

### *Memorandum of Understanding*

Between the Town of Marlboro and the Hogback Mountain Conservation Association, regarding the transfer of monies in the Marlboro's "Hogback Preservation Fund", and subject to Marlboro Voter Approval.

Now come the Town of Marlboro ("Marlboro") through its Select Board and the Hogback Mountain Conservation Association ("HMCA") and agree to the following statements, roles and responsibilities. The **Agreement** provisions set forth below are subject to ratification by Marlboro Voters at a Special Town Meeting.

#### **Background**

HMCA is a Vermont non-profit, all-volunteer organization, which was formed by local citizens of Marlboro to raise funds for the purchase of a 593-acre tract known as Hogback Mountain, located in Marlboro, Vermont (hereinafter "Hogback Mountain"). Volunteers conducted a capital campaign from 2006 to 2010, raising \$1.73M for the acquisition and conservation of this important parcel and in March 2010, following the successful capital campaign, the "Hogback Mountain Conservation Area", including the former Hogback Mountain Ski Area and its outbuildings, was gifted to the Town of Marlboro.

The conveyance of Hogback Mountain to Marlboro was and is subject to a Grant of Development Rights held by the Vermont Land Trust (VLT) and the Vermont Housing and Conservation Board (VHCB). The Grant describes the primary purposes behind this conservation easement as follows: "To conserve forestry values, wildlife habitats, riparian buffers, aquatic habitats, wetlands, soil productivity, and water quality on the Protected Property, and the ecological processes that sustain these natural resource values as these values exist on the date of this instrument and as they may evolve in the future, non-motorized, non-commercial recreational opportunities, open space values, and scenic resources associated with the Protected Property for present and future. As secondary purposes, to conserve biological diversity, natural communities, and native flora and fauna associated with the Protected Property for present and future generations."

At that time the property was conveyed to the Town, HMCA also donated monies raised in its capital campaign to specifically create an Endowment Fund ("the Fund") totaling \$120,000 to Marlboro, along with a separate gift of \$11,600 to cover immediate expenses. The HMCA's original intent for the Fund was to underwrite in perpetuity the modest cost of recreational programs and activities benefiting the public interest in education, conservation, wildlife, trail management, low-impact recreation and other activities in accordance with the Hogback Conservation Easement. HMCA's intent for the Fund was to allow the principal to remain and grow in perpetuity with dividends used as needed to fund programs and activities utilizing the property.

In 2010, the aforementioned intent of the HMCA Endowment Fund gift to Marlboro and of Town officials' understanding of this intent, are indicated by:

1. The specific proposal presented to the Select Board in 2011 by the Hogback Preservation Commission (HPC), a committee established and appointed by the Marlboro Select Board to help manage uses of Hogback Mountain and the Fund, was to invest the Fund in a financial institution that would preserve capital, allowing for the Fund's growth such that annual distributions would support Hogback expenses in perpetuity.
2. The Fund was never combined with the Marlboro's General Fund. Rather, the Town created a separate fund account named the Hogback Preservation Fund. Since then, this has always been treated as separate from the town's General Fund and has been managed by the elected Trustees of Public Funds.

Since its inception the Hogback Preservation Fund has been invested primarily in insured Certificates of Deposit yielding a low interest rate; the 5-year \$95,000 CD maturing this year has been yielding 1.5%. Meanwhile, the annual Fund expenditures over the past 11 years have averaged 2.06% of the original \$131,600 endowment and gift. Due to the Hogback Preservation Fund's low returns and two large expenses—a \$3,000 payment towards a boundary issue settlement mandated by the Select Board in 2012, and an \$8,000 biodiversity study that HPC and HMCA felt was essential for future planning—the Hogback Preservation Fund has declined. At the end of 2020 the Fund's principal had fallen to \$115,700.

The Trustees of Public Funds recently received legal advice from the town's attorney stating that:

1. Due to the absence of a written gift instrument accompanying HMCA's donation of the Hogback Preservation Fund monies to the town, the Trustees do not have legal authority to manage the fund.
2. HMCA, the donor, cannot retroactively create a gift instrument to document the original intent of the donation.

The Trustees of Public Funds have recommended to the Marlboro Select Board:

- A. The return of all the monies held in the Hogback Preservation Fund to HMCA for its investment and management consistent with the original intent of the funds as expressed above, and
- B. Holding a legally warned Special Town Meeting in the fall to ask voters to approve this action.

While the Select Board has discretion to implement the Trustees' proposal regarding transfer of The Fund without public consent, it seeks to share the details of the proposed transaction with the public and to attain their awareness, understanding and consensus.

## Agreement

Consistent with the intent behind creating an endowment fund and the utilization of the Hogback Preservation Fund monies over the past 10+ years for these purposes, the Town of Marlboro and HMCA hereby agree as follows:

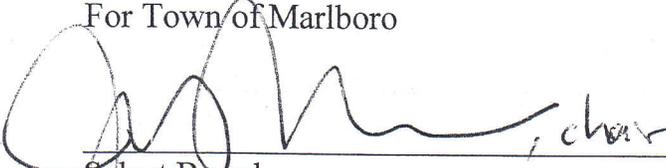
1. Marlboro will transfer all monies held in the designated Hogback Preservation Fund currently totaling approximately \$115,700, to HMCA and HMCA will in turn create a nonprofit fund with these monies at the Vermont Community Foundation (VCF) of Middlebury, VT named Hogback Mountain Endowment Fund ("Hogback Fund"). The Hogback Fund will be bound by all VCF policies and procedures (even though VCF is not a direct party to this MOU).
2. The Hogback Fund with VCF will be a Nonprofit Endowment Fund. The HMCA will maintain the Hogback Fund at the VCF permanently. VCF's current policies for endowment funds indicate that the principal cannot be invaded except under very exceptional circumstances by request to the VCF Board.
3. The HMCA may request that the Hogback Fund receive an automatic distribution, which is currently set at 5% of the 36-month fund balance average. The HMCA will prudently and solely at its discretion use this distribution to pay for the modest cost of producing and managing recreational programs and activities benefiting the public interest in education, conservation, wildlife habitat, trail management, low-impact recreation and other related activities and improvements in accordance with the Hogback Grant of Development Rights. Marlboro as owner of the Hogback Mountain will continue to carry liability insurance on the property covering all anticipated public uses and activities in the Hogback Mountain Conservation Area.
4. Hogback Fund distributions not utilized within one year of receipt by HMCA (or otherwise designated for anticipated expenses) will be held by HMCA for use (and investment) for in future years. HMCA may also choose to place the Hogback Fund on automatic reinvestment whereby those annual distributions will be held and invested by VCF AND remain available to HMCA for future uses consistent with the purposes of the Hogback Fund.
5. Marlboro's Select Board and representatives of HMCA will meet once a year to review and agree upon anticipated public programs and activities utilizing Hogback Mountain and the associated expenses. Essential to any proposed and approved activities is the ability to pay for them out of the annual distribution for that particular year. Upon review and Select Board approval, HMCA can proceed with said activities and pay directly all related expenses. If any activity requires Marlboro's contractual signature and therefore results in bills sent to the town, the town shall review and approve the bill and then forward it to HMCA for payment.

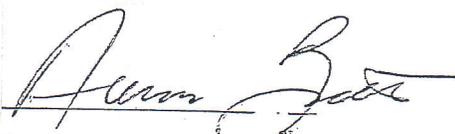
Marlboro will not commit the use of the Fund for any activities without prior review and approval of HMCA.

6. Upon request of the Select Board, HMCA will make available the most recent Hogback Fund statement issued by VCF as well as HMCA's records of Hogback Mountain expenses incurred or paid. Fund statements are currently issued quarterly by the VCF.
7. HMCA shall provide in its bylaws that if for any reason it dissolves in the future, it shall pass its responsibilities for utilizing the distributions to another like-minded non-profit (as local as possible) and if no such willing non-profit can be located, then responsibilities shall be assumed by the Marlboro Select Board. As part of HMCA's nonprofit endowment fund agreement with the VCF, the HMCA can name a contingent organization to receive fund distributions.
8. Marlboro Select Board and HMCA believe this new arrangement and relationship will relieve the Select Board of the burden of investing and otherwise overseeing these monies while ensuring the integrity of the fund and the fulfillment of the purposes behind the acquisition and public use of Hogback Mountain, for which these funds were originally raised. The bylaws of HMCA will be amended to include a provision that a member of its board, a Town of Marlboro resident, will be designated to serve as liaison to the Select Board as a link between the organizations.
9. Marlboro Select Board hereby endorse this Memorandum of Understanding and will call for a Special Town Meeting to put this agreement to the town voters. It will work with HMCA to disseminate information on this proposal. HMCA in turn endorses this Memorandum of Understanding and plans to continue activities and public uses of Hogback Mountain and prudently oversee investment and use of the Hogback Fund and resulting distributions to these ends.

For Town of Marlboro

Dated: 8.12.21

  
Select Board

  
Select Board

James Gal  
Select Board

For Hogback Mountain Conservation Association. Dated: 8/9/21

Cebk  
Association Board President

Nancy K. Anderson  
Association Treasurer