Massachusetts Land Trust Coalition
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February 24, 2017

Andrea Peraner-Sweet
Chair
Board of Selectmen
Town of Westford
55 Main Street
Westford, MA 01886

Re: Drew Gardens APR

Dear Ms. Peraner-Sweet,

I am writing to you regarding the Mass Land Trust Coalition's (MLTC) continuing interest in the Drew Gardens APR issue. Please consider this letter and the attached memo as an offer of assistance in helping to clarify matters of law as you continue your discussion.

We have been following events closely since our original letter to your board, sent September 22, 2016. In that letter we expressed our board's deep concern over the Selectmen's proposal to amend the Drew Gardens Agricultural Preservation Restriction (APR) through a warrant article.

Recent developments have prompted us to reach out to you again and ask you to consider the issues raised in the accompanying memo as Westford debates taking action, which, in effect, will release the APR. A team of attorneys who advise MLTC on such matters drafted the memo. They spent considerable time and effort laying out solid legal arguments for adhering to the process required by statute and the Massachusetts Constitution.

We hope that you will find this memo helpful in your deliberations. Please contact me if we may be of further service.

Sincerely,

Marylynn Gentry
Executive Director
Mass Land Trust Coalition

Cc: John Lebeaux, Commissioner, Massachusetts Department of Agricultural Resources
Michelle Bodian, General Counsel Massachusetts Department of Agricultural Resources
Drew Farms Task Force, Town of Westford
Maura Healy, Attorney General
Senator Eileen M. Donoghue
Representative James Arciero

MEMORANDUM

To: Marylynn Gentry
Executive Director, Mass Land Trust Coalition

From: MLTC MEDs group
Jonathan Bockian Esq., William G. Constable Esq., Irene Del Bono Esq., Elizabeth Wroblicka, Esq., Douglas Muir, Esq., Ray Lyons, Esq., Kathleen O'Donnell, Esq.

Date: 2.10.17

Re: Westford APR

We are writing to clarify various matters of Massachusetts law set out in the January 18, 2017, letter from Gregor I. McGregor, Esq., to Westford Town Manager Jodi Ross et al. (the "M&L Letter") regarding "Board of Selectmen Authority to Amend Drew Gardens APR".[1] We respectfully disagree with several of the opinions expressed in that letter regarding the law relative to amendments of agricultural preservation restrictions in general and the Drew Gardens APR in particular, to MGL c. 184, sections 31 through 33 (the "Statute"), and to Article 97 of the Massachusetts Constitution as applied to Drew Gardens APR 3.[2]

A brief review of provisions of the Statute is necessary. The overriding purpose of the Statute is the protection of agricultural, conservation, historic preservation and certain other restrictions.[3] Those restrictions that meet the requirements of sec. 31-33 receive the benefits of the Statute, and are enforceable in perpetuity, notwithstanding that the benefit of the restriction does not run to any other identified parcel of land and regardless of lack of privity. These are often referred to as "Statutory Restrictions."

One of the most essential steps which must be taken for a restriction to have the benefit of the Statute (including enforcement in perpetuity) is that it must be approved by statutorily specified government agencies as being in the public interest. Section 32 requires that for an agricultural preservation restriction ("APR") held by a city or town to have the benefit of the Statute it must

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[1] This letter does not create an attorney-client relationship with the signatories. Recipients should not construe any information in this letter as a legal opinion on any specific facts or circumstances, and should not act on such information without seeking legal or other professional counsel.

[2] The agricultural preservation restrictions recorded with Middlesex North Registry of Deeds in Book 10124, Page 169.

[3] The title of the original legislative Act adding sections 31-33 to c. 184 began with, "An Act *Protecting* Conservation and Preservation Restrictions Held or Approved By Appropriate Public Authority." {Emphasis added.] Acts 1969, c. 666.

be approved by the commissioner of food and agriculture ("commissioner").[4] We disagree with the M&L Letter's assertion that "[t]he Commissioner's signature is not necessary to render APR 3 enforceable under M.G.L. c. 184 §31 *et seq.*"[5] While a restriction which has not been approved by the commissioner may be enforceable pursuant to other statutes, to be "enforceable under M.G.L. c. 184, §31 *et seq.*" an APR must be approved by the commissioner.

A Statutory APR that has been approved by the commissioner[6] may not be "released, in whole or in part" unless the release is likewise approved by the commissioner. (We discuss the meaning of "release" later in this letter.) The original approved Statutory APR remains intact, enforceable in its entirety, unless the release is likewise approved by the commissioner.[7] A Statutory APR that is crafted to meet the requirements necessary to obtain the signature of the commissioner only to be amended later without the commissioner's approval, and avoiding the approval process so as to allow prohibited uses or uses that are destructive of the restriction and its purposes, violates the APR[8] and the purposes of the statutory scheme. An amendment that is a de facto release of any part of an approved Statutory APR without the commissioner's approval is a nullity and has no effect on the existence and enforceability of the original APR. Preventing ill considered amendments that violate and impair the purposes of a Statutory APR and that do not meet the high standards required for serving the public interest in protecting the Commonwealth's natural resources is precisely the reason the Statute requires all releases to be reviewed by the commissioner and only those releases which the commissioner approves to take effect.

An additional reason the state approval is required for a release in whole or part is to give the state the means to enforce the provision of section 32 which states that if a Restriction was purchased with state funds or granted in consideration of a loan or grant made with state funds, it shall not be released "unless it is repurchased by the land owner at its then current fair market value and funds so received shall revert to the original fund source."[9] Without the requirement of state approval for the release, the state would have no way of knowing whether to invoke the repurchase requirement.

The Statute does not define "release" or "amendment." Plainly, an amendment to a valid existing Statutory APR that seeks to add *more* land subject to the Restriction, or prohibits

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[4] Other required steps are that the holder must sign the Restriction as accepting the grant, the Restriction must be described by metes and bounds or a registered or recorded plan showing its boundaries, and the Restriction must be recorded in the Registry of Deeds.

[5] That assertion in the M&L Letter is inaccurate. When section 32 of the Statute states, "This section shall not be construed to imply that any restriction, easement, covenant or condition which does not have the benefit of this section shall, on account of any provision hereof, be unenforceable," it is merely saying that the requirements imposed by the Statute on those restrictions seeking the benefit of the Statute do not undermine the enforceability of the other types of restrictions which do not have the benefit of the Statute.

[6] And that has satisfied the other requirements of the Statute mentioned in footnote 3.

[7] Not only is the requirement of approval by the commissioner stated in section 32, but section 31 also states, "Such agricultural preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two."

[8] Like most Statutory Restrictions, APR 3 states that it may only be released, in whole or in part, by the procedures established by MGL c. 184, section 32.

[9] In addition to the repurchase requirement, such Restriction may only be released by the holder if the land is no longer deemed suitable for agricultural or horticultural purposes or unless two-thirds of the Legislature votes that the release if for the public good.

additional uses not prohibited by the original Restriction, would not be a "release." However, to be enforceable in perpetuity under the Statute, such an amendment would still be required to receive the approval of the commissioner and to comply with all of the other required steps of the Statute just as if it were a new Statutory APR.

Equally plainly, an amendment to a Statutory APR that seeks to allow a use that was prohibited by the original APR, such as to allow a previously forbidden structure to be built on agricultural land, is a release. As explained above, under Section 32, an amendment that is a release requires a public hearing and approval by the commissioner.[10] In our opinion, when a Statutory APR (a) states as one of its purposes the prohibition of any activity detrimental to the actual or potential agricultural use of the protected premises, (b) prohibits construction of non-agriculturally related temporary or permanent structures on the premises, and (c) prohibits construction of structures for non-agricultural uses, including retail sales, or the use of the premises for non-agricultural uses without the prior approval of the APR grantee, an amendment to that APR to allow construction of a large restaurant, function hall and parking lot that covers nearly the entirety of the land protected by the APR, is a de facto release, regardless of how else anyone may characterize the amendment.

On this basis, we would not advise either the APR holder, the owner of the APR land or a lessee of the APR land to put substantial assets at risk on the belief that they could allow or engage in a construction prohibited by an APR simply because the holder had executed an amendment without complying with all the statutory requirements for a release, including the approval of the commissioner after a public hearing.

Similarly, there is a distinct difference between who has standing to enforce *a particular restriction* with the question of who has standing to enforce the approval process required by *the Statute* or other laws

As to enforcing a particular Statutory Restriction, the fact that a particular Statutory Restriction states that enforcement is at the sole discretion of the grantee does not limit the enforcement rights of other entities which have enforcement rights provided by other laws and which are not bound by the contract.[11] A restriction may not — nor may any contract — by its terms limit the enforcement rights held by others by operation of law.[12]

M.G.L. c. 214, § 3, ¶ (10) provides that the Attorney General or (with leave of court) ten taxpayers of a municipality may bring an action to enforce the purpose or purposes of any gift or conveyance which has been made to and accepted by a municipality for a specific purpose or purposes in trust or otherwise. (See Daly et al. v. McCarthy et al., 11 LCR 367 (Mass. Land Ct. 2003), aff'd 63 Mass.App.Ct. 1103, 823 N.E. 2d 434 (2005).) An amendment of an APR which derogates from the original purposes of the APR may be subject to such a challenge, regardless of the definition of "release" in the Statue or who approved the APR.

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[10] As well as a local public hearing and approval.

[11] Enforcement of a restriction which creates a so-called charitable trust is not addressed in this letter.

[12] A Restriction may also confer third party enforcement rights to additional qualified holders.

As to enforcement of the Statute, the Attorney General on the commissioner's behalf or on behalf of the Commonwealth has standing to enforce laws of the Commonwealth generally and specifically to prevent or remedy damage to the environment caused by anyone, including a municipality (MGL c. 12, s. 11D) . Other possible sources of standing to compel municipal compliance with the release requirements of the Statute include M.G.L. c. 214, § 7A, which authorizes the Superior Court to hear a ten-resident suit alleging that "damage to the environment is occurring or is about to occur ... [which] constitutes a violation of a statute... or regulation the major purpose of which is to prevent or minimize damage to the environment." (See Cummings v. Secretary of the Executive Office of Envtl. Affairs, 402 Mass. 611 (1988)). Such a suit could assert that the Statute's major purpose is to protect the environment by making Statutory APRs perpetually enforceable, and that the court ought to enjoin a municipal action which, in violation of the Statute (in that the commissioner's approval was not obtained for an amendment that was a partial release), sought to allow a use which had previously been prohibited by the APR and which would harm the environment as protected by the APR. While the outcome of such a suit cannot be predicted with certainty, it would be foolhardy to say that only the municipality that holds a Statutory APR has standing to ask a court to enforce the provisions of the Statute regarding releases..

The M&L Letter also addresses the question of whether the proposed amendment to the Drew Gardens APR requires the approval of the Legislature to comply with Article 97 of the Massachusetts Constitution. The M&L Letter does not question that the Drew Gardens APR is an interest in real estate which is subject to and protected by Article 97. As an interest in real estate which is subject to and protected by Article 97, if the municipality of Westford proposes that the Drew Gardens APR premises "be used for other purposes" than the purposes of the APR "or otherwise disposed of,"[13] Article 97 requires a two-thirds majority vote by roll call of each branch of the Legislature — whether the Town's action is by amendment of the APR or otherwise and regardless of whether approval by the commissioner is required.

Neither the Constitution nor the courts have definitively limited or itemized precisely what it means to "dispose of" a real property interest subject to Article 97. The Supreme Judicial Court has identified two state actions which did not require an Article 97 vote. The SJC stated that in certain circumstances issuance by the Commonwealth of a so-called chapter 91 waterways license affecting land subject to Article 97 did not require an Article 97 vote,[14] and in a footnote favorably cited an Appeals Court decision to the effect that a "[g]rant of a one-year seasonal permit, revocable at will, for conducting a program under the supervision of the Department of Environmental Management was not a disposition of land subject to art. 97."[15] In the latter case the SJC declined to say whether a lease of town property for conservation purposes is or is not a disposition subject to Article 97. The primary guidance offered by these decisions is that a

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[13] The final paragraph of Article 97 states, "Lands and easements taken or acquired for such purposes [protected by Article 97] 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."

[14] The court wrote, "The chapter 91 license merely certifies that the planned use, including the lease, complies with G. L. c. 91 and accompanying department regulations. It does not, as the motion judge concluded, transfer from the department to the BRA 'an extent of legal control over the land at issue.'" *Mahajan v. Department of Environmental Protection*, 464 Mass. 604, 621 (2013).

[15] *Cranberry Growers Service, Inc. v. Duxbury*, 415 Mass. 354 (1993), footnote 2, citing *Miller v. Commissioner of the Dep't of Envtl. Management*, 23 Mass. App. Ct. 968, 970 (1987).

municipal or state action which gives up a government right to prohibit or restrict a certain use of land protected by Article 97 is likely to require an Article 97 vote. By this standard, an amendment to the Drew Gardens APR which allows a previously forbidden use would require an Article 97 vote.

The Attorney General has given formal Opinions which serve as a guide to the meaning of the word "dispose" in general or in certain specific circumstances.[16] The Attorney General's position has been that any action which relinquishes or surrenders any legal or physical control of property subject to Article 97 requires an Article 97 vote. Again, by this standard, an amendment to the Drew Gardens APR which allows a previously forbidden use would require an Article 97 vote.

[16] Rep. A.G., Pub. Doc. No. 12, at 139 (1973); Rep. A.G., Pub. Doc. No. 12, at 129 (1980); and Rep. A.G., Pub. Doc. No. 12, at 143 (1981).