

## MEMO

**Date:** March 6, 2017  
**To:** Loomis Communities, Inc.  
**From:** Peter C. Connor  
**Re:** Loomis House (Holyoke) Charitable Funds

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### I. Standard of Review for Charitable Gifts

As a general rule, to the extent that a donor places restrictions upon a gift, the terms of the charitable donation need to be studied to determine its use. In Massachusetts, liberal interpretation is permitted to continue the charitable purposes of the funds rather than allowing a gift to revert to the donor. If a gift states that a fund is to be maintained and that the income can be used for either a general or specific purpose, then the fund is restricted and the income (and pursuant to the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”) potentially some of the growth) can be used, but only for the purpose (if any) that the donor established in its deed of gift. Under charitable trust law, the funds are not useable for any other purpose, and, if the purpose can no longer be sustained by the charity, and the gift is for a general charitable purpose, the funds can be distributed by the Probate Court to another holder to continue the purpose of the gift. A charity, in short, is entitled to hold and administer the funds only for so long as the purpose can be honored by it; in this sense, it does not “own” them.

The Attorney General oversees enforcement of charities and charitable funds held by them. It is important to understand that a restricted fund is not available to be used by the charity for any purpose other than the original purpose identified by the donor, nor to produce any benefit to the institution otherwise. Thus, a charity that holds a gift that requires the income to aid children could not use the fund to help animal shelters or invade the principal for general operating costs. In Loomis’ case, donations that restrict distributions to income for a particular purpose cannot be utilized by Loomis for calculations of debt service, construction projects, operations or even for its general endowment.

The doctrine of *cy pres* can be applied to any gift which evidences a generable charitable purpose. A NY court summarized the doctrine as follows: “When a court determines that changed circumstances have rendered the administration of a charitable trust according to its literal terms either impracticable or impossible, the court may exercise its *cy pres* power to reform the trust in a [manner] that will most effectively accomplish its general purposes.” For instance: A gift is left to a college, the income from which is to support the teaching of renaissance madrigals, and, the college drops this program. The doctrine then permits consideration of alternative uses. To invoke this doctrine the charity is required to file an action with the Probate Court. The Attorney General’s Office is a party in such action. The trustee

(holder) of the funds requests the Court to ascertain the existence of a general charitable intent and to identify the charitable recipient/use most closely reflective of that intent. There is no assurance that the named holder will be the continued holder of the funds involving a changed purpose. That said, if a general purpose is ascertained and the current holder of the fund can show that it has a proposed use which meets the general intent of the terms of the gift (albeit not the specific intent), then the Court is likely to permit the deviation in purpose and the charity will continue to be able to administer the fund as changed by the Court. Using the example of the college set forth above, the Court would likely permit the funds to continue to be held by the charity, if the college agreed that the fund would be used solely for the study of renaissance history and culture.

In addition to the general application of *cy pres*, as Loomis House (the nursing center) is selling substantially all its assets, the Attorney General is required to receive notice of the proposed transaction and may decide to use her oversight powers regarding the use of charitable funds.

We have reviewed the funds of Loomis and the trusts established for its benefit based upon the foregoing. What follows is a review of certain funds or trusts which required further examination. It is important to remember that any reference to Loomis Housing Corporation means Loomis Communities, Inc. ("LCI") as it changed its name in the 1990s.

## II. Loomis Charitable Funds

- a. Trusts with Independent Trustees - In 1981 Loomis Housing Corporation was formed and the Hampden County Probate Court was petitioned in 1985 to transfer the endowment and amend the Merritt and Potts funds to substitute Loomis Housing Corporation (now Loomis Communities, Inc.) for Holyoke Home for the Aged which was allowed. Bank of America is the Trustee of each Trust.

- i. Louise C. Merritt Trust - Louise C. Merritt by her will provided:

The balance of the Fund in the hands of the Trustee shall be continued in trust and all net income therefrom each year shall be paid in perpetuity to Holyoke Home for Aged People of Holyoke, Massachusetts, quarterly or at such more frequent intervals as the Trustee shall deem advisable.

- ii. Lottie Potts - Trust created by her Will probated in 1942. Clause 19<sup>th</sup> established a Trust and paid the residue of her estate to the Trustee to be administered as follows:

To pay the net income thereof as often as semiannually to the Holyoke Home for Aged People...for its general corporate purposes. (*emphasis added*).

A Petition was filed to substitute Loomis Housing Corporation as the beneficiary, which was assented to by the Attorney General and subsequently allowed by Hampden County Probate Court on 10/8/1985.

b. Funds Transferred to Loomis in Trust - In addition to Merritt and Potts, the following restricted gifts have been made to the Loomis Corporations:

i. Barbara G. Sheldon Memorial Fund - By her Trust dated June 9, 1971, Ms. Shelton provided:

All remaining trust property...shall be distributed to LOOMIS HOUSING CORPORATION ... to be held as a perpetual trust and to be known as THE BARBARA G. SHELTON MEMORIAL FUND ... As to...[the] perpetual fund set up hereunder, income only shall be distributed....

Note: There is no restriction on the use of the income.

ii. Arthur Rankin Trust - By the fifth amendment to his Trust, Arthur Rankin made the following bequests:

1. \$50,000.00 to LOOMIS HOUSING CORPORATION of Holyoke, Massachusetts, specifically for the use of the Friendship Fund to provide scholarships from income only to assist in defraying the expenses of those residents in the Assisted Living Unit.
2. \$50,000.00 to LOOMIS HOUSE, INC., the income from which to be used by the Friends of Loomis to buy equipment for the use and benefit of the residents of Loomis House.

iii. Horace and Eloise Fuller Trusts - Effective after their deaths both Trusts provide that the remainder is to be distributed:

...to Loomis Housing Corporation to be forever maintained as a separate fund the income from which shall be added to the Friendship Fund of said Corporation as then constituted to the extent required to implement the purposes of said Fund for the benefit of those residents of the Jarvis Avenue Campus of the Loomis House Retirement Communities. To the extent there may be any surplus income over that needed for the stated Friendship Fund purposes, such income may be accumulated for future such purposes or may be distributed to the parent corporation of the Loomis House Retirement Communities as directed from time to time by the Board of Directors of such parent; provided the same is

at the time for any distribution to it qualified as exempt from Federal income taxes as a charitable organization under the provisions of the United States Internal Revenue Code then in effect.

- c. Wright Charities - Loomis Communities, Inc. became the sole member of Wright Charities, Inc. in 2002 and agreed in the affiliation agreement as follows:

Based upon appropriate financial criteria, Loomis shall provide support to members of the Community who otherwise meet Loomis' entrance requirements in its retirement community in Holyoke, Massachusetts, provided, however, that the annual expenditure of such funds shall not exceed four (4%) percent of the total value of the fund as of the close of the prior calendar year ("Annual Levy") and such support shall first be allocated to current residents. Loomis' Finance Committee shall annually determine the maximum amount a resident may receive from the account to be applied towards his/her charges incurred at Loomis. The Annual Levy shall also be utilized to pay all actual costs incurred by or on behalf of Wright Charities including, but not limited to, insurance, accounting and filing fees. (*emphasis added.*)

The Articles of Organization were amended in 2002 to provide, in part:

The purposes of the Corporation are as follows:

Subject to eligibility rules established by the Corporation, to provide financial assistance to elderly persons of Easthampton, Southamton, or Westhampton, Massachusetts, who otherwise meet entrance requirements, to reside at the Loomis House Retirement Community located in Holyoke, Massachusetts, and for any other purposes for which a corporation may be formed under General Laws, Chapter 180. (*emphasis added.*)

### III. Analysis

In light of the discussion above, it is our view that some of the Funds may be subject to divestiture upon either the Attorney General's review of the sale (and imposing conditions) or a post-closing *cy pres* action.

Merritt - This trust was determined to have a general charitable intent and pursuant to the court decision of 1985, no restriction to a particular campus or use other than for the benefit of Loomis Housing Corp. (now Loomis Communities, Inc.) is set forth. As the purpose of the corporation remains unchanged, it is unlikely that this fund would need to be divested.

Potts - There is no limitation regarding location of services. The purpose is to provide for serving aged people based upon admission rules “substantially in the manner in which it” conducted admissions in 1946. At the time, a resident assigned her assets to Loomis in return for lifetime residence. As the current Residency Agreements are substantially similar in intent, I do not anticipate a problem if the Holyoke campus is sold.

Sheldon - No limitation of use or location is identified.

Rankin - One part of this gift was made to the Friendship Fund of the Loomis Housing Corporation (now Loomis Communities, Inc.). The Fund was established after construction of the Jarvis Avenue Campus and before Loomis Village or Applewood. As Loomis Village also has Assisted Living Units, an argument for retention of the fund can be asserted.

The second part is donated to the Friends of Loomis for Loomis House, Inc., i.e., the Nursing Center. Even if the Attorney General’s office does not act pre-closing, when the Nursing Center is sold, this fund must also be the subject of a *cy pres* action and the fund may be lost. However, as the entity (Loomis House) is not dissolving and might build a new nursing center, there is a basis to assert that there is no change in purpose.

Fuller - The terms of the gift initially are specific to the Jarvis Avenue site’s Friendship Fund. There is a clear general charitable intent in that the parent corporation is allowed to utilize excess income for its general purposes. If the Holyoke campus is sold, these funds will need to be reviewed by the Attorney General and Probate Court in a *cy pres* action. At Mr. Fuller’s death, the Friendship Fund benefited the Holyoke campus only and the Attorney General could argue that another charity should be substituted. That said, because the fund recognizes other uses by LCI of the fund, it may be that Loomis would be successful in seeking a deviation order to LCI in general. Of course, any such deviation would still be subject to the requirement that the fund be used first for Friendship Fund needs.

Wright Charities -This Fund’s purpose is limited to the use of the Holyoke campus to support residents from the specified towns and must be presented in a *cy pres* action. It is probable that the Attorney General’s Office, and other interested parties, may conclude that serving needy residents of Easthampton, Southamptton and Westhampton might better be served by another charity located within those communities. I suggest that we expect this Fund will not transport across the river to the campus in South Hadley.

IV. Summary - The Attorney General’s office will be receiving notice of the proposed sale of the Nursing Center and, as a result, may decide to review the charitable funds dedicated to it. As noted above, this is limited to the second Rankin fund. The Attorney General may also wish to review the other funds,

although that is not a certainty. Even if the Attorney General's Office does not review the funds as part of the sale process, LCI must undertake *cy pres* actions for each of the following funds to determine if it remains the proper holder and administrator of them: Wright Charities, Rankin (both funds) and the Fuller funds. In our petition, LCI will provide the best case for trying to retain these funds, but as noted above, some of these funds may be ordered by the Probate Court to be divested.

CONFIDENTIAL



## CONFIDENTIAL MEMORANDUM

**DATE:** March 6, 2017  
**TO:** Board of Directors  
**FROM:** David Scruggs  
Marge Mantoni  
**SUBJECT:** Loomis House Restricted Funds

The Board has requested additional information about the expected disposition of the Loomis House (LH) restricted funds upon a sale of the campus.

Peter Connor has prepared a memorandum explaining the legal process for establishing ownership of these funds upon a sale. Peter also has provided an analysis of the likelihood that each of the major donor restricted funds will remain with Loomis or be transferred to another 501(c)(3) charitable organization. It is likely that any transfer to another charitable organization would be to Berkshire Healthcare Systems, as the donor imposed restrictions can be characterized as limiting the use of the funds to the Loomis House campus in Holyoke. Peter's memorandum is being provided to the Board along with this information provided by management.

As management understands it, the Board has three general concerns:

1. The Board would like know with specificity the amount of and restrictions on all of the donor restricted funds that are carried on The Loomis Communities' (TLC) balance sheet and allocated to LH.
2. The Board would like to know which of the LH donor restricted funds are likely to be retained by TLC and which are likely to be transferred to another charitable organization.
3. Understanding that the principal balance of the major donor restricted funds generally is unavailable for use by Loomis or a successor organization, the Board would like to know how much income from the donor restricted funds potentially will be available for the general unrestricted use of a successor organization upon divestiture of the funds.

### THE AMOUNT AND RESTRICTIONS ON DONOR RESTRICTED FUNDS

The attached table lists all of the LH donor restricted funds.

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- The top half of the table lists the major donor restricted funds that were discussed at the March 2, 2017, Board meeting. The bottom half of the table lists the miscellaneous restricted funds. Total major donor restricted funds on this table is approximately \$155,000 less than presented to the Board on March 2. The March 2 table was based on bank and investment account balances as of December 31, 2016, which are slightly different from the amounts of audited net assets for financial reporting purposes. Steve Corrigan's request for information over the weekend referred to audited amounts, and we used them for the current presentation.
- The second column lists the purpose and/or restriction on the donor restricted funds.
- The first grouping of three columns of dollar amounts under the heading "Restricted Funds" shows the balance of the funds segregated between permanently and temporarily restricted amounts, as well as in total.

### **LIKELIHOOD OF LOOMIS RETAINING DONOR RESTRICTED FUNDS**

- The second grouping of two columns of dollar amounts under the heading "Likelihood of Divestiture" shows the dollar amounts of the funds likely to be retained by Loomis and the amounts likely to be divested. The allocations between the columns are based on management's review and discussion with Peter Connor of his memorandum analyzing the origin, restriction and probability of Loomis retaining the funds. The total amount likely to be divested is approximately \$60,000 lower than estimated for the March 2 Board meeting. The March 2 table was based on bank and investment account balances as of December 31, 2016, which are slightly different from the amounts of audited net assets for financial reporting purposes.
- As described in Peter's analysis, it is important to note that the final disposition of the funds cannot be determined until an authoritative legal judgement is made after the Asset Purchase Agreement is signed or after the sale is completed. The timing depends on the fund.
- Peter's opinion is that it practically is a certainty that the Wright Charities funds will be divested. Peter believes, and management concurs, that the most appropriate successor organization may not be Berkshire Healthcare Systems. The purpose of the fund was to provide financial assistance to elderly persons in Easthampton, Southampton and Westhampton. Lathrop Communities is a nonprofit retirement community that provides independent living in Easthampton and Northampton, as well as assisted living in Easthampton.
- To be conservative, some funds have been listed as likely to be divested although Peter believes there is a reasonable legal argument that some of those funds should be retained by Loomis.

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### FUNDS AVAILABLE FOR THE GENERAL UNRESTRICTED USE OF A SUCCESSOR ORGANIZATION

- The third grouping of two columns of dollar amounts under the heading “Annual Income Available for General Operations Other than Direct Financial Assistance to Residents at 6% Earnings” is meant to show the financial “windfall” to the successor organization (the far right column).
- For the major donor restricted funds that likely will be divested, none of the principal balance is available for expenditures by the successor organization.
- For the major donor restricted funds that likely will be divested, in all but two instances, all of the income from the funds is expressly restricted for the benefit of residents of Loomis House that need financial assistance.
  - The income cannot be shifted to the successor organization’s other retirement communities or nursing centers.
  - The income cannot be used by the successor organization to cover operating expenses or make capital expenditures.
- Two of the major donor restricted funds that likely will be divested provide that certain amounts can be made available to cover operating expenses or make capital expenditures.
  - The first Rankin fund specifies that its income is to be used to purchase equipment for the Loomis House nursing center. At a 6% rate of return, that fund provides approximately \$3,000 of income per year.
  - The Fuller trusts provide that the greater of 4% of the trusts’ balances or the actual income from the trusts be used as financial assistance for the direct benefit of residents of Loomis House Retirement Community. If the amount calculated is more than is required for financial assistance, the excess amount may be distributed to the parent corporation of the Loomis Communities Retirement Community (i.e., The Loomis Communities).

Peter believes that a strong argument can be made that the first claim to the trusts’ income may remain for direct independent living and assisted living financial assistance to residents at LH or elsewhere, but the claim for income in excess of direct financial assistance needs would remain with Loomis.

LOOMIS HOUSE								
Donor Restricted Funds								
December 31, 2016								
	Fund Purpose - Funds for Direct Financial Assistance to Residents or Team Members are Highlighted in Yellow	Restricted Funds			Likelihood of Divestiture		Annual Income Available for General Operations Other than Direct Financial Assistance to Residents at 6% Earnings	
		Permanently Restricted Funds	Temporarily Restricted Funds	Total Restricted Funds	Likely to be Retained by Loomis	Likely to be Divested	Likely to be Retained by Loomis	Likely to be Divested
<b>Major Donor Restricted Funds:</b>								
Arthur Rankin	Income to purchase equipment for nursing center	\$ 50,000	\$ -	\$ 50,000	\$ -	\$ 50,000	\$ -	\$ 3,000
Arthur Rankin	Income to provide financial assistance for assisted living residents	50,000	39,640	89,640	-	89,640		
Horace and Eloise Fuller Trusts	The greater of 4% of the trust balance or actual income to provide financial assistance; Excess income to the parent corporation of Loomis House Retirement Communities	1,045,200		1,045,200	-	1,045,200		
Barbara Sheldon Trust (Temporary Amount is Endowment Appreciation)	No limitation on use or location	524,993	823,922	1,348,915	1,348,915	-	80,935	-
Donor Restricted (Most Likely Sheldon Trust Endowment Appreciation)	Most likely no limitation on use or location		316,636	316,636	316,636	-	18,998	-
Wright Charities (Included in Unrestricted Net Assets)	Income up to 4% to provide financial assistance for retirement community residents	1,058,645		1,058,645	-	1,058,645		
Louise C. Merritt Beneficial Trust	Income use unrestricted	958,433		958,433	958,433	-	57,506	-
Arlottie Potts Beneficial Trust	Income use unrestricted	119,641		119,641	119,641	-	7,178	-
<b>Total Material Restricted Funds</b>		<b>3,806,912</b>	<b>1,180,198</b>	<b>4,987,110</b>	<b>2,743,625</b>	<b>2,243,485</b>	<b>164,617</b>	<b>3,000</b>
<b>Miscellaneous Restricted Funds:</b>								
Friendship Fund	Financial assistance to residents		87,733	87,733	-	87,733		
Nursing Center Building Fund	Redevelopment of nursing home - donor is LV resident and may change designation		53,725	53,725	53,725	-		
Scholarship Fund	Scholarships for team members		15,770	15,770	-	15,770		
Nursing Center Dining Room	Specific equipment purchase		808	808	-	808		
Loomis House Independent Living Activities	Independent Living Activities		400	400	-	400		
Keyboard	Specific equipment purchase		176	176	-	176		
iPod Project	Specific equipment purchase		152	152	-	152		
Benches	Specific equipment purchase		34	34	-	34		
<b>Total Donor Restricted Funds</b>		<b>\$ 3,806,912</b>	<b>\$ 1,338,996</b>	<b>\$ 5,145,908</b>	<b>\$ 2,797,350</b>	<b>\$ 2,348,558</b>	<b>\$ 164,617</b>	<b>\$ 3,000</b>