

11/27 (13)

Christine Joyce

From: Don Johnson
Sent: Monday, November 27, 2006 4:39 PM
To: Christine Joyce; Maryjane Kenney
Cc: John Murray
Subject: FW: Questions for counsel on the Woodlands CR
Importance: High

Please copy all of this, including the attachment, and place in Extra Information tonight.

From: Don Johnson
Sent: Monday, November 27, 2006 4:38 PM
To: Andrew Magee
Cc: Board of Selectmen
Subject: FW: Questions for counsel on the Woodlands CR

Andy:

Here is Counsel's response to your questions. Please let me know if we need to elaborate further. I will include this material in Extra Information tonight.

Regards,
Don

From: Daniel C. Hill [mailto:dhill@AndersonKreiger.com]
Sent: Monday, November 27, 2006 3:28 PM
To: Don Johnson
Cc: Stephen Anderson; Tom Tidman
Subject: Acton/40B LaurelHill: Questions for counsel on the Woodlands CR

Hi Don,

Just for background, the property that's being restricted is a 4-acre narrow strip of land running along the western boundary of the project site, in the vicinity of an existing depression/drainage basin that has wetland qualities. The restricted area will contain several new detention basins and other stormwater management infrastructure. The comp. permit required the applicant to convey a restriction that was "mutually acceptable," and the final draft is the product of negotiations between the Commission and the applicant, Avalon.

In response to Andy's specific questions:

(1) EOEAs execution of a certificate will come later - the parties agreed that this would not be a prerequisite to the recording of the restriction. Given the fact that the parcel being restricted is not suitable or appropriate for public access, there's a good chance that EOEAs will not accept the restriction, and therefore the restriction will not have the benefit of Section 32 of Chapter 184. The restriction should still be enforceable under the terms of the comp. permit for as long as the permit is effective against the property, and in perpetuity under the terms of the restriction itself and as a land use restriction having the benefit of G.L. c. 184, s. 23 and 26 (being held for a public purpose by a governmental entity).

(2) I had requested that this language be removed, but Avalon insisted that it remain - they actually plan on installing utilities in that area. Tom can confirm this. At the meeting at Town Hall on October 31st, Tom consented to this language. As noted above, if we do not get EOEAs approval, the restriction should still be enforceable under the terms of the comp. permit, and as a land use restriction held for a public purpose by a governmental authority under G.L. c. 184, s. 23 and 26.

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(3) The area to be restricted is not suitable for public access, and is inaccessible from public ways in Acton. I agree that this may preclude EOEAs endorsement, but EOEAs approval is not required in order for this restriction to be enforceable in perpetuity, as discussed above.

(4) Same response as Question 3.

(5) This is boilerplate language that provides that if there were any previous drafts of the restriction, or agreements between the parties on the restriction, these would be superseded by the Restriction. The purpose of the clause is to avoid any uncertainty about the enforceability of previous agreements on this issue (I'm not aware of any). It does not serve to eviscerate the language of the comprehensive permit, which was granted by the ZBA and can only be amended by the ZBA pursuant to statutory law.

(6) There will be no mortgages on the property at the time of conveyance and recording. The grantor (Avalon) is making an affirmative representation under Section XI(c) that there are no encumbrances that would affect the Town's title to the Restriction.

Let me know if this need further elaboration.

Thanks, Dan

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From: Don Johnson [mailto:djohnson@acton-ma.gov]
Sent: Monday, November 27, 2006 10:49 AM
To: Daniel C. Hill
Cc: Manager Department
Subject: FW: Questions for counsel on the Woodlands CR

Dan:
Below are a number of questions Andy Magee has with respect to the Woodlands' Conservation Restriction that the Selectmen will be considering tonight. Can you provide responses, please?

Regards,
Don

11/27/2006

From: Andrew Magee
Sent: Monday, November 27, 2006 8:51 AM
To: Don Johnson
Cc: Board of Selectmen
Subject: Questions for counsel on the Woodlands CR

<<DOC112706avalon.pdf>>

Don:

The Conservation Restriction (Packet item #13) for the Woodlands at Laurel Hill appears to be incomplete. Specifically, it is missing the signature page indicating approval by the Secretary of Environmental Affairs (see attached pdf).

In addition there are a number of items that need to be explained. Could you please ask Dan Hill to explain the following:

III.B.1, 2 and 3 appear to reserve the right of the grantee to construct septic systems, underground tanks, underground structures, and utilities "of all types," and to clear the forest for "vistas" (see attached pdf). This would not appear to be a conservation restriction that would meet EOEA standards.

V. Restricts public access.

X. Again, no reference to EOEA.

XII.D I do not understand the language of the final line.

Do we need subordination of the mortgagees?

I do not recall getting an opinion from the BOS's land advisory committee - the Open Space Committee - on this CR.

Thank you.

-Andy

**APPROVAL BY SECRETARY OF ENVIRONMENTAL AFFAIRS
COMMONWEALTH OF MASSACHUSETTS**

The undersigned Secretary of The Executive Office of Environmental Affairs of the Commonwealth of Massachusetts hereby certifies that the foregoing Conservation Restriction has been approved as being in the public interest pursuant to Massachusetts General Laws Chapter 184, Section 32.

Approval of this Conservation Restriction pursuant to Massachusetts General Laws Chapter 184, Section 32 by any municipal officials and by the Secretary of Environmental Affairs is not to be construed as representing the existence or non-existence of any pre-existing rights of the public, if any, in and to the Premises, and any such pre-existing rights of the public, if any, are not affected by the granting of this Conservation Restriction.

Dated: _____
~~Ellen Roy Herzfelder~~
Secretary, Executive Office of Environmental Affairs

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss _____, 200__

Then personally appeared before me, the undersigned notary public, the above named Ellen Roy Herzfelder and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, and acknowledged that she signed it voluntarily for its stated purpose as Secretary of the Executive Office of Environmental Affairs of the Commonwealth of Massachusetts.

, Notary Public

My commission expires _____

- (4) Cutting, removing or otherwise destroying trees, grasses or other vegetation;
- (5) The further subdivision of the Premises;
- (6) Activities detrimental to drainage, flood control, water conservation, water quality, erosion control, soil conservation or archaeological conservation; and
- (7) Any other use of the Premises or activity thereon which is inconsistent with the purpose of this Conservation Restriction or which would materially impair other significant conservation interests unless necessary for the protection of the conservation interests that are the subject of this Conservation Restriction.

B. Reserved Rights and Exceptions to Otherwise Prohibited Acts and Uses:

The following acts and uses otherwise prohibited in paragraph A are permitted but only if such acts and uses do not materially impair the purposes of this Conservation Restriction or other significant conservation interests (except for the uses listed in subparagraph B.1, which shall be permitted in accordance with their terms in any case).

- 1. Excavation and removal from the Premises of soil, gravel or other mineral resource or natural deposit as may be incidental to the installation or maintenance or removal of underground tanks, septic systems, utilities, and other underground structures or to the maintenance of good drainage, soil conservation practices or to other permissible use of the Premises. * ?!!
- 2. Installation and maintenance of ~~drainage facilities, septic facilities and underground utilities of all types and kinds including but not limited to gas, electric, water and cable television lines and any and all appurtenances thereto.~~
- 3. Selective ~~cutting of trees for fire protection, unpaved trail and road maintenance, tick control, or otherwise to preserve the present condition of the Premises, including vistas.~~
- 4. Erection of signs by the Grantor or Grantee identifying the Grantee as holder of the restriction and to educate the public about the conservation values protected and any limitations relating to public access.
- 5. Passive Recreation which shall be defined as trails for walking and hiking.

The exercise of any right reserved or permitted by the Grantor under this paragraph B shall be in compliance with the then-current Zoning by-law of the Town of Acton, the Wetlands Protection Act (General Laws Chapter 131, Section 40), and all other applicable federal, state and local law. The inclusion of any reserved or permitted right in this paragraph B requiring a permit from a public