

**NONJUDICIAL SETTLEMENT AGREEMENT PURSUANT TO RSA 564-B:1-111  
REGARDING THE WALTER AND MARILYN SMYK FAMILY TRUST DATED  
MARCH 16, 1990**

NOW COME the TOWN OF STRATHAM (the "TOWN"), with an address of 10 Bunker Hill Avenue, Stratham, New Hampshire 03885, THOMAS J. DONOVAN, ESQ., DIRECTOR OF CHARITABLE TRUSTS FOR THE STATE OF NEW HAMPSHIRE ("DIRECTOR") with an address of 33 Capitol Street, Concord, New Hampshire 03301-6397, and M. SCOTT LEARNED AND JAMES H. SWARTOUT, TRUSTEES OF THE WALTER AND MARILYN SMYK FAMILY TRUST DATED MARCH 16, 1990 ("TRUSTEES"), c/o Considine & Considine, 8989 Rio San Diego Drive #250 San Diego, California 92108, being all of the "interested persons" as that term is defined in New Hampshire Revised Statutes Annotated Section 564-B:1-111(a) (the "Interested Persons") with respect to the specific bequest established under Article Two, Section D. paragraph 3. g. of the Walter and Marilyn Smyk Family Trust Dated March 16, 1990, whose signatures to this Agreement are required to make it effective, and agree as follows:

**Background**

I. On March 16, 1990, Walter Smyk and Marilyn Smyk (the "Grantors") established the Walter and Marilyn Smyk Family Trust Dated March 16, 1990, as amended on December 13, 1990, March 12, 1993, May 24, 1996, October 18, 1996, December 2001, August 26, 2002, August 9, 2005, October 26, 2007, November 12, 2015, and September 8, 2016 (the "Trust Agreement").

II. Walter Smyk passed away on August 19, 2007, and Marilyn Smyk passed away on May 18, 2017.

III. From 1993, until their respective deaths, the Grantors resided at 7 Bunker Hill Avenue, Stratham, New Hampshire (the "Smyk Property"), located directly across the street from the TOWN's administrative offices.

IV. During their years in Stratham, New Hampshire, the Grantors developed a deep appreciation for the TOWN and its citizens, as well as for the pastoral setting of their residence.

V. In evidence of the Grantors' appreciation, they decided to leave the Smyk Property to the TOWN upon their deaths, for use as a public park upon the terms provided in Article Two, Section D., paragraph 3. g. of the Trust Agreement, which provides as follows:

g. Provided the Trust owns the Grantors' real property located at 7 Bunker Hill Avenue, Stratham, New Hampshire upon the surviving spouse's death, the Grantors give the sum of Three Hundred Thousand Dollars (\$300,000.00) and said property, consisting of 10.78 acres of land, more or less, acquired by the Grantors from the Marilyn E. Flynn Revocable Trust by deed dated March 22, 1993, and recorded in the Rockingham County New Hampshire Registry of Deeds at Book 2973, Page 729, together with any buildings situated thereon, to the Trustees of the Trust

Funds for the Town of Stratham, New Hampshire ("the Town"), subject to a reasonable period of time following the surviving Grantor's death to remove her personal property from said property, upon the following terms and conditions which shall be inserted as restrictive covenants into the Trust's deed of conveyance as well as any other documents necessary to carry out these distributions, the breach of which will result in a reversion to the Grantors' Trust:

- i. The land given to the Town under this provision shall be named the "Mary and Walt Smyk Park" ("the Park") and may only be referred to in all Town documents as the "Mary and Walt Smyk Park," "Smyk Park," or "Stratham Park." The Grantors' Trust will commission and erect a commemorative plaque of at least Three Hundred square inches (300 sq. in.) denoting the Grantors' contribution of the property to the Town, which shall be placed at a visible location at or near the main entrance to the Park and perpetually maintained by the Town.
- ii. The monies given to the Town under this provision ("the endowment") shall be held in trust and the income therefrom shall be used to maintain the Park.
- iii. All decisions regarding the management and use of the Park and its endowment, as provided for in this Article 2, D., 3, f., shall be made by the Trustees of the Trust Funds or, in their absence, by at least three Trustees appointed by the Town Selectmen.
- iv. The uses of the Park shall be limited to recreational and cultural purposes for residents of the Town of Stratham. Consistent with these uses, the Park may contain picnic tables, fire pits and barbeque facilities. Swings and other similar park and playground equipment are allowed provided they are constructed of wood and are stained and not painted. No trees may be removed unless they are dead, dying or decayed. Any trees that are removed must be replaced, on any area of the property, with reasonably mature trees of a similar species. No significant changes may be made to the topography of the land in the Park.
- v. The existing house and barn may be retained or replaced with a new building or structure, which may not exceed the footprint of the building or structure it replaces. Any new buildings, structures or changes to the existing buildings will require the unanimous approval of the Town's Trustees and

a majority of its Selectmen.

- vi. No replacement building or other similar structure may be located within four hundred feet (400') of Portsmouth Avenue or Bunker Hill Avenue. In conjunction with the construction of any replacement building or structure, the existing well and septic system may be relocated as necessary.
- vii. In addition to the replacement of the existing buildings or structures provided for in subparagraphs v. and vi. above, the Town may also construct a maintenance and storage shed having a footprint of no more than Seven Hundred and Fifty square feet (750 sq. ft.) and a restroom facility of no more than Five Hundred square feet (500 sq. ft.), together with associated well and septic systems, and a single, pavilion type structure of not more than Three Thousand square feet (3,000 sq. ft.).
- viii. The design of any new or replacement building or structures must reflect the rural nature of the Town and may not exceed twenty feet (20') in height.
- ix. Once the Park and the endowment are distributed to the Town, the Town shall hold the Grantors' Trust harmless and indemnify it from any claim made against the Grantor's Trust in connection with the property.

(the "Smyk Park Bequest").

VI. Following Marilyn Smyk's death, the TOWN received notice of the Smyk Park Bequest and subsequently notified the TRUSTEES that under New Hampshire law, the proper party to take title to real estate on behalf of the TOWN is the TOWN's Board of Selectmen and not the Trustees of the Trust Funds. Additionally, the TOWN has notified the TRUSTEES that the Trustees of the Trust Funds have no legal authority to manage the real estate owned by the TOWN, and that therefore the TOWN's Board of Selectmen is the appropriate TOWN entity to make decisions regarding the management of the Town's real estate, including the real estate included as part of the Smyk Park Bequest.

VII. The Grantor's overriding intent was to establish the Smyk Property as a public park for the benefit of the TOWN and its citizens. The specific way the TOWN holds title to the park or manages the same is not relevant to the Grantors' intent, so long as the land is maintained as a public park as set forth in the Trust.

VIII. In reviewing subparagraph iv. of the Smyk Park Bequest, the TOWN determined that if it were to install commercial playground equipment in the Park for the recreation of children,

as contemplated by the Grantors, that modern safety standards dictate the use of plastic and other composite materials as part of the construction of such equipment instead of wood. Consequently, as a condition of acceptance of the Smyk Park Bequest, the Town has requested that it be allowed to install commercial playground equipment constructed with plastic and/or composite materials, consistent with modern safety standards, where appropriate.

IX. In reviewing the terms and conditions of the Smyk Park Bequest, the TRUSTEES have determined that the primary intent of the grantors in establishing the park was to preserve the Smyk Property in its existing natural state for use by the public and that the Grantors' requirement that swings and other similar park and playground equipment be constructed of wood, and that such wood be stained and not painted, was to ensure that the playground equipment will visually blend into the park's landscape.

X. In evaluating the TOWN's request that the trust be modified to allow commercial grade plastic and/or composite playground equipment that meets modern child safety standards, the TRUSTEES have determined that the Grantors' primary intent can be met by requiring that the colors utilized in the construction of such equipment shall be natural earth colors, consistent with the park's existing vegetation.

XI. In its further review of subparagraph iv. of the Smyk Park Bequest, the TOWN determined that the standard requiring any removed trees be replaced with "reasonably mature trees" is ambiguous and potentially prone to misinterpretation. Consequently, as a condition of acceptance of the Smyk Park Bequest, the Town has requested that the trust define an objective standard for the size of trees to be planted to replace any trees removed.

XII. In reviewing the terms and conditions of the Smyk Park Bequest, the TRUSTEES have determined that the primary intent of the Grantors in establishing the park was to preserve the Smyk Property in its existing natural state for use by the public, and that the requirement for "reasonably mature trees" to replace any trees removed is so that the new trees will reasonably blend with the existing trees to allow for an attractive park setting, and so the new trees would have a reasonable chance for survival without the Town incurring undue cost to acquire and plant the trees or undertaking a burdensome level of care or maintenance of excessively juvenile trees, which care and maintenance would interrupt the public's enjoyment of the park.

XIII. In evaluating the TOWN's request that the trust be modified to include an objective standard for the size of replacement trees, the TRUSTEES have determined that the Grantors' primary intent can be met by requiring any replacement trees to be at least 1.5 inches caliper in width, as this minimum size is large enough to reasonably blend into the overall landscape and to ensure that a reasonably hardy tree is planted as a replacement tree.

XIV. In its further review of subparagraph iv. of the Smyk Park Bequest, the TOWN determined that the language requiring that "No significant changes may be made in the topography of the land in the Park" is ambiguous and potentially prone to misinterpretation. Consequently, as a condition of acceptance of the Smyk Park Bequest, the Town has requested that the Trust include a clarification that changes in the topography necessary to provide for safe

and reasonably level parking areas and associated drainage structures near intended and allowed uses shall not be considered prohibited "significant" changes in topography.

XV. In reviewing the terms and conditions of the Smyk Park Bequest, the TRUSTEES have determined that the primary intent of the Grantors in establishing the park was to preserve the Smyk Property in its existing natural state for use by the public.

XVI. In evaluating the TOWN's request that the trust be modified to clarify that changes to the topography of the land as necessary to provide safe and reasonably level parking areas and associated drainage structures near intended and allowed uses shall not be considered prohibited as "significant" changes, the TRUSTEES have determined that the primary intent of the Grantors in establishing the park was to permit the public to enjoy the existing natural state of the Smyk Property. The public's ability to enjoy the existing natural state requires access to the park, which can only be accomplished if motor vehicles can be parked in or near the park and its various amenities, given there is no safe parking available outside of the park. Particularly given the overall size of the parcel of land comprising the Smyk Property, the TRUSTEES have determined that the installation of safe and reasonably level motor vehicle parking areas and associated drainage structures near intended and allowed uses is required for the public's use and enjoyment of the Park and will necessarily require some alteration to the topography of the land and that such alteration, provided it occurs in areas selected in accordance with best management practices to minimize the amount of necessary terrain alteration, will not constitute a "significant" change in the topography of the park which would defeat the primary intent of the Grantors.

XVII. In its review of subparagraph v. of the Smyk Park Bequest, the TOWN determined that the language was ambiguous and potentially prone to misinterpretation, in that it is unclear whether the TOWN must replace the existing dwelling structure and/or barn if the TOWN elects to remove same. Consequently, as a condition of acceptance of the Smyk Park Bequest, the Town has requested that the trust include language explicitly stating that replacement of the existing structures is not required.

XVIII. In reviewing the terms and conditions of the Smyk Park Bequest, the TRUSTEES have determined that the primary intent of the Grantors in establishing the park was to preserve the Smyk property in its existing natural state for its use by the public as described in the Smyk Park Bequest.

XIX. In evaluating the TOWN's request that the trust be modified to explicitly state that replacement of the existing structures is not required should the TOWN elect to remove them, the TRUSTEES have determined that the primary intent of the Grantors in establishing the park was to permit the public to enjoy the existing natural state of the Smyk Property, and have determined that the Grantors' primary intent can be accomplished even if the existing structures are removed and not replaced, in that the existing natural state of the Smyk Property will be preserved and enhanced if fewer structures are present on the Smyk Property.

XX. In its review of subparagraph viii. of the Smyk Park Bequest, the TOWN determined that modern construction standards relative to roof pitches to address snow loading conditions could not be met for larger structures if the TOWN were to comply with the restriction

that any additional or replacement structures not exceed 20' in height at the peak. Given current construction standards and zoning requirements, the TOWN has determined that 30' is a more appropriate maximum height for the peak of a roof for a pavilion of a size permitted by the bequest, and therefore, as a condition of acceptance of the Smyk Park Bequest, the Town has requested that the maximum height of any new or replacement structure be increased to 30' at the peak.

XXI. In reviewing the terms and conditions of the Smyk Park Bequest, the TRUSTEES have determined that the primary intent of the Grantors in establishing the park was to preserve the Smyk Property in its existing natural state for use by the public, including the addition of certain structures including a pavilion, or replacement of existing structures, for use by the public as described in the Smyk Park Bequest.

XXII. In evaluating the TOWN's request that the trust be modified to permit additional or replacement structures up to 30' at the peak, the TRUSTEES have determined that the primary intent of the Grantors in establishing the park was to permit the public to enjoy the existing natural state of the Smyk Property, and have determined that the Grantors' primary intent can be met by permitting buildings with a maximum height of 30' at the peak, in light of current construction standards for roof pitches to address snow loading conditions and the fact that some of the current structures on the Smyk Property already exceed the 20' height restriction.

### **Statutory Authority**

XXIII. NH RSA 564-B:1-111 allows Interested Persons to enter into binding nonjudicial settlement agreements with respect to any matter involving a trust, including but not limited to the modification of a trust, provided the agreement does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by a court under this chapter or other applicable law.

### **Modification of Trust**

XXIV. To carry out the Grantors' intent of gifting the Smyk Property to the TOWN for use as a public park, to allow the TOWN to install playground equipment meeting modern safety standards, to build structures meeting modern construction standards relative to roof pitches and snow loading conditions which do not exceed the height of existing structures on the Property, to build reasonably level parking areas with associated drainage structures, and to reduce ambiguous language in the Trust, the Trust is hereby amended by deleting the existing Article Two, Section D., paragraph 3. g., and replacing it with the following new Article Two, Section D., paragraph 3. g., as follows:

g. Provided the Trust owns the Grantors' real property located at 7 Bunker Hill Avenue, Stratham, New Hampshire upon the surviving spouse's death, the Grantors give the sum of Three Hundred Thousand Dollars (\$300,000.00) and said property, consisting of 10.78 acres of land, more or less, acquired by the Grantors from the Marilyn E. Flynn Revocable Trust by deed dated March 22, 1993, and recorded in the Rockingham County New Hampshire Registry of Deeds at Book 2973, Page 729,

together with any buildings situated thereon, to the Town of Stratham, New Hampshire ("the Town"), subject to a reasonable period of time following the surviving Grantor's death to remove her personal property from said property, upon the following terms and conditions which shall be inserted as restrictive covenants into the Trust's deed of conveyance as well as any other documents necessary to carry out these distributions, the breach of which will result in a reversion to the Grantors' Trust:

- i. The land given to the Town under this provision shall be deeded to the Selectmen for the Town of Stratham, on behalf of the Town, and said land shall be named the "Mary and Walt Smyk Park" ("the Park") and may only be referred to in all Town documents as the "Mary and Walt Smyk Park," "Smyk Park," or "Stratham Park." The Grantors' Trust will commission and erect a commemorative plaque of at least Three Hundred square inches (300 sq. in.) denoting the Grantors' contribution of the property to the Town, which shall be placed at a visible location at or near the main entrance to the Park and perpetually maintained by the Town.
- ii. The monies given to the Town under this provision ("the endowment") shall be held in trust by the Trustees of the Trust Funds for the Town of Stratham and the income therefrom shall be used to maintain the Park.
- iii. All decisions regarding the management and use of the endowment, as provided for in this Article Two, Section D., paragraph 3, g., shall be made by the Trustees of the Trust Funds. All decisions regarding the management and use of the Park as provided for in this Article Two, Section D., paragraph 3, g. shall be made by a majority vote of the Board of Selectmen.
- iv. The uses of the Park shall be limited to recreational and cultural purposes for residents of the Town of Stratham. Consistent with these uses, the Park may contain picnic tables, fire pits and barbeque facilities. Swings and other similar commercial park and playground equipment constructed of wood, plastic and/or other composites are allowed provided they are colored in natural earth colors, consistent with Park's existing vegetation. No trees may be removed unless they are dead, dying or decayed. Any trees that are removed must be replaced, on any area of the property, with trees of a similar species which are at least 1.5 inches caliper in width. No significant changes may be made

to the topography of the land in the Park. The alteration of topography necessary to construct reasonably level parking facilities with associated drainage structures near intended and allowed uses shall not be considered a "significant" change prohibited by this paragraph provided the location of such improvements is selected in accordance with best management practices.

- v. The existing house and barn may be retained or replaced with a new building or structure, which may not exceed the footprint of the building or structure it replaces. Any new buildings, structures or changes to the existing buildings will require the approval of a majority of its Selectmen. Nothing herein shall be construed to require the TOWN to replace the existing house and/or barn should the TOWN elect to remove same.
- vi. No replacement building or other similar structure may be located within four hundred feet (400') of Portsmouth Avenue or Bunker Hill Avenue. In conjunction with the construction of any replacement building or structure, the existing well and septic system may be relocated as necessary.
- vii. In addition to the replacement of the existing buildings or structures provided for in subparagraphs v. and vi. above, the Town may also construct a maintenance and storage shed having a footprint of no more than Seven Hundred and Fifty square feet (750 sq. ft.) and a restroom facility of no more than Five Hundred square feet (500 sq. ft.), together with associated well and septic systems, and a single, pavilion type structure of not more than Three Thousand square feet (3,000 sq. ft.).
- viii. The design of any new or replacement building or structures must reflect the rural nature of the Town and may not exceed thirty feet (30') in height.
- ix. Once the Park and the endowment are distributed to the Town, the Town shall hold the Grantors' Trust harmless and indemnify it from any claim made against the Grantor's Trust in connection with the property.



XXV. The Interested Persons hereby agree that the amendment of the Trust as set forth above will not violate any material purpose of the Trust and could be properly approved by a court of competent jurisdiction.

**General Provisions**

XXVI. This Agreement shall be governed by and construed in accordance with the laws of the State of New Hampshire.

XXVII. This Agreement may be executed in more than one original and each such counterpart shall be deemed an original, and all such counterparts shall constitute one and the same agreement. This Agreement shall be effective immediately upon execution by all Interested Persons, but all parties need not execute the same original or the same counterpart.

XXVIII. By signing this Agreement, the parties acknowledge that they have had the opportunity to obtain separate legal counsel and advice regarding this Agreement and that they have read and understand this Agreement. Each party represents that they have executed this Agreement with a full understanding hereof.

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SIGNATURES AND ACKNOWLEDGMENTS FOLLOW ON NEXT TWO PAGES

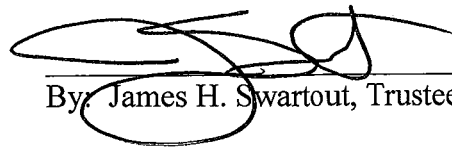
IN WITNESS WHEREOF, the parties hereto have signed this Agreement effective upon the full execution of this Agreement by all the parties.

**WALTER AND MARILYN SMYK FAMILY TRUST DATED MARCH 16, 1990**

Date: 10/15/18

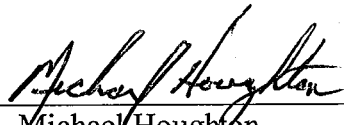
  
By: M. Scott Learned, Trustee

Date: 10/15/18

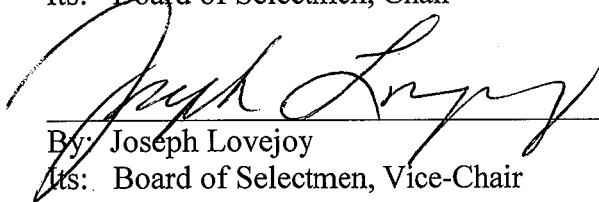
  
By: James H. Swartout, Trustee

**TOWN OF STRATHAM**

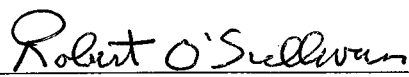
Date: 9/17/2018

  
By: Michael Houghton  
Its: Board of Selectmen, Chair

Date: 9/17/2018

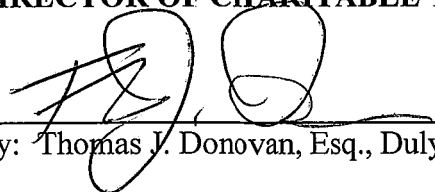
  
By: Joseph Lovejoy  
Its: Board of Selectmen, Vice-Chair

Date: 9/17/2018

  
By: Robert O'Sullivan  
Its: Board of Selectmen, Member

**DIRECTOR OF CHARITABLE TRUSTS**

Date: Oct. 8, 2018

  
By: Thomas J. Donovan, Esq., Duly Authorized

STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_  
2018, by M. Scott Learned and James H. Swartout in their capacities as Trustees of the Walter and  
Marilyn Smyk Family Trust Dated March 16, 1990.

(Seal, if any)

*See attached  
certificate*

\_\_\_\_\_  
Notary Public / Justice of the Peace  
My Commission Expires:

STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

The foregoing instrument was acknowledged before me this 17<sup>th</sup> day of September 2018,  
by Michael Houghton, in his capacity as Chair of the Board of Selectmen of the Town of Statham,  
New Hampshire; Joseph Lovejoy, Vice Chair of the Board of Selectmen of the Town of Stratham,  
New Hampshire; and by Robert O'Sullivan, Member of the Board of Selectmen of the Town of  
Stratham, New Hampshire.

(Seal, if any)

*Valerie Kemp*  
\_\_\_\_\_  
Notary Public / Justice of the Peace  
My Commission Expires: *1/28/2020*

**VALERIE KEMP**  
**Notary Public - New Hampshire**  
**My Commission Expires January 28, 2020**

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

The foregoing instrument was acknowledged before me this 8 day of October  
2018, by Thomas J. Donovan, Esq. in his capacity as Director of Charitable Trusts for the State of  
New Hampshire.

(Seal, if any)

*Audrey Blodgett*  
\_\_\_\_\_  
Notary Public / Justice of the Peace  
My Commission Expires:

**AUDREY BLODGETT**  
**~~JUSTICE OF THE PEACE~~**  
**NOTARY PUBLIC**  
**COMM. EXPIRES ~~12/11/2012~~**  
*3/21/2013*

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

**CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )  
County of San Diego )  
On Oct 15, 2018 before me, Carolyn Russell, Notary Public  
Date Here Insert Name and Title of the Officer  
personally appeared M. Scott Learned  
Name(s) of Signer(s)  
and James H. Swartout

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature Carolyn Russell  
Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

**Description of Attached Document**

Title or Type of Document: Nonjudicial Settlement Smyk Family Trust Document Date: \_\_\_\_\_  
Number of Pages: 11 Signer(s) Other Than Named Above: no other signers

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: M. Scott Learned  
 Corporate Officer — Title(s): \_\_\_\_\_  
 Partner —  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_  
Signer Is Representing: \_\_\_\_\_

Signer's Name: James H. Swartout  
 Corporate Officer — Title(s): \_\_\_\_\_  
 Partner —  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_  
Signer Is Representing: \_\_\_\_\_