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January 18, 2017

RE: Board of Selectmen Authority to Amend Drew Gardens APR

Dear Ms. Ross, Ms. Peraner-Sweet and Mr. Alphen:

We address in this correspondence a number of questions that have come up, relative to a portion of property in Westford covered by a restriction known as "APR 3."[1]

The first question is whether APR 3 can be amended by the Westford Board of Selectmen. The answer is yes. The second question is whether a town meeting vote or vote of the Legislature is necessary to approve an amendment to APR 3. The answer is no. The third question is whether the Commissioner of the Massachusetts Department of Agricultural Resources ("Department") has control over whether and how APR 3 is amended. The answer is no.

This letter will present the basis for our legal opinions. It also will address statements we believe to be erroneous in the September 22, 2016 letter to the Westford Board of Selectmen from the Commissioner of the Department. We comment as well on an e-mail from the staff of the Department declining authority over the stewardship of APR 3.

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[1] APR 3 is recorded with the Middlesex North District Registry of Deeds at Book 10124, Page 169 and pertains to the land shown as "APR 3" on a plan entitled "Compiled Plan of Land" dated May 6, 1997, and recorded with said Registry of Deeds at Book of Plans 194, Plan 7.

Next, we will clear up some errors in the September 22, 2016 letter from the Massachusetts Land Trust Coalition, namely that such projects *are* allowed on APR land, that an amendment to APR 3 *would not* impact the meaning of "in perpetuity" as it applies to Agricultural Preservation Restrictions ("APRs"), and that APRs *may* be amended without a 2/3 vote at Town Meeting and without a 2/3 vote of the Legislature.

Finally, we turn to the September 13, 2016 letter to William and Marian Harman from Douglas Muir, which makes a serious error confusing the administration of APRs with a statute governing town land exchanges.

Our overall conclusions are that APR 3 is a statutory Agricultural Preservation Restriction that can be administered, enforced, and amended by the Westford Board of Selectmen. The Commissioner's signature is not necessary to render APR 3 enforceable under M.G.L. c. 184, § 31 *et seq.*—in fact, two other APRs on adjacent property lack the Commissioner's signature. In addition, the Westford Board of Selectmen can execute an amendment to APR 3 without seeking permission from the Commissioner of the Department, without a town meeting approval, and without bringing the amendment to the Massachusetts Legislature for an Article 97 vote. This means the selectmen can amend APR 3 in their sole discretion, by agreement with the landowner.

The language of APR 3 explicitly states that the Westford Board of Selectmen—the Grantee—is the only body that can administer and enforce it. Specifically, Section IV of APR 3 provides:

> *This Agricultural Preservation Restriction shall be administered on behalf of the Grantees by the Town of Westford Board of Selectmen. This restriction shall be enforced by the Grantees as they in their sole discretion may decide.*

A Grantor of an APR may grant rights to the Grantee not enumerated under M.G.L. c. 184, § 31. *Commissioner of Agriculture v. Bagdon*, 55 Mass. App. Ct. 1110 (2002). The Massachusetts Supreme Judicial Court ruled that the express statutory language of M.G.L. c. 184 can be supplemented by the words within the APR itself, and that the words of an APR control. Therefore, in addition to the powers enumerated in M.G.L. c 184, § 31, a Grantee may have rights bargained for and encompassed in the APR itself. *Bennett v. Commissioner of Food and Agriculture*, 411 Mass. 1 (1991); *Twomey v. Commissioner of Food & Agriculture*, 435 Mass. 497 (2001).

This happened here. The Westford Board of Selectmen have in the wording of APR 3 itself the independent discretion and authority to allow a non-agricultural project to go forward on APR 3 if they, the Grantees, believe that the proposed project furthers the overarching purposes of the restriction. *McClure v. Epsilon Group, LLC*, 2011 WL 3299144.

Should the Westford Board of Selectmen seek to amend APR 3, it is our opinion that they may do so independently, without seeking approval from the Legislature. A legislative vote may be necessary for a release of an APR, but there is no case law, statutory requirement, or Article 97 bill equating an APR amendment with an APR release.

Specifically, we are aware of no Article 97 bill passed in the Legislature seeking approval of an amendment to an APR. In an examination of bills relating to APRs and conservation restrictions dating back to 1989, we found no bill seeking legislative approval for an APR amendment. We did find several bills seeking partial and full releases of APRs—the partial releases reduced the acreage covered by an APR, and full releases extinguished the restrictions in their entirety.

In our examination of Article 97 bills, we did find two instances where the Legislature referenced Grantors and Grantees executing amendments to APRs, but in those instances there was no action or vote taken by the Legislature to explicitly grant such authority, nor action taken to approve a specific amendment.[2]

It follows that an amendment is not regarded as a release, the Legislature does not need to approve whether a Grantor executes an amendment, and the Legislature does not need to approve the specific language of an amendment.

In our opinion, the Commissioner of the Department does not have control over whether and how APR 3 is amended. Because the APR explicitly defines who the Grantees and Grantors are, and the Commissioner is not included, he is not a Grantee for APR 3. This is so despite the Commissioner's signature being on APR 3. It is not as a Grantee but rather in the context of ensuring privity of estate for the APR.

Based on our research, it appears that the Commissioner has authority to enforce and control amendments of APRs in only two circumstances: the first being where the Commissioner is the Grantee and therefore charged with administering an APR, and the second situation is where the APR was created under the Massachusetts APR program.[3] *Bennett v. Commissioner of Food and Agriculture*, 411 Mass. 1, 5 (1991). It follows that the Commissioner does not have standing to administer or enforce APR 3—this power lies solely with the Westford Board of Selectmen.

Next, we address the September 22, 2016 letter from the Commissioner to the Westford Board of Selectmen. In our opinion, it contains multiple errors, among them

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[2] Chapter 181 of the Acts of 2006; Chapter 224 of the Acts of 2010.

[3] The Massachusetts APR Program is where individuals can apply to the Department for an APR—however that program is only available to farms at least five acres in size (APR 3 only covers approximately 3 acres) and involves an application and approval process which did not occur in the creation of APR 3.

that APR 3 would not be a statutorily recognized APR without the Commissioner's signature.[4]

The Commissioner's signature is not required to render an APR statutorily recognized or enforceable. There is no provision in M.G.L. c. 184, § 31 *et seq.* that renders an APR unenforceable without the Commissioner's signature. In fact, M.G.L. c. 184, § 32 states, "This section shall not be construed to imply that any restriction...which does not have the benefit of this section shall, on account of any provisions hereof, be unenforceable." APR 3 would meet the statutory definition of an APR even without the Commissioners signature. M.G.L. c. 184, § 31 and 330 C.M.R. 22.02 both define "Agricultural Preservation Restriction," and there is no requirement in either definition that the Commissioner must sign or be a party to a restriction for it to be an APR under the law.

In our legal opinion, APR 3 satisfies the explicit statutory requirements to qualify as an APR under M.G.L. c 184, § 31, because APR 3 Section III (C) acts as a limit on construction of buildings; Section III (C) (2) acts as a limit on excavation; and Section III (B) effectively limits uses detrimental to the land's agricultural use.[5]

The Commissioner's letter also incorrectly states that "each proposed amendment must be reviewed by the Department on a case by case basis." It is well settled that only a holder of an APR may enforce it.[6] The Commissioner is not the holder of APR 3. Only the Westford Board of Selectmen as Grantee is the holder of APR 3.

In *Prime v. Zoning Bd. of Appeals of Norwell*, the Massachusetts Appeals Court rejected an attempt by abutters to enforce an APR and confirmed the Superior Court's finding that "the restrictions imposed by the purchase may be enforced only by the holders of the APR" and "abutters have no standing on this issue." 42 Mass. App. Ct. 796, 803 (1997).

The Appeals Court in *Kelley v. Cambridge Historical Commission* found that "the [Grantee] owns a preservation restriction that provides it legal control over whether

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[4] The Commissioner's Letter claims that "without the Department's approval of APR3, purchased by the Town for $175,000, the recorded restriction would not be a statutorily recognized APR and therefore would not be afforded the permanent protection and benefits that such an approval creates."

[5] For a restriction to qualify as APR under M.G.L. c. 184, § 31 it must embody all three of the following requirements: 1) forbid or limit any or all construction or placing of buildings except those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; 2) forbid or limit any or all excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land's overall future agricultural potential; and 3) forbid or limit any or all other acts or uses detrimental to such retention of the land for agricultural use. M.G.L. c 184 § 31.

[6] M.G.L. c. 184, § 31; *Kelley v. Cambridge Historical Commission*, 84 Mass. App. Ct. 166 (2013); *Prime v. Zoning Bd. of Appeals of Norwell,* 42 Mass. App. Ct. 796, 803 (1997) ("As to the APR, the restrictions imposed by the purchase may be enforced only by the holders of the APR. *See* G.L. c. 184, § 32."); *McClure v. Epsilon Group, LLC*, 2011 WL 3299144 (A person "has no standing to enforce a restriction when he is not named in the Restriction.").

projects...go forward." 84 Mass. App. Ct. 166 (2013). Similarly, in *McClure v. Epsilon Group, LLC*, the Land Court said "when a restriction under G.L. c. 184 states by whom it may be enforced, that language is to the exclusion of others." 2011 WL 3299144; *Wolfe v. Gormally*, 14 LCR 629 (2006); *Brear v. Fagan*, 447 Mass. 68 (2006).

Consistent with our opinion, on December 7, 2015, the Department staff wrote an email responding to administrative questions regarding APR 3. The Department staff concluded, in our opinion correctly, that "we have no authority over the stewardship of this APR."

The Commissioner's September 22 letter also was incorrect in saying "the change in use would invalidate [APR 3]...." This is a dramatic conclusion, with no stated basis that APR 3 would be null and void.

There is no authority to support the argument that the proposed project would invalidate APR 3. The language of APR 3 gives the Westford Board of Selectmen leeway to administer APR 3 "as they in their sole discretion may decide."[7] In addition, if the Westford Board of Selectmen were to amend APR 3, the restriction would be modified to accommodate the proposed project so it fits squarely within the four corners of the APR document.

Next, we address statements in the September 22, 2016 letter from the Massachusetts Land Trust Coalition. The letter asserts that projects such as the one proposed on APR 3 "are disallowed on APR land." This is patently incorrect. APR 3 specifically contemplates commercial activity on the parcel—APR 3 is tailored to allow non-agricultural uses on the property. There are multiple sections of APR 3 which indicate that the Grantors anticipated allowing development and non-agricultural uses on the land, such as Section III (B) (2), and Section III (C).

Furthermore, as evidenced by the content of APR 3, a Grantor may retain rights on the property that are not "agricultural." For example, Section III (A) of APR 3 outlines the retained rights of the Grantor and his assigns, which include non-agricultural uses such as electrical or gas facilities, and the maintenance and use of the "farm stand-country store building."

As we point out above, a Grantor may grant rights to a Grantee not enumerated under M.G.L. c. 184, § 31. *Commissioner of Agriculture v. Bagdon*, 55 Mass. App. Ct. 1110 (2002). The Massachusetts Supreme Judicial Court ruled that the express statutory language of M.G.L. c. 184 can be supplemented by the words within the APR itself, and that the words of an APR control. Therefore, in addition to the powers enumerated in M.G.L. c 184, § 31, a Grantee may have rights bargained for and encompassed in the APR itself. *Bennett v. Commissioner of Food and Agriculture*, 411 Mass. 1 (1991); *Twomey v. Commissioner of Food & Agriculture*, 435 Mass. 497 (2001).

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[7] APR 3, § IV: "This Agricultural Preservation Restriction shall be administered on behalf of the Grantees by the Town of Westford Board of Selectmen. This Restriction shall be enforced by the Grantees as they in their sole discretion may decide."

We turn to the Coalition's statement that a 2/3 vote of the Legislature is required for this project. It is our opinion that a Grantee may amend an APR without releasing it. We have yet to come across any case law or other authority supporting the notion that an amendment to an APR constitutes a release.

While there is no definition of "release" under M.G.L. c. 184 § 31 or 330 C.M.R. 22.02, case law illustrates what is a release. In *Abrams v. Board of Selectmen of Sudbury*, the owners of two parcels of land (which were both burdened with an APR) entered into an agreement "whereby the APR would be declared invalid and released." 76 Mass. App. Ct. 1128 (2010). In the litigation stemming from the agreement, all courts involved agreed that the act of declaring an APR invalid constitutes a "release" under M.G.L. c. 184 §§ 32. *Id.*; *See also Daly v. McCarthy,* 63 Mass. App. Ct. 1103 (2005).

In *Kelley v. Cambridge Historical Commission*, the Massachusetts Appeals Court ruled that allowing a new project that conforms to the bounds of a deeded restriction (such as an APR) is not a release—it is the proper administration of the restriction. 84 Mass. App. Ct. 166 (2013).

In *McClure v. Epsilon Group, LLC*, the Grantees determined that a controversial project could go forward on APR land in Chelmsford without constituting a "release." Plaintiffs brought suit against the Chelmsford Planning Board, Board of Selectmen, Building Commissioner and Zoning Board of Appeals (and the land owner) alleging that by approving the project the Grantees effectively "released" the restriction. The Land Court found administration of the APR "is highly discretionary in the Selectmen." *McClure v. Epsilon Group, LLC,* 2011 WL 3209144.

Now we turn to the Muir letter of September 13, 2016, which erroneously asserts that allowing the proposed use would amount to an action triggering procedures under Article 97 of the Massachusetts Constitution. While a release under M.G.L. c. 184, § 32 would require a vote of the Legislature, and is commonly regarded as needing it, Mr. Muir fails to provide any support or citations for the idea that exercising discretion to allow the proposal, or amending the APR to accommodate the project, would amount to a release.

Indeed, the Muir letter incorrectly simply assumes that allowing the proposed project to go forward would trigger a "release" of APR 3. Case law and the wording of APR 3 itself dictate otherwise. As discussed above, APR 3 gives the Westford Board of Selectmen sole authority to administer or enforce APR 3 "as they in their sole discretion may decide."

Under the Appeals Court's rulings in *Abrams* and *Kelley*, then, and the Land Court's ruling in *McClure*, a Grantee may exercise substantial discretion in applying the terms of an APR without releasing the restriction. A mere amendment is not a release. In our opinion, APR 3 can be amended without an Article 97 vote of the Massachusetts Legislature.

Finally, the Muir letter attempts to invoke M.G.L. c. 40, § 15A and claims that "release" of an APR requires 2/3 vote at Town Meeting. This is incorrect for several reasons. M.G.L. c. 40, § 15A governs the procedure for transferring the control of real property from one municipal body to another. Amending APR 3, however, does not involve any transfer of control from one municipal body to another—the Westford Board of Selectmen will not be relinquishing its role as the Grantee of APR 3.

M.G.L. c. 40, § 15A is simply inapplicable to a Grantee's interest in an APR. It cannot be used to argue that a 2/3 vote of Town Meeting is required for a release or an amendment of an APR.

Based on the foregoing, it is our opinion that APR 3 is a statutory Agricultural Preservation Restriction that can only be administered and enforced by the Westford Board of Selectmen. In addition, the Westford Board of Selectmen can execute an amendment to APR 3 without seeking permission from the Commissioner, without a town meeting approval, and without filing and passing an Article 97 bill in the Massachusetts Legislature. Such an amendment would not constitute a release of APR 3.

Very truly yours,

Gregor I. McGregor

cc Greg J. Corbo, Esquire