REPORT

to the Executive Committee
of the Marine Biological Laboratory

On the Sale of Land to Director H. O. Halvorson and Others

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Introduction

Upon a recommendation voted in the course of the Annual Meeting of the MBL Corporation of Friday, August 17, 1990, the following motion was made and carried at the meeting of the Laboratory’s Trustees on the same day:

...that the Board of Trustees appoint a committee consisting of former Directors and Chairmen of the Board to review the Fay Road land sale and submit a report no later than October 1, 1990 to be presented to the Executive Committee for distribution by mail to Corporation members and discussed at the February Trustees’ meeting, and furthermore, that this committee may use the appropriate outside counsel if needed.

We have carried out the review as charged and discussed its findings. In what follows we set forth those findings and, in the spirit of the charge and related discussions of August 17th, offer our conclusions.

We thank those members of the Laboratory community with whom we communicated -- staff, Corporation members, Trustees, and administrators (among them Chairman Gifford, Director Halvorson, and former Executive Committee member John Dowling) -- for providing us with information and for their willing participation in the process.

Because of the urgency implied by the action of August 17, we undertook the work of assembling facts immediately. Our assessment of them took place at several meetings in Woods Hole the following week. This report is our effort to convey the results as economically as possible, without, however, glossing over specific events and issues about which Trustees and others had expressed concern. It begins with a chronology of objectively-recorded events. There follows a listing of what we understand to be the major issues. Observations on those issues are then presented and are followed by a brief concluding statement.

Our hope is that readers of this report will find it adequate to its purpose, and that it may contribute to a prompt and final settlement of the controversy.

Chronology

February and June 1984: At the winter and summer meetings, respectively, of the Board of Trustees, with Dr. Gifford in the Chair and Dr. Halvorson present at both meetings, there is extended discussion of sales and leases of MBL-owned land in Woods Hole, occasioned by inquiries from such interested parties as the Sea Education Association and Boston University. The Trustees go on record as opposed to such transactions without a prior, enabling vote of all the Trustees.
13 May 1987: Director-designate Halvorson receives an appraisal from Vincent Associates Real Estate (Falmouth) of a 2-acre (approximate) subdivision of land owned by the Marine Biological Laboratory, the plot known as Lot 12, Fay Road, Falmouth, Barnstable County, Massachusetts. [The land is subsequently referred to as Lots 104 (Halvorson) and 103 (Bowles); but the eventual Bowles property was not separately appraised.] The appraisers "...examine recent sales of similar properties and adjust for differences between the comparable properties and the subject property," arriving thereby at a valuation of $175,000.

October 1987: Director Halvorson and Associate Director Epstein sign an affidavit before staff of Hunziker, McDermott and Kirk (Falmouth attorneys) attesting to their authority to purchase and dispose of property for the Laboratory. This is a standard MBL document, employed in prior administrations for the management of property transfers in the Devil's Lane and Gansett tracts by former General Manager Homer P. Smith, and reaffirmed periodically, in order to adjust for changes of administrative personnel, by the Executive Committee. The last such reaffirmation recorded (in Committee minutes) was voted on March 12, 1983, in favor of Mr. Smith and Dr. Gross. The 1987 affidavit refers to action at an Executive Committee meeting of October 17, 1987, but the minutes of that session do not record the vote.²

11-28 June 1988: There is an exchange of correspondence among Francis P. Bowles, Ray L. Epstein, Harlyn O. Halvorson, and Prosser Gifford, concerning land within the MBL holding (Lot 12) which adjoins the Bowles property on Fay Road. Mr. Bowles offers to buy the parcel (later referred to as Lot 103, 0.5 acres) for $22,500.

August 1988: The Halvorsons' home in Wayland (MA) is sold.

11 September 1988: Associate Director Epstein writes to Attorney Brian McDermott, informing him of the sale of Lot 103 (0.5 acres) to Bowles (for $25,000) and Lot 104 (2 acres) to Halvorson (for $175,000), with payment for the latter due the MBL after sale of the Halvorsons' Woods Hole property.³

December 1988: Construction begins on the Halvorson home.

¹At this time J. R. Whittaker was the acting Director. Halvorson took office on September 1, 1987.
²A reaffirmation was voted by the Executive Committee on August 31, 1989 and recorded in minutes of the meeting.
³The property (No. 430 Woods Hole Road) remains unsold at the time of writing.
29 December 1988: Attorney McDermott reports to Associate Director Epstein the recording of deed\textsuperscript{4} for Lot 104 to Dr. and Mrs. Halvorson.

15 March 1989: The Enterprise reports the land sale.

May 1989: The Halvorsons occupy their new home.

8 August 1989: Drs. Brown, Moore, and Salzberg call upon Chairman Gifford, seeking an explanation for the land sales and the procedures followed in making them. They express concern over the sales and their handling.

9 August 1989: Drs. Armstrong and Moore visit Director Halvorson in order to make the same inquiries and to express similar concerns. They urge the Director to allow the MBL to repurchase the property (land and house), whereafter they would serve as the MBL Directors’ residence. Dr. Halvorson declines this advice.

11 August 1989: This is the date of the first officially-recorded, open discussion of the Fay Road land sale: a meeting of the Board of Trustees. Retiring Trustee John G. Hildebrand, referring to the 1984 actions, makes a speech denouncing the land sale as contrary to the repeatedly-expressed will of the Trustees. His motion, which prevents in the future such practices as were used, is passed. A motion to ratify the Fay Road land sale is offered and withdrawn. A vote of confidence in the Chairman and the Director, offered in order to dissociate this particular issue from broader issues of administration, is carried unanimously.

14 August 1989: Dr. Hildebrand presents the case against the land sales in a detailed memorandum addressed to "Concerned Members of the MBL Community."

29 August 1989: Dr. Halvorson asks the Chairman to place the land sale on the docket of the Executive Committee meeting of August 31 so that it may be ratified.

30 August 1989: A letter is sent to the Executive Committee by Foley, Hoag & Eliot, Boston attorneys, in behalf of fourteen members of the Corporation,\textsuperscript{5} urging the Committee not to ratify the sales to Halvorson and Bowles, and giving various reasons why such ratification would be illegal.

\textsuperscript{4} with the Barnstable County Registry of Deeds, Land Court Section, on Tuesday, December 27, 1988; Land Court Document No. 475,175. The sales to Halvorson and Bowles include the standard right of first refusal for the MBL in case of a potential sale of the properties to parties outside the Corporation.

31 August 1989: At the Executive Committee meeting, Chairman Gifford proposes a compromise solution, the effect of which is to ratify the sales and to increase the likelihood of eventual recapture of the land for the MBL. The proposal is adopted and duly recorded. On the same day, the aggrieved parties (clients of Foley, Hoag & Elliot) issue their own open letter to the MBL community, detailing their objections but undertaking from this date forward not to pursue the matter further.

1 September 1989: Chairman Gifford writes to the Trustees, reporting the Executive Committee action, and seeking its approval via mail ballot. In the eventual returns, 25 of 37 Trustees vote yea, four nay, and one abstains. Eight do not respond.

5 September 1989: Dr. K. Van Holde writes to the aggrieved authors of the 31 August open letter, chiding them for continuing to incite discord. In the following month there are indignant replies from those addressed.

26 December 1989: A Falmouth National Bank loan is made to Halvorson, with which he pays the MBL for the land plus interest of 9% for the prior year.

29 December 1989: Associate Director Epstein signs for the MBL a duly notarized quitclaim in favor of the Halvorsons.

1 February 1990: In a letter to John Moore, Chairman Gifford agrees that the earlier mail ballot has no legal status. He asserts that the February Trustees’ meeting will be the occasion for the full Board to ratify the compromise solution voted by the Executive Committee. As Old Business, such action will serve as the second Trustees’ discussion of the issue, satisfying the intent of the Hildebrand motion and making the ratification, in his opinion, legal and binding.

February and June 1990: There is no resolution of the land sales controversy at the Board meetings held in these months.

17 August 1990: Motions are passed at the Corporation and Trustees’ meetings establishing and charging this committee of review.

The Major Issues

1. Alleged disregard by the Chairman, the Director, and others of the central administration, who should have been aware of them because they were participants, of the land sale actions by the Trustees in 1984 (February 11 and June 9). This complaint includes an alleged failure of the Chairman and the Director properly to inform either the Executive Committee or the Board as a whole of the proposed sales.
2. Impatience with the Chairman's explanation (that he considered sale to a Director different from sale to another institution, such as the Sea Education Association); and the absence of any explanation for the sale to Bowles.

3. Absence of evidence that the Power of Attorney, claimed to have been voted by the Executive Committee in 1987, was so voted at the time stated.

4. Claimed irrelevance of the ratification of sale by the Executive Committee on August 31, 1989, in light of the August 11 vote of the Trustees on the Hildebrand motion requiring Trustee approval by a two-thirds vote.

5. The allegation that "...the Halvorson and Bowles sales were at far below market prices, based on sales prices of other Woods Hole property."\(^6\)

6. The general argument that outright sales of MBL land, even with the right of first refusal covenant, long ago ceased to be advantageous to the Laboratory, as was once - when Gansett and Devil's Lane lots were being sold to Corporation members -- believed. The current, contrary belief of most Trustees, evidenced by arguments and votes since the early 1980s, is that once sold, MBL land is permanently lost because of the inexorable rise of property values in Woods Hole and the limitations of MBL budgets, which do not allow competition for Woods Hole property in the commercial market.

Observations\(^7\)

1. It is surprising that neither Dr. Gifford nor Dr. Halvorson, both of whom were aware of the heated discussion of land sales only three years earlier, and of the urgencies which led to the then-Director's appointment of the Kravitz Committee and the building of twenty new Devil's Lane cottages, moved ahead so briskly with the Fay Road transaction and with so little effort to obtain explicit approval from the Trustees.

Dr. Gifford has admitted misjudgment in this regard, however, and the Director believes that he was entirely forthcoming with members of the Executive Committee and others. It is important to record that through part of this period, so critical for communications, the Director experienced and was later in recovery from a very serious illness.

There is something more to be said in defense of each officer. At the end of a long and difficult search for a new Director, the Chairman alone was burdened with the responsibility of negotiating with the candidate and recruiting him to the position.

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\(^7\)These refer seriatim to the Issues listed above.
Laboratory was fortunate to have attracted to candidacy so experienced an administrator-scientist, and so long-standing an MBL "regular" as Halvorson. It is evident from documents and from the assertions of the principals that a year-round residence for the Halvorsons was an early and significant issue in the negotiation process.

The suitability of Fay Road Lot 12 for a Director's residence had been discussed earlier: both Homer Smith and Paul Gross had pointed out informally to Trustees its potential use as a future MBL Director's residence (owned by the Laboratory, of course) and its unsuitability for almost anything else, due to zoning regulations.

It was important for the new Director to find a suitable residence and to do so promptly, and for the Chairman to assist therein by the means at his disposal. The Fay Road property was available and appropriate. A Director is a different category of purchaser from an outside, and possibly competing, institution, and the right of first refusal for the Laboratory makes the property recoverable by the Laboratory in principle (although--alas!--increasingly only in principle).

We believe that the Chairman and the Director acted in good faith and in what they believed was the best interest of the MBL. That they displayed less than sound administrative and political judgment cannot be denied.

2. That said, there remains the puzzle of the sale to Bowles. Again we believe that it was done with conviction that the transfer would not hurt the laboratory--since the subject strip of land (57' X 400', approximately) would be of no particular use to anyone but Bowles--and that it would help in two ways: via receipt by the Laboratory of the $25,000 sale price, and via good relations with the Bowles and Clowes families, long-time friends, donors, officers, and scientists of the MBL.

3. The power of attorney should have been taken up explicitly and in open session with the Executive Committee, so that a vote could be recorded in the minutes as in the past. The intended use of that power in the Fay Road land sales should, moreover, have been made explicit at the time. It would have been the natural and timely occasion for Trustee notification. But we have no evidence that such notification was omitted consciously and with intent to mislead.

The Director insists that his building plans were under regular discussion with Executive Committee members, and to some extent we have confirmed that. It appears that he did not make it clear to them that the house was going up on land bought from the MBL, and that visitors to the site may have been unaware that the land they were standing on to view the construction was MBL--or former MBL--property. We find here nothing but naiveté.

4. If the Hildebrand motion of August 11, 1989 (and subsequent amendments) were applicable in law to the Fay Road sales, then "ratification" by the Executive Committee at
the time they took action would by itself be ineffective. Proper ratification would be a responsibility of the Trustees as a body.

But the sale took place and was duly recorded well in advance of August 11, 1989, and the Hildebrand motion contains no language making it retroactive. What remains, then, as the basis of a potential legal challenge to the sales is the reassigned (from Smith and Gross to Epstein and Halvorson) power of attorney. That certificate is not, in our opinion, the sole or even the principal enabling power.

When the Chairman is granted the power to negotiate with a candidate-Director and to do what is necessary to recruit him, he has at his disposal all those assets of the Laboratory with which, in his good judgment, he can exert the necessary persuasion. Whether the use of the Fay Road lot was good judgment is arguable; but we do not believe that his right to strike a bargain ad hoc is open to question.

5. The argument about prices derives from a difference between the Vincent Associates appraisal and the assessed value (for both purchases, Halvorson and Bowles) shown on Town of Falmouth tax rolls. The latter are much higher than the former. It is true, moreover, that at the time "comparable sales" in Woods Hole would have suggested a considerably higher price than that indicated by the appraisal. Again, this is a matter of judgment, not of law. The Treasurer or the Controller might have asked for a second appraisal, as is commonly done in the disposition of corporate assets, especially to officers. Nevertheless a professional appraisal by a respected local realtor is not to be dismissed lightly. It would be difficult to fault the Halvorsons for not seeking out other appraisers so that they might pay a higher price for the property.

6. We agree, as did the Chairman in remarks made to the Trustees in 1984, that MBL land ought not nowadays to be sold abruptly, even with the right of first refusal at time of resale. But we do not agree that the original policy was wrong for the Laboratory. Several generations of loyal and productive investigators became MBL regulars because of the opportunity to build a summer house in this pleasant place. One can do no more than guess about the kind of place it might have become in the 1940s and 50s without such an opportunity, and a good guess is a less successful MBL. But times and circumstances have changed and, most importantly, Woods Hole has changed. The Fay Road property, even though it can be used for no more than a single-family residence, would be a significant loss were it to disappear forever from the list of MBL assets.

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8It is perhaps worthy of note that in response to Proposition 2% there was a Town-wide reassessment of land and property values beginning in 1986. The new assessments, which were much larger than those they replaced, were not published until June 22, 1987. The Vincent Associates appraisal of Lot 12 was dated May 13, 1987.
Conclusions

It seems clear to us that if we were to be concerned with placing blame, it would have to be distributed very widely. Senior administrators have been rather insensitive to currents of opinion within the Corporate community. Professional administrators -- including financial officers -- of the Laboratory seem to have been blind to important processes involving the institution's fixed assets and the relation of such processes to Board policy. Executive Committee members were evidently preoccupied with a range of other things, such as labor relations and the costs of coming to the MBL. To be sure both of those are important issues. The latter is also, necessarily, in part a selfish one for Trustee-scientists. But one expects Trustees and especially Executive Committee members to give at least equally close attention to the long-term problems of assets management and intellectual quality. Placing blame -- which is what many members of the community have been doing for the past year -- is a waste of time. Most of what we have, with some effort, discovered was already known to the principals in the controversy. Hence while our report may enlighten Corporation members who have not been in Woods Hole recently, its facts cannot by themselves help to resolve the conflict. That will happen only if, in contiguity with the facts, the alternative resolutions are spelled out, and what we hope is an unbiased choice among them is identified and made.

There are several alternative scenarios for a conclusion to this controversy.

The first of these is a voluntary resale of Lots 103 and 104, and any improvements made on them, to the MBL now and at cost. All indications are that this won't happen. All parties to the conflict believe that they have acted in good faith and for the good of the institution. Why, then, should the buyers consent to a reversal which, even though it had no such significance, would nevertheless give every appearance of an admission of fault or misfeasance on their parts?

The second is legal action by the MBL or by a subset of its Corporation members to render the sales null and void. The costs of such action, monetary and human, would be great, perhaps even devastating. Aside from the suffering of the losers -- and any outcome, even a hung jury, would imply losers -- the loss to the institution in ways we need not spell out would be, in our view, disproportionate. Since we believe, having examined the events and their motives to the best of our ability, that all parties have acted honorably if not always with the best judgment, the imposition of severe losses upon any of them would be unfair and unwise.

The third scenario is to let the sale stand without modification of its original terms. With this we cannot agree, for the reasons given in the discussion of Woods Hole land values and the future of the MBL. The right of first refusal for the Laboratory in response to an imminent sale of the property to interests outside the MBL is not good enough today. The chance of the MBL's successful competition in the commercial market for land and buildings so handsomely placed is bound to be very small.
But a fourth scenario has already been proposed and acted upon, however incompletely. It is the proposal made by Chairman Gifford at the August 31, 1989 meeting of the Executive Committee, endorsed by the Laboratory’s legal counsel, approved unanimously by the Committee, and agreed to by the Director. The proposal is the best kind of compromise: each side gives something up, but neither loses dramatically or is in disgrace. Its terms include the following language:

...upon the death of the survivor of Harlyn and Jean Halvorson, the MBL will have the right to repurchase Lot 104...and the buildings upon it from the executors of the Halvorson estate at the then appraised market value for land and buildings combined. The executors will notify the MBL within ninety days of the death of the surviving Halvorson spouse, and upon such notification the MBL will have ninety days to exercise its right to repurchase the lot and the buildings upon it. If the MBL chooses not to exercise its right within a period of ninety days, the right is extinguished and no longer exists. The property would, however, remain subject to the provision in the existing deed of the MBL’s option of first refusal upon a subsequent sale.

This arrangement seems to us fair to both sides in the circumstances, and unlike the more general and traditional option of first refusal, to offer a specific opportunity for the Laboratory to reclaim the property, if it can find the will and the funds for it, within the lifetime of at least its younger scientists. From our point of view it is the best the MBL community can get.

We hope that an appropriate majority of the Trustees will approve it in regular or special session; that an end will be called to hostilities among persons who have for decades worked together unselfishly toward those noble ends which so impressed Ambassador Crane and Mr. Rockefeller at the beginning of the Laboratory’s life; and that we can get on with the real work of the institution.