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Hon. Kelly Ross and
Members of Board of Selectmen
Westford Town Hall
55 Main Street
Westford, MA 01886

Re: Drew Farm APR Amendment

Dear Members of the Board of Selectmen:

I am writing in response to your request for clarification regarding the process for amending an Agricultural Preservation Restriction ("APR") that the Town holds on two adjoining parcels of land located at 66 Boston Road and known as "Drew Farm" (the "Property"). Specifically, you would like to know: (1) whether a decision to amend an Agricultural Preservation Restriction requires a two-thirds vote of Town Meeting; (2) whether the decision to amend an Agricultural Preservation Restriction requires approval of the Massachusetts Legislature in accordance with Article 97 of the Massachusetts Constitution; and (3) whether the decision to amend the Agricultural Preservation Restriction requires approval of the Department of Agriculture.

Whether the Selectmen need the approval of a two-thirds Town Meeting vote and/or the approval of the State Legislature under Article 97 depends, in my opinion, on whether the proposed change to the APR constitutes a release of the Town's interest in the APR or whether it is a mere amendment to that interest. Although this is an issue in which the statutes and case law do not offer clear guidance, it is my opinion that the Selectmen's considerable discretion in establishing the terms of the APR, when combined with the rights retained by the Town after the proposed amendment, reasonably supports the conclusion that the change under consideration will result in an amendment of the APR that does not require a two-thirds vote of Town Meeting or the State Legislature.

Background

By way of background, at the Special Town Meeting held on October 21, 1996, the Town voted to authorize the Board of Selectmen "to acquire over the period of three fiscal years the development rights to an agricultural preservation restriction on, and an option to purchase agricultural rights in certain real property consisting of two parcels totaling 8.97 acres located on Boston Road known as Drew Farms . . . The remaining terms to be negotiated by the Board of Selectmen." (emphasis supplied). In accordance with this Town Meeting vote, over the course of the next three fiscal years, the Board acquired three related APRs on the Property for which it paid cash consideration of $175,000 each (separately referred to herein as "APR 1", "APR 2" and "APR 3"). APR 1 and APR 2 generally prohibit the use of the Property for non-agricultural purposes, and APR 3 generally prohibits the use of the Property for non-agricultural purposes and generally allows for continued use of an existing "country store" building. Included in each of the three APRs is a right of first refusal for the benefit of the Town

should the Property be offered for sale. Each of the three APRs was approved by the Commissioner of Food and Agriculture, but no State funds were used in connection with the purchase.

Since the Town's acquisition of the APRs, the Property has been allowed to lie fallow for several years, and the "country store" building is vacant and in disrepair, such that they have become a blight on the surrounding neighborhood. In 2015, Town officials were approached by a potential purchaser who submitted a development plan to reestablish the agricultural use of the Property through the installation and maintenance of a high tensile orchard, cherry trees, a greenhouse, and row crops. The buyer's ability to maintain these proposed agricultural uses, however, is dependent upon the ability to use a portion of the Property for a farm-to-table restaurant and function room with related parking, which necessitates the removal of the "country store" structures. In light of this proposal and in consultation with Town officials and the Drew Farm Task Force, the Board of Selectmen found that the viability of the two parcels for sustained agricultural use is limited due to their small size, topography and location, and that allowing the use of one of the APR areas for restaurant and function hall purposes would have a positive effect on the public good and yield a substantial benefit to the agricultural resources of the Town.

As a result of its support of the project, the Board voted not to exercise its right of first refusal, and the buyer purchased the property subject to the existing three APRs. In conjunction with the Board's decision not to exercise the right of first refusal, the Board and the buyer entered into an agreement to amend APR 3 to allow the construction and operation of an up to 16,500 square foot building with related parking and utilities, to be used for restaurant and banquet hall purposes. Any exercise of rights under the proposed amendment are expressly contingent upon the two contiguous parcels being actively engaged in agricultural use, and the Town expressly retains its right of first refusal. The agreement to amend APR 3 was made contingent upon approval of the amendment by Town Meeting. When the question was presented at the Annual Town Meeting on April 2, 2016, the question failed to obtain a majority vote in favor. It is my understanding, however, that the buyer has approached the Board of Selectmen with a revised proposal to reduce the size of the building being proposed.

Town Meeting Quantum of Vote

Pursuant to M.G.L. c. 184, §32, an APR is considered an interest in land, and the statute states that "the restriction may be released, in whole or in part, by the holder for consideration, if any, as the holder may determine, in the same manner as the holder may dispose of land or other interests in Land. . . ." (emphasis supplied). The statute does not define the term "release," and I am not aware of any case law interpreting the statute in a context similar to this one. Although reasonable minds may differ, it does not appear that the Board of Selectmen is seeking to release the Town's interest in the APRs. To the contrary, through the proposed amendment, the Town expressly retains all of its rights under the three APRs, including the right to require that the Property be used for agricultural purposes and the right of first refusal. The only proposed change is an amendment to the general conditions of APR 3 to allow a use incidental to the other agricultural uses of the property. In fact, the amendment is

specifically conditioned on the owner restoring the land of the two contiguous parcels to active agricultural use. Therefore, in my opinion, it is reasonable to conclude that the proposed amendment to APR 3 is not a "release" within the meaning of M.G.L. c. 184, §32, and as such, it is not a disposition of the Town's interest in the land.

Because it does not appear that the Town is releasing its interest in the APR, it can be argued that Town Meeting approval was not even required to authorize the amendment. While the General Laws require Town Meeting approval for the Board of Selectmen to acquire and dispose of interests in land, the terms of such transactions are generally left to negotiation by the Board. In fact, when Town Meeting authorized acquisition of the subject APRs, Town Meeting specifically left negotiation of the specific terms to the Board of Selectmen. I am not aware of any provision in the General Laws that requires Town Meeting approval for an amendment in the terms of an existing interest in land. To the contrary, M.G.L. c. 40, §3 allows the Board of Selectmen to make such orders as it may deem necessary or expedient for the use of its corporate property. Therefore, in this circumstance where the Board of Selectmen appear to have the authority to act without Town Meeting approval, it can be argued that any Town Meeting vote is advisory in nature and, any such advisory vote may be by simply majority.

Even assuming that the amendment can be considered a disposition of the Town's interest in the property, it is my opinion that the amendment is subject to approval by majority vote at Town Meeting. Pursuant to M.G.L. c. 40, §3, the Board of Selectmen may convey an interest in the Town's real estate when authorized to do so by a majority vote at Town Meeting. A two-thirds vote is only required when the land is held for a particular purpose and it needs to be transferred for some other purpose, such as for purposes of conveyance. See, M.G.L. c. 40, §15A. In this matter, the Board is not seeking to change the purpose for which the restriction is held by the Town. The Town's only interest in the property is to ensure that the requirements of the restriction are complied with and to exercise its right of first refusal, if applicable. This purpose does not change as a result of the proposed amendment. In fact, even after the amendment, the Town retains the right to enforce the restrictions and to exercise its right of first refusal. Therefore, because the purpose for which the property is held by the Town remains the same, it is my opinion that any change in the terms of APR 3, to the extent such change is considered a disposition, requires only a majority vote at Town Meeting.

Applicability of Article 97

Article 97 states, in relevant part, that "Lands and easements taken or acquired for [agricultural] purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court." According to guidance from the Massachusetts Executive Office of Environmental Affairs, Article 97 is triggered when there is:

> a) any transfer or conveyance of ownership or other interests; b) any change in physical or legal control; and c) any change in use, in and to Article 97 land or interests in Article 97 land owned or held by the Commonwealth or its political subdivisions, whether by deed, easement, lease or any other instrument effectuating such transfer, conveyance or change. A revocable permit or

> license is not considered a disposition as long as no interest in real property is transferred to the permittee or licensee, and no change in control or use that is in conflict with the controlling agency's mission, as determined by the controlling agency, occurs thereby.

http://www.mass.gov/eea/agencies/mepa/about-mepa/eea-policies/eea-article-97-land-disposition-policy.html

In this matter, as previously discussed, it does not appear that the Town intends to transfer or convey any interest in the Property and the proposed amendment does not effect any change in physical or legal control of the Property. The Town continues to hold the right to enforce the APRs and its right of first refusal. Moreover, the proposed amendment is expressly conditioned upon the property owner maintaining the land in active agricultural use, and the amendment is revocable if that condition is not met. Therefore, it is reasonable to conclude that the amendment is not a disposition that triggers the requirements of Article 97. See Mahajan v. Department of Environmental Protection, 464 Mass. 604 (2013) (although the granting of an easement over Article 97 land is a disposition, a disposition of a lesser property interest, such as a Chapter 91 license is not a disposition); McClure v. Epsilon Group, LLC, 19 LCR 384 (Land Court 2011) (no disposition for Article 97 purposes where the benefitted party has not given up any rights under a restriction); Miller v. Commissioner of DEP, 23 Mass.App.Ct. 968 (1987) (revocable permit to operate ski area not a disposition for Article 97 purposes).

While it seems reasonably clear that the amendment is not a disposition for Article 97 purposes, the question of whether the amendment constitutes a change in use for Article 97 purposes is a closer one. While the Property has not previously been used as a restaurant/function hall, in my opinion, that is not the sole deciding factor in determining whether there is a change in use for Article 97 purposes. When Town Meeting authorized acquisition of the APRs, it left the determination of what uses would be allowed to the discretion of the Board of Selectmen. There is nothing in the Town Meeting vote that limits the Board's discretion or that suggests that the Board could not have allowed this use in connection with the original APRs. If the Board could have allowed this use as part of the original APRs, it can be argued that an amendment of the APR does not constitute a change in use for purposes of Article 97.

Moreover, although the Town acquired three APRs, the subject property comprises two abutting parcels, and it is my understanding that they have historically been used as one. In fact, it is my understanding, based on the configuration of the property lines, that it is unlikely that the parcels could be separated. The three APRs work in concert with each other to ensure that the Property as a whole remains in agricultural use. Even with the two parcels combined, however, the Board of Selectmen found that the viability of the property for sustained agricultural use is limited due to its small size, topography and location. This finding is supported by the fact that the parcels have been allowed to lie fallow for several years, and the "country store" building is vacant and in disrepair, such that they have become a blight on the surrounding neighborhood.

Based on the property owner's stated intention of restoring agricultural use on the property, the Board found that allowing the use of one of the APR areas for restaurant and function hall purposes would have a positive effect on the public good and yield a substantial benefit to the agricultural resources of the Town. The proposed amendment is expressly conditioned upon the requirement that the remainder of the property be kept in active agricultural use, and the Board of Selectmen retains the authority to enforce the terms of the APRs should the property owner fail to comply with that requirement. Therefore, in light of these factors, it is reasonable to conclude that the amendment promotes the agricultural uses of the Property rather than changing the use of the Property to something different. Therefore, it is my opinion that the Board of Selectmen may reasonably determine that the amendment does not constitute a change in use for purposes of Article 97.

Approval of Department of Agriculture

Prior to submission of the matter to Town Meeting, the Director of Land Use Management obtained an opinion from Christine Chisholm, APR Regional Planner at the Department of Agricultural Resources, who opined that the Department's approval of the proposed amendment was not required.

In summary, the determination of whether the proposed amendment constitutes a release of the APRs or change in use for Article 97 purposes requires a highly fact-specific determination, and judging by the amount of public discussion and controversy that this matter has generated, it is a determination in which reasonable minds can differ. Although I have researched the issue, I have not found any precedent which conclusively supports or contradicts the Board's decision to treat the proposal as an amendment rather than a release of the APR. As with any other matter of interest to the public, there is always a risk of legal challenge. While I cannot predict the outcome of any such legal challenge, it is my opinion that the Board has reasonable support for its position that the proposed amendment does not require the approval of a two-thirds Town Meeting vote and/or the approval of the State Legislature under Article 97.

Please do not hesitate to contact me if you have any further questions in this regard.

Very truly yours,

Gregg J. Corbo

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