens?

When Town Meeting authorized the purchase of the property, Town Meeting also:

- authorized and directed the Board of Selectmen and the Town Manager to "impose a perpetual Conservation Restriction, on such terms and conditions as the Selectmen may determine, on all or any portion of the Caouette Land so as to protect and preserve said land in perpetuity;"
- authorized the Board of Selectmen and the Town Manager "to delegate the management of the Conservation Land to the Conservation Commission, subject to the perpetual Conservation Restriction as aforesaid;" and

- authorized the Board of Selectmen and the Town Manager “to lease, on such terms and conditions as the Selectmen may determine, all or any portion of the Caouette Land for agricultural use.”

Accordingly, future uses of the property will include agricultural use. In addition, the Selectmen will determine the terms and conditions of the perpetual Conservation Restriction to be imposed on all or a portion of the land, the open space uses to be allowed under the Conservation Restriction, and the uses of the remainder of the land (if any).

Will the town have access to the property?

In the event the Town proceeds with the purchase, the Town will own the land and will control access to the property. Town Meeting has authorized a lease of the farm land back to the seller for continued agricultural use. Under the terms of the proposed Farm Lease, the Town will have the right to access and enter upon the leased premises for the purposes of inspection and exercising any right reserved to Landlord. In addition the proposed Farm Lease permits the Town to give the public the right to access and enter upon certain areas of the property at certain times, consistent with the agricultural use of the property.

Will some of the land be used for parking for the rail trail?

One of the significant advantages for the Town of this property is that it abuts the Assabet River Rail Trail parcel to be developed in the future into a multi-use recreational rail trail. The proximity of the farm, the open space, and the Mill Pond, to the Assabet River Rail Trail enhances the many potential open space uses of both the property to be acquired and the rail trail itself. At the same time, farming is the Selectmen’s priority for the use of the land going forward, so other uses will be considered with that priority in mind.

Future use of some of the land for parking for the rail trail is an option but certainly not a foregone conclusion.

Will there be restrictions in place to protect children and others who might come in contact with the soil?

If the Town acquires the property, the Town anticipates that it will promptly remediate the identified environmental condition at the property in a manner that is protective of public health, safety, welfare and the environment.

Under the proposed Farm Lease, the Tenant must prohibit public access to the leased premises from time to time in conjunction with applications of herbicides or pesticides for Tenant’s agricultural operations. The premises will typically be closed to public access for no more than two (2) days after the application of

herbicides or pesticides, and will not be so closed more than twelve (12) times per year during the lease term. The Tenant will deliver written notice to the Town at least forty-eight hours before any application of herbicides or pesticides that will require the closure of the leased premises to the public, and Tenant will post signs on the leased premises and take other reasonable measures prior to such application to so close the leased premises and prohibit public access.

What will be grown on the farm?

In the event the Town proceeds with the purchase, the proposed Farm Lease provides that the leased premises “may be used solely for agricultural purposes and uses accessory thereto, which uses shall be generally consistent with Tenant’s current use of the Demised Premises.”

Can we put in restrictions to make the farm organic? If not for the 10 year lease, then can we do this for the future? What needs to happen to make the farm organic?

In the event the Town proceeds with the purchase, the proposed Farm Lease provides that the Town intends to place a conservation restriction on the leased premises and that the terms of the conservation restriction must be approved by the Executive Office of Energy and Environmental Affairs (“EOEEA”). The Farm Lease will be subject to the terms of the conservation restriction. The Town will consult with the Tenant concerning the terms of the conservation restriction and the Town must use reasonable efforts in an attempt to ensure that agricultural use of the leased premises is permitted under the conservation restriction.

At the present time, the Simeone-Caouette family appears interested in leasing the agricultural land from the Town and farming the land for as long as possible. At this time, in the event the Town becomes the owner of the land, the Selectmen do not anticipate requiring changes in the family’s farming operations or requiring that the farm become an organic farm during the term of the family’s lease of the land for agricultural use. Thereafter, the Selectmen could, through an appropriate process and public discussion of the advantages and disadvantages, require organic farming practices for the future on the land.

Is the family interested in farming it after the 10 years? If not, who might we lease it to?

The initial Farm Lease is for 10 years. Both parties have the option to consider a new or renewed Farm Lease at the expiration of the 10 year term. If the family is not interested in farming the land after the initial 10 year term or after any renewal term, other local farmers could be identified or other agricultural options pursued.

Alternative Development Scenarios

If the Town does not buy the land because of the environmental issues wouldn't a developer likely put in a lower offer allowing the town to match that lower offer? Wouldn't that guarantee that the town would have another chance to buy the land under the Chapter 61A right of first refusal, thereby preventing development of this important resource but at a lower price?

If the Town were to terminate its P&S Agreement because of environmental issues, there are several potential outcomes:

- The developer that made the original offer could opt to proceed to purchase the property on the terms previously offered. In that case, absent unusual circumstances or material changes to the developer's offer, the Town would not have a "second bite at the apple" under its Chapter 61A right of first refusal.
- The owners and the developer could negotiate a new agreement at a lower price and on different terms to take into account the contamination and other facts and circumstances that have evolved since the developer's original offer. In that case, given material changes to the developer's offer, the Town would have a "second bite at the apple" under its Chapter 61A right of first refusal.
- The owners, having paid the back taxes on the property under Chapter 61A this past summer, could allow one year to expire from that payment and then proceed to sell the property either to the Town or to a third party free and clear of the Town's Chapter 61A right of first refusal.
- The owners could take the property off the market.

In these circumstances, it is not a "sure thing" that the price of the property will come down or that the Town will have another chance to buy the property.

If the Town does not buy the land, how many houses can be built there? I heard it is only 6 or 8. If there's an environmental problem won't that reduce the number of houses that can be built even more?

If the Town does not purchase the property, the "highest and best use" of the land is for residential development. A conventional subdivision of the property could yield six buildable lots, each with a single family home. However, other, more intensive residential development options exist as well, including possibly a Planned Conservation Residential Communities (PCRC) under Section 9 of the Zoning Bylaw, a Senior Residences Development under Section 9B of the Zoning Bylaw, or an affordable housing development project under Chapter 40B (unless that statute is repealed at the upcoming state election).

To the extent the environmental problem is defined and the remediation costs are manageable for a developer, the environmental problem will not reduce the number of residences that can be built on the property. Rather, with appropriate management of the environmental problem under the applicable regulations, the property can be fully utilized for residential uses.

Procedural Questions

Didn't we already vote this at the 2010 Annual Town Meeting? Why are we back again?

The acquisition of the property was unanimously approved by Annual Town Meeting in 2010, and one million dollars of Community Preservation Act open space funds were appropriated for that acquisition. After that approval, the Town discovered through its due diligence (a) environmental issues related to the Property, and (b) the Property contains less acreage than originally anticipated because of issues related to the delineation of lot lines in the Mill Pond. The Selectmen then determined to bring this matter back to Town Meeting for further guidance. Specifically, Town Meeting will be asked to appropriate funds for environmental remediation of the property, any delta between the purchase price of the property and the allowable amount of CPA funds that can be used for the purchase, and the additional expenses related to the Town's due diligence activities and associated extensions to the closing date.