

EXTRA INFO. 4/4/06 - 1

ARTICLE 30

MEMORANDUM

TO: Don P Johnson, Town Manager  
FROM: Stephen D. Anderson, Town Counsel  
RE: Acton/2006 ATM: Application of Massachusetts Constitution's Anti-Aid Amendment to ATM Article 30  
DATE: April 4, 2006

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One member of the Finance Committee has inquired as to the validity of 2006 ATM Article 30 under the Massachusetts Constitution's Anti-Aid Amendment.<sup>1</sup> Following the procedures specified herein, I conclude that Article 30 does not violate the Anti-Aid Amendment.

Article 30 provides as follows (emphasis added):

To see if the Town will vote to authorize the Board of Selectmen to transfer the real property shown as parcel 46 on Map H-3A of the 2005 edition of the Town Atlas, which land is currently held for general municipal purposes or for other specific municipal purposes for which it has heretofore been devoted, from the tax title custodian to the Board of Selectmen for the purpose of conveyance, and **to authorize the Board of Selectmen to convey such land for affordable housing purposes on such terms and conditions and for such consideration, which may be non-monetary consideration, as the Selectmen may determine, or take any other action relative thereto.**

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<sup>1</sup> The Anti-Aid Amendment, Article 46, § 2, of the Amendments to the Massachusetts Constitution, as rewritten in 1974 by article 103 of the Amendments, provides as follows (emphasis added):

**No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.**

The Summary for Article 30 in the Warrant reads as follows (emphasis added):

This article transfers control of a 0.6-acre parcel of town-owned land at 74 River Street to the Board of Selectmen so that they may convey it to a third party. **The Selectmen's stated intent is to offer this land for the non-profit development of a single or two-family affordable home, such as that envisioned by the local chapter of Habitat for Humanity North Central Massachusetts, Inc.** Such a cooperative, nonprofit affordable housing development strategy will result in all site housing counting toward the Town's state mandated requirement for affordable housing units, as compared to a market-rate offering of the parcel whereby a 40B proposal could result in the development of three market-rate units for every one affordable unit. Cost benefits may also be realized by volunteer support, contributions and community involvement. The 74 River Street parcel is located in the South Acton Smart Growth district and within walking distance of the South Acton village center and public transportation.

**1. Application of Anti-Aid Amendment to Disposition Town-Owned Property**

In *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence*, 403 Mass. 531, 553-554 (1988), the Supreme Judicial Court held in no uncertain terms that a transaction of the type contemplated here does not violate the Anti-Aid Amendment:

The plaintiffs claim that selling parcel B of the project area to Emerson College as redeveloper violates the anti-aid amendment. Because the sale price is less than the city's cost to acquire the property, the plaintiffs argue that the sale involves a grant of public money to a nonpublic institution. We disagree. No public aid can be involved where a private institution pays fair market value for public property. *Opinion of the Justices*, 374 Mass. [836] at 856-857, 371 N.E.2d 1349 [1970].<sup>2</sup> See *Brooks v. Boston*, 334 Mass. 285, 286, 135 N.E.2d 13 (1956).<sup>3</sup>

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<sup>2</sup> In *Opinion of the Justices to the House of Representatives*, 374 Mass. 843, 856-857 (1978), the SJC opined as follows with respect to the constitutionality of a pending bill authorizing the transfer to Boston University of the City of Boston's interest in the Franklin Institute and the City's and the Commonwealth's interest in accumulating bequest, which was established under Benjamin Franklin's will and which was to be distributed in 1991:

The city of Boston and the Commonwealth each have the power to dispose of part of the Franklin Fund in 1991. This Fund was established by a private bequest of Benjamin Franklin. Thus the Franklin Fund is not "public money." Boston and the Commonwealth could, therefore, give their portions of this Fund to Boston University without violating art. 46.

Under the bill, the city of Boston would also transfer its title to the Franklin Institute. With one exception, the assets of the Franklin Institute have been acquired and

Significantly, in Acton's case, Article 30 authorizes the Board of Selectmen to convey the River Street land "for affordable housing purposes on such terms and conditions and for such consideration, which may be non-monetary consideration, as the Selectmen may determine." The Town acquired the property as a gift in 1980 pursuant to ATM Warrant Article 25 (Exhibit A) by deed dated October 13, 1980, recorded at Book 14100, Page 121 (Exhibit B). While the land may be a buildable lot today by virtue of the construction of the nearby Town sewer, its value for purposes of the Anti-Aid Amendment is judged as affected by the restrictions placed on the land by the Selectmen for affordable housing purposes at the time of its disposition.

As the Court stated in *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence*, 403 Mass. 531, 553-554 (1988):

**The judge, after considering the numerous restrictions the disposition agreement and the urban renewal plan imposed on parcel B, found that the sale price to Emerson College is the fair market value.** The judge was entitled to rely on the disposition appraisal commissioned by the LRA, and the testimony of that appraiser. The LRA's appraiser considered comparable sales of residentially zoned land and took into account the restrictions the LRA placed on the property. The other appraisals introduced in evidence did not account for the decrease in value caused by the restrictions. **Restrictions on use, development, and resale of property under an urban renewal plan**

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maintained through private gifts, including the Franklin bequest and the Carnegie donation. For the reasons stated above, transfer of these assets to Boston University would not violate art. 46. The only exception to the use of private funds for the acquisition of the assets of the Franklin Institute was the purchase of the site on which the Institute is located with money from the city's publicly raised general funds. Under the terms of art. 46, the transfer of title to the land to Boston University might be prohibited. However, the bill provides in s 4 for the payment by Boston University of the fair value of this land. Since fair value would be paid for the portion of the Franklin Institute which was acquired through the \*857 use of public funds, no violation of art. 46 would result from the transfer of this asset.

<sup>3</sup> In *Brooks v. City of Boston*, 334 Mass. 285, 287 (1956), the SJC upheld the constitutionality of Statute 1955, c. 36, § 1, which read as follows: "The board of park commissioners of the city of Boston, with the approval of the mayor, is hereby authorized to sell and convey to the Hebrew Home for Aged a charitable corporation organized and existing under the laws of the Commonwealth, a certain parcel of land containing nine acres, more or less, bounded by Centre street and Walter street in the West Roxbury section of said city, and known as Joyce Kilmer Park, held by said city for public park purposes." The Court observed that "the city has been expressly authorized to sell and convey the locus to the Hebrew Home for Aged. The statute has been accepted by the city council. There is nothing in the record which supports the argument of the petitioners that the making of the conveyance mentioned in c. 36 would violate art. 46, § 2, of the Amendments to our Constitution forbidding the use of public money or property for sectarian purposes. The city held the park only in its municipal capacity as an agency of the government for the benefit of the general public subject to the power of the Legislature to authorize its sale." *Id.* at 286-287.

affect the fair market value of property in much the same way as do easements, zoning restrictions, and other development restraints. The judge properly considered these restrictions, and his finding as to fair market value was warranted by the evidence. There was no violation of the anti-aid amendment. Because public funds are not being used to aid Emerson College, we need not analyze the proposed transaction in terms of the three criteria enunciated in *Commonwealth v. School Comm. of Springfield*, 382 Mass. 665, 675, 417 N.E.2d 408 (1981).

## 2. Disposition of Town-Owned Property

To dispose of town-owned property under G.L. c. 40, § 15, the officer having charge of the land must notify the selectmen that the land is no longer required for public purposes, and Town Meeting by a two thirds vote must authorize the conveyance of the land and specify the minimum amount to be paid for such conveyance. Thereafter, the selectmen may, for such amount or a larger amount, and upon such other terms as the selectmen shall consider proper, convey the land.

Under the Uniform Procurement Act, G.L. c. 30B, § 16(c), a “governmental body shall solicit proposals prior to ... disposing of, by sale or rental to any person, real property or any interest therein, **determined in accordance with paragraph (b) [of § 16] to exceed twenty-five thousand dollars in value**” (emphasis added). This section “shall not apply to the rental of residential property to qualified tenants by a housing authority or a community development authority.” No similar exemption exists for the conveyance of a fee interest in real property to a non-profit builder of affordable housing.

Under Section 16(b), the Town "shall determine the value of the property through procedures customarily accepted by the appraising profession as valid." Under Section 16(a), the Town can "declare the property available for disposition and shall specify the restrictions, if any, that it will place on the subsequent use of the property."

As in the *Lawrence* case, it is the value of the property **as restricted** that controls:

- If the value of the property determined under Section 16(b), and restricted for affordable housing use under Section 16(a), is less than or equal to \$25,000, then Chapter 30B's RFP requirements would not apply.
- If the value of the property determined under Section 16(b), and restricted for affordable housing use under Section 16(a), is greater than \$25,000, then Chapter 30B's RFP requirements would apply.

In addition, under Section 16(g), if the Town "decides to dispose of property at a price less than the value as determined pursuant to paragraph (b), the governmental body shall publish notice of its decision in the central register, explaining the reasons for

its decision and disclosing the difference between such value and the price to be received."

Accordingly, before the Selectmen can convey the property to Habitat or anyone else, the following procedure should be followed:

1. There must be a finding by the current custodian that the land is no longer required for public purposes. A proposed finding is attached.
2. A 2/3 Town Meeting vote is required to authorize the disposition of the town-owned parcel of land for affordable housing purposes. The motion should specify the minimum amount to be paid for such conveyance. A proposed finding is attached.
3. Prior to disposition, the Selectmen shall specify the restrictions which shall govern the disposition and reuse of the property, which in this case contemplate (a) the construction of one single-family or two-family home within a time certain, (b) the imposition in perpetuity of an affordable housing restriction under a Deed Rider to be promulgated by the Selectmen, and (c) the imposition of a right of reverter to the Town in the deed to ensure that the Grantee in fact develops the land in accordance with the terms of the disposition and the affordable housing restriction.
4. Prior to disposition, the Selectmen shall determine the value of the property as so restricted through procedures customarily accepted by the appraising profession as valid
5. If the value of the property as so determined is less than or equal to \$25,000, then the Selectmen may dispose of the property without an RFP.
6. If the value of the property as so determined is greater than \$25,000, then the Selectmen must dispose of the property in accordance with Chapter 30B's RFP requirements. (Habitat may or may not be the successful bidder in response thereto.)
7. In either case, the Town must receive a payment in lieu of taxes from the Grantee, calculated in accordance with G.L. c. 44, § 63A.<sup>4</sup>

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<sup>4</sup> Chapter 44, Section 63A, covering sales of public land and payment of taxes provides as follows:

Section 63A. Whenever in any fiscal year a town, which term, as used in this section, shall include a city, shall sell any real estate, the board or officer executing the deed therefor in the name and behalf of the town shall, as a condition precedent to the power to deliver such deed, receive from the grantee as a payment in lieu of taxes allocable to the days ensuing in said fiscal year after the date of such deed, a sum which shall be equal to

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such portion of a pro forma tax computed as hereinafter provided as would be allocable to the days aforesaid if such pro forma tax were apportioned pro rata according to the number of days in such fiscal year; provided, however, that whenever the said real estate shall be sold between January second and June thirtieth of the fiscal year, the town shall also receive an additional amount equal to the entire pro forma tax computed as hereinafter provided and allocable as a payment in lieu of taxes for the next succeeding fiscal year. Such pro forma tax shall be computed by applying the town's tax rate for the fiscal year of the sale, or, if such rate is not known, the town's tax rate for the fiscal year next preceding that of the sale, to the sale price after crediting any exemption to which, if the deed had been executed and delivered on January first of such next preceding fiscal year, the grantee would have been entitled under section five of chapter fifty-nine. A recitation in the deed that there has been full compliance with the provisions of this section shall be conclusive evidence of such fact. Sums received under this section shall not be subject to section sixty-three of this chapter or to section forty-three of chapter sixty, but shall be credited as general funds of the town.

**Notice of Determination Under G.L. c. 40, §15**

The undersigned Board of Selectmen, being the custodian and board in charge of the real property shown as parcel 46 on Map H-3A of the 2005 edition of the Town Atlas, which was acquired by the Town as a gift in 1980 pursuant to ATM Warrant Article 25 (Exhibit A) by deed dated October 13, 1980 and recorded in the Middlesex South District Registry of Deeds at Book 14100, Page 121 (Exhibit B) finds and declares that:

- This property is currently held for general municipal purposes;
- This property is no longer needed for the purpose(s) for which it was acquired, and
- This property or interests therein may be conveyed by the Town if so desired.

TOWN OF ACTON, MASSACHUSETTS,  
By its Board of Selectmen,

\_\_\_\_\_  
Peter K. Ashton, Chairman

\_\_\_\_\_  
F. Dore' Hunter

\_\_\_\_\_  
Lauren S. Rosenzweig

\_\_\_\_\_  
Walter M. Foster

\_\_\_\_\_  
Andrew D. Magee

V10-15

MASSACHUSETTS QUITCLAIM DEED SHORT FORM (INDIVIDUAL) 19

I, THOMAS F. LITRENTA

of Acton, Middlesex

County, Massachusetts

for consideration of less than ONE HUNDRED (\$100.00)..... Dollars paid, grant to TOWN OF ACTON, its successors and assigns (address of Grantee: Town Hall, P.O. Box 236, Acton, Massachusetts) for municipal purposes

with QUITCLAIM COVENANTS

~~the land is~~

A certain parcel of land located on the Northerly side of River Street in Acton, Middlesex County, Massachusetts, and being shown as Lot A on a plan entitled "Plan of land in South Acton, Massachusetts", owned by Thor Realty Corporation, Everett M. Brooks Company, Civil Engineers, dated August 31, 1963 and recorded with Middlesex South District Deeds in Book 11466, Page 212, and bounded and described as follows:

Beginning at the Southeasterly corner thereof on the Northerly side of River Street and at Lot B as shown on said plan and thence running NORTH 57° 12' 45" WEST, 150 feet by said River Street to an iron pipe set in a stone wall at land formerly of William E. Stearns;

Thence turning and running NORTH 14° 23' 15" EAST by land of said Stearns, 203.90 feet to the center of a stone bound as shown on said plan;

Thence turning and running SOUTH 74° 40' EAST, 115.56 feet by land formerly of Mary E. Gates, 115.56 feet to a stone bound at said Lot B;

Thence turning and running SOUTH 8° 13' 33" WEST, 89.66 feet to a point;

Thence turning and running NORTH 76° 46' 27" WEST, 45.59 feet to a point;

Thence turning and running SOUTH 13° 13' 33" WEST, 39 feet to a point;

Thence turning and running SOUTH 76° 46' 27" EAST, 49 feet to a point;

Thence turning and running SOUTH 8° 13' 33" WEST, 122 feet to the point of beginning. The last five (5) courses being by Lot B as shown on said plan.

Containing 27,141 square feet of land, more or less, and being Lot A on said plan however otherwise bounded, measured or described.

For grantor's title see deed from Thor Realty Corporation, dated April 28, 1970 and recorded with said Deeds in Book 11825, Page 598.

Witness my...hand and seal this...13th.....day of ...October.....19.80.

*Thomas F. Litrenta*  
Thomas F. Litrenta

The Commonwealth of Massachusetts

Middlesex,

ss.

October 13,

19 80

Then personally appeared the above named Thomas F. Litrenta

and acknowledged the foregoing instrument to be his free act and deed, before me

*Christina J. Farrell*  
Notary Public  
My commission expires *July 20* 19 *82*

Property Affected: 72 River Street, Acton, Middlesex County, Massachusetts

SEP 16 80 AM 11:47 181HE 4410

MASSACHUSETTS  
 Statute Form of  
**Quitclaim Deed**  
 (INDIVIDUAL)

Thomas F. Litrenta  
 TO  
 Town of Acton

RECEIVED IN DISTRICT  
 DEEDS  
 COUNTY  
 DISTRICT

(Please print or type)

Norman F. Cohen Esq.  
 Palmer & Dodge  
 Boston, MA 02108

at ..... o'clock and ..... minutes ..... m.  
 Received and entered with .....  
 Book ..... Page ..... Deeds  
 Attest: ..... Register

FROM THE OFFICE OF

RETURN TO →

SAMUEL NARCUS, LEGAL STATIONER  
 BOSTON, MASS.  
 FORM 19  
 REVISED CHAPTER 497 - 1969

(THE FOLLOWING IS NOT A PART OF THE DEED, AND IS NOT TO BE RECORDED)

CHAPTER 183, SECTION 11, GENERAL LAWS

A deed in substance following the form entitled "Quitclaim Deed" shall when duly executed have the force and effect of a deed in fee simple to the grantee, his heirs and assigns, to his and their own use, with covenants on the part of the grantor, for himself, his heirs, executors, administrators and successors, with the grantee, his heirs, successors and assigns, that at the time of the delivery of such deed the premises were free from all encumbrances made by him, and that he will, and his heirs, executors and administrators shall, warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through or under the grantor, but against none other.

(\*Individual—Joint Tenants—Tenants in Common—Tenants by the Entirety.)

CHAPTER 183 SEC. 6 AS AMENDED BY CHAPTER 497 OF 1969

Every deed presented for record shall contain or have endorsed upon it the full name, residence and post office address of the grantee and a recital of the amount of the full consideration thereof in dollars or the nature of the other consideration therefor, if not delivered for a specific monetary sum. The full consideration shall mean the total price for the conveyance without deduction for any liens or encumbrances assumed by the grantee or remaining thereon. All such endorsements and recitals shall be recorded as part of the deed. Failure to comply with this section shall not affect the validity of any deed. No register of deeds shall accept a deed for recording unless it is in compliance with the requirements of this section.

**Motion on Article 30 – Transfer Real Property – 74 River Street**

Mr. Magee moves that the Town authorize the transfer of the real property shown as parcel 46 on Map H-3A of the 2005 edition of the Town Atlas, from its current custodian to the Board of Selectmen for the purpose of conveyance, and authorize the conveyance of that property as set forth in the Article, provided that the minimum amount to be paid for such conveyance shall be the value of the property as restricted by the Selectmen for affordable housing purposes, which value shall be determined through procedures customarily accepted by the appraising profession as valid