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Paul F. Alphen, Esquire
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August 30, 2016

Drew Garden Task Force
Town of Westford
55 Main Street
Westford, MA 01886

RE: August 31, 2016 Meeting

Dear Members of the Task Force

In preparation for the August 31st meeting, and our review of the APR Subcommittee analysis, we wish to go on record as follows:

1. We would like to reiterate the comments we made at the August 25th meeting, especially the comments regarding the legal opinions provided by Town Counsel in Attorney Corbo's June 13, 2016 letter to the Board of Selectmen and the related emails and his responses to the question and answer session at the Selectmen's meeting on June 28th.

2. Within the APR Subcommittee analysis documents the various references to "Conservation Restrictions" and the policies of the Secretary of Energy and Environmental Affairs are irrelevant, as the APR instruments are not Conservation Restrictions nor were the APRs approved by the Secretary of Energy and Environmental Affairs (or their predecessors).

3. We think that you will find that APR #3 was approved by the Commissioner of Food and Agriculture to make sure the APR was enforceable without privity of contract or privity of estate, which are ordinarily required for restrictions on land to be enforceable. The lack of privity issue was resolved when the Commissioner of Food and Agriculture approved the APR as provided by M.G.L.A. 184 § 32. I have underlined the applicable language from the statute:

" No conservation restriction, **agricultural preservation** or watershed preservation **restriction** as defined in section thirty-one, **held by any governmental body** or by a charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area, and no preservation restriction, as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include preservation of buildings or sites of historical significance or of a particular such building or site, and no affordable housing restriction as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include creating or retaining or assisting in the creation or

retention of affordable rental or other housing for occupancy by persons or families of low or moderate income **shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes, or on account of the governmental body the charitable corporation or trust having received the right to enforce the restriction by assignment, provided (a) in case of a restriction held by a city or town** or a commission, authority or other instrumentality thereof **it is approved by** the secretary of environmental affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, **the commissioner of food and agriculture if an agricultural preservation restriction,** the Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction, and (b) in case of a restriction held by a charitable corporation or trust it is approved by the mayor, or in cities having a city manager the city manager, and the city council of the city, or selectmen or town meeting of the town, in which the land is situated, and the secretary of environmental affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction." Mass. Gen. Laws Ann. ch. 184, § 32 (West)

I feel certain that you will confer with your own counsel regarding the interpretation of the law regarding this matter and the other outstanding legal issues that have been raised though the APR review process.

Thank you for this opportunity.

Very truly yours,
Alphen & Santos, P.C.

Paul F. Alphen, Esquire

GARRITY, LEVIN AND MUIR LLP
COUNSELLORS AT LAW

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DIRECT DIAL: 617-236-5011

PLEASE SEND
CORRESPONDENCE TO THE
BOSTON OFFICE

September 13, 2016

William and Marian Harman
10 Chamberlain Road
Westford, MA 01886

Dear Mr. and Mrs. Harman:

You have asked for our opinion with respect to certain aspects of a current proposal under consideration by the Westford Board of Selectmen to "amend" one of the Agricultural Preservation Restrictions on the so-called "Drew Gardens" property on Boston Road to allow for construction of a restaurant-function hall business with parking and associated infrastructure and, specifically, what legal requirements, besides approval by the Selectmen, must be satisfied for the restaurant proposal to be legally permitted under the terms of the applicable APR and G.L. c. 184, Sections 31-33.

In considering the matter, we have reviewed the APR document, applicable statutory provisions and a June 13, 2016 letter of Attorney Gregg Corbo of Kopelman and Paige, P.C. addressed to the Board of Selectmen.

Among other things, we note that the APR document does not address amendment of the APR or a process by which amendment might be undertaken. While the owner retains certain non-agricultural rights in the property; e.g., use of trails and wood roads, installation and maintenance of utilities, and while certain activities (generally agricultural related) may be permitted with the approval of the holder of the restriction, none of these activities remotely approach the construction of restaurant-functional hall business. The APR document clearly provides that no activity can be permitted which is inconsistent with the intent of the restriction, which is the perpetual protection and preservation of agricultural land.

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The term "agriculture" is defined in the APR document, which employs a definition which mirrors definitions of agriculture which appear in the Massachusetts General Laws. This definition, and indeed any commonly accepted notion of "agriculture" simply doesn't apply to a restaurant - whether or not the operator intends to serve products grown on site. A restaurant is a commercial enterprise; it is not "agriculture." Indeed, if this proposal is accepted, what would happen if the owner decides that more parking is needed, or outdoor seating, or expansion of the building to make the enterprise commercially viable? When does commercial activity exceed the bounds of a "mere amendment," in Attorney Corbo's words.

Whether or not the Town might have developed a different APR document for this property back in 1996-1999 is frankly not legally relevant. This APR simply doesn't allow for a restaurant use which so clearly flies in the face of the clear intent of the restriction. The rights of the property owner and the Town are governed by this APR document, not one that might have been developed differently 15-20 years ago.

In our opinion, the only way the restaurant proposal can be legally accommodated on the Drew Gardens site is for the portion of the site to be used for that purpose (including any associated grading or topographical changes on portions of the Drew Gardens site covered by the other APRs), to be considered "released" from the APRs. Such a release is a disposition of an interest in land and the process by which that would take place is clear - indeed it is described in Attorney Corbo's June 13 letter:

1. Since the APR interests were acquired for a particular purpose (the preservation of agricultural land), the change in use of a portion of the protected land must be approved by a two-thirds vote at Town Meeting pursuant to G.L. c. 40, Section 15A.

2. As this is a "release" of a portion of APR-protected land, it must be approved by the Massachusetts Commissioner of Agriculture, pursuant to G.L. c. 184, Section 32; and

3. As this is also a disposition of protected agricultural land by a municipality, it is governed by Article 97 of the Amendments to the Massachusetts Constitution, which requires a two thirds votes by yeas and nays of both houses of the Massachusetts Legislature.

We hope that the Town and landowner can find a way to restore the Drew Gardens site to active agriculture without resorting to a proposal that is so far from the purpose and intent of this APR and the Massachusetts APR program generally.

Sincerely,

Douglas A. Muir

cc: Tara Zadeh, General Counsel
MA Dept. of Agricultural Resources

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Ms. Jodi Ross, Town Manager
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Westford, MA 01886

Andrea Peraner-Sweet, Chair
Board of Selectmen
Town of Westford
55 Main Street
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Paul F. Alphen, Esq.
Alphen & Santos, P.C.
200 Littleton Road
Westford, MA 01886

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).

[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

Massachusetts Land Trust Coalition
www.MassLand.org

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email: Info@MassLand.org

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).