

Christine Joyce

2/23 (18)

From: Don Johnson
Sent: Tuesday, February 10, 2004 5:10 PM
To: Christine Joyce
Cc: John Murray
Subject: FW: ACT/Bertolami: Restrictive Covenant - Station Master's House

Also, copy the other documents from the first message and put them in the Selectmen's packet when we send them the document for signature, please.

-----Original Message-----

From: Don Johnson
Sent: Tuesday, February 10, 2004 5:08 PM
To: Christine Joyce
Cc: John Murray
Subject: FW: ACT/Bertolami: Restrictive Covenant - Station Master's House

Chris:

Please be on the lookout for this document and include it on the 2/23 agenda for Selectmen's signature.

-----Original Message-----

From: Don Johnson
Sent: Tuesday, February 10, 2004 5:06 PM
To: Stephen Anderson
Cc: Zachary S. Maurer; Garry Rhodes
Subject: RE: ACT/Bertolami: Restrictive Covenant - Station Master's House

Good deal, Steve. I will place this on the Selectmen's 2/23 agenda for signature. Thank you.

Regards,
Don

-----Original Message-----

From: Stephen Anderson
Sent: Monday, February 09, 2004 11:50 AM
To: Don Johnson
Cc: Zachary S. Maurer; Garry Rhodes
Subject: ACT/Bertolami: Restrictive Covenant - Station Master's House

<<DeclarationofRestrictiveCovenant.pdf>> <<CertificateofTrustee.pdf>>
<<StipulationofDismissal.pdf>> <<NylenLtr2-5-04.pdf>>

Dear Don:

Mr. Bertolami's attorney has returned the signed documents we requested from him, copies of which are attached. The Selectmen will need to execute the Restrictive Covenant before we can record it. (We already recorded the prior agreement, so the Town is protected. But the Restrictive Covenant adds better protection for the long run.)

Zach: Please send the original of the Restrictive Covenant only to Don Johnson in Acton under cover of a copy of this email.

Don: Please return the fully executed original to me. We will record it and the Certificate in the Registry and sign and file the stipulation of dismissal with the Court.

Stephen D. Anderson
ANDERSON & KREIGER LLP

Zachary S. Maurer

From: Stephen D. Anderson
Sent: Monday, February 09, 2004 11:50 AM
To: Don P. Johnson (E-mail)
Cc: Zachary S. Maurer; Garry Rhodes (E-mail)
Subject: ACT/Bertolami: Restrictive Covenant - Station Master's House



DeclarationofRestri
ctiveCovena...



CertificateofTruste
e.pdf



StipulationofDismiss
al.pdf



NylenLtr2-5-04.pdf

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Stephen D. Anderson
ANDERSON & KREIGER LLP
43 Thorndike Street
Cambridge MA 02141-1764
Phone: 617-252-6575
Fax: 617-252-6899
e-mail: sanderson@andersonkreiger.com
www.andersonkreiger.com

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LYNCH, DESIMONE & NYLEN, LLP

ATTORNEYS AT LAW
12 POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

Telephone: (617) 348-4500
Facsimile: (617) 348-4545

JOHN M. LYNCH, P.C.
ERNEST P. DESIMONE
RICHARD A. NYLEN, JR.
FREDERICK S. GILMAN
STEPHEN W. DECOURCEY
JOHN P. CARR
SHANNON MICHAUD

OF COUNSEL

JAMES W. MURPHY
WAYNE H. SCOTT

February 5, 2004

Stephen D. Anderson, Esq.
ANDERSON & KREIGER LLP
43 Thorndike Street
Cambridge, MA 02414-1764

RE: Hawthorne Realty Trust v. Acton Zoning Board
Miscellaneous Case: 289465

Dear Steve:

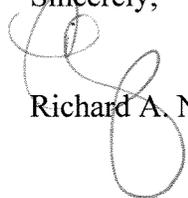
Attached please find the following documents with regard to the above-referenced case.

1. Signature of Trustee regarding status of trust with notarized signature;
2. Signature on Declaration of Restrictive Covenant executed by Jane Bertolami, trustee of Hawthorne Realty Trust which has also been notarized; and
3. Proposed Stipulation of Dismissal to be filed with the Land Court.

Please let me know if the documents are appropriate and feel free to either execute the Joint Stipulation of Dismissal and return it to me or file it with the Court. Thank you.

Please contact me if you have any questions.

Sincerely,



Richard A. Nylén, Jr.

RAN/jaj
Attachment
cc Leo Bertolami

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF THE COMMONWEALTH
LAND COURT

CASE NO. 289465

HAWTHORNE REALTY TRUST
Plaintiff

v.

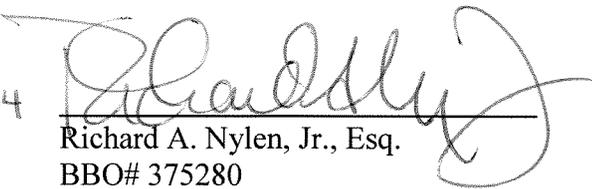
ACTON ZONING BOARD, JONATHAN
WAGNER, DAVID L. BLACK, KENNETH
KOZIK,
Defendant

JOINT STIPULATION OF DISMISSAL

All parties hereby stipulate that this action shall be and hereby is dismissed with prejudice and without costs. All parties waive all rights of appeal from a judgment so entered.

The Plaintiff,
Hawthorne Realty Trust

The Defendant,
Town of Acton Zoning Board of Appeals
and its Members,

2-2-04 
Richard A. Nylan, Jr., Esq.
BBO# 375280
Lynch, DeSimone & Nylan, LLP
12 Post Office Square, Suite 600
Boston, MA 02109
(617) 348-4500

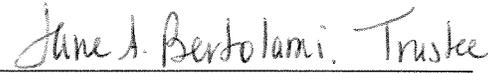
Stephen D. Anderson, Esq.
BBO# 018700
ANDERSON & KREIGER LLP
43 Thorndike Street
Cambridge, MA 02141
(617)-252-6575

CERTIFICATE OF TRUSTEE

The undersigned, Jane A. Bertolami, being the sole Trustee (the "Trustee") of the Hawthorne Realty Trust (the "Trust") established under a Declaration of Trust (the "Declaration of Trust") dated July 8, 1992, and recorded with the Middlesex South Registry of Deeds in Book 22201, Page 310, hereby certify that:

1. The undersigned is the sole trustee of the Trust;
2. The Declaration of Trust has not been revoked, terminated or amended;
3. The Trust is the sole owner in fee of certain land, together with the improvements thereon, known and numbered as 111 Great Road, Acton, MA, which is shown as Parcel 28 on Acton Assessors' Map G-4 in Acton, Middlesex County, Massachusetts, all as more particularly described in a deed of John Kress Williams, Jr., Trustee of the Williams Family Trust, dated August 5, 1999 and recorded in said deeds at Book 30514, Page 127 (the "Premises");
4. Pursuant to Section VIII of the Trust, any person dealing with the Trust estate or the Trustee may always rely on a certificate signed by any person then appearing from the records of the Registry to be a trustee thereunder as to the identity of the Trustees or as to the existence or non-existence of any fact or facts which constitute conditions precedent to acts by the Trustees or which are in any other manner germane to the affairs of the Trust;
5. The owners of one hundred percent (100%) of the beneficial interest in and to the Trust have authorized and directed the Trustee to grant, declare, execute, acknowledge, deliver, and record a declaration of restrictive covenants in favor of the Town. Such restriction shall affect the Premises and prohibit the Trust or its successors in interest to the Premises from (A) applying for any demolition permit, the purpose of which is to demolish or substantially alter the Station Master's House, or (B) demolishing or substantially altering the Station Master's House located on the Premises, except in the event of substantial damage to the relocated Station Master's House by fire or other casualty. The declaration shall include such further terms, conditions or restrictions deemed by the Trustee to be necessary or appropriate, the execution of such declaration to be conclusive evidence that such further terms, conditions or restrictions are duly authorized;
6. All of the Beneficiaries and Trustees of the Trust are of adult age, are legally competent, and under no disability. The sole Trustee is not the sole Beneficiary of the Trust.

Witness my hand and seal as of the 22 day of January 2004.



Jane A. Bertolami, as Trustee of the
Hawthorne Realty Trust

COMMONWEALTH OF MASSACHUSETTS

, ss.

January 22, 2004

Then personally appeared the above-named Jane A. Bertolami, Trustee of the Hawthorne Realty Trust and acknowledged the foregoing instrument to be her free act and deed and the free act and deed of Hawthorne Realty Trust before me.

Andrea Blood

Notary Public

My commission expires: 4-7-06

act\bertolami\m\certificateoftrustee.001A

DECLARATION OF RESTRICTIVE COVENANT

This Declaration of Restrictive Covenant ("Declaration") is made this 22nd day of January, 2004, by Jane A. Bertolami, Trustee of the Hawthorne Realty Trust, under Declaration of Trust dated July 8, 1992, and recorded with the Middlesex South Registry of Deeds in Book 22201, Page 310 (the "Trust"), as the owner of land located at and known as 111 Great Road, Acton, MA, which is shown as Parcel 28 on Assessors' Map G-4 in Acton, Middlesex County, Massachusetts, and described as Parcel One in the deed to the Trust recorded with the Middlesex South Registry of Deeds in Book 30514, Page 127 and in Exhibit A hereto (said land being hereinafter called the "Subject Land"), and the Town of Acton, a Municipal corporation, with an address of Town Hall, 472 Main Street, Acton, MA 01720, acting by and through its Board of Selectmen (the "Town").

WHEREAS, the Trust owns the Subject Land;

WHEREAS, the Trust also owns the real property located at and known as 107 Great Road, Acton, MA, which is shown as Parcel 28-1 on Assessors' Map G-4 ("Parcel 28-1");

WHEREAS, the Subject Land is adjacent to Parcel 28-1;

WHEREAS, on Parcel 28-1 is situated the historic Stations Master's House, built by Station Agent Arthur Raynor c. 1910;

WHEREAS, the Trust seeks to relocate the Station Master's House from Parcel 28-1 to the Subject Land;

WHEREAS, to enable the relocation of the Station Master's House from Parcel 28-1 to the Subject Land, the Town of Acton held a Special Town Meeting on October 20, 2003, at which the Town voted to amend the Acton zoning map, Map No. 1, by rezoning the Subject Land from Limited Business District (LB) to East Acton Village District (EAV) (the "Zoning Amendment");

Whereas on October 28, 2003, the Massachusetts Attorney General's office approved that Zoning Amendment;

WHEREAS, the Trust and the Town entered into a Contract dated October 6, 2003, governing the relocation of the Station Master's House from Parcel 28-1 to the Subject Land, a true copy of which is attached hereto as Exhibit B (the "Contract");

WHEREAS, the Supreme Judicial Court has held in Durand v. IDC Bellingham, 440 Mass. 45, 55 (2003), that "conditioning otherwise valid zoning enactments on agreements reached between municipalities and landowners that include limitations on the use of their land or other forms of mitigation for the adverse impacts of its development" does not constitute illegal contract zoning.

NOW, THEREFORE, for one dollar and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Trust does hereby make and declare the Subject Land subject to the following restrictive covenant in favor of and enforceable by the Town of Acton:

1. **RESTRICTION.**

The Trust shall relocate the Stations Master's House from Parcel 28-1 to the Subject Land in accordance with the Contract; and thereafter the Trust shall not (A) apply for any demolition permit, the purpose of which is to demolish or substantially alter the Station Master's House, or (B) demolish or substantially alter the Station Master's House; provided however that this Restriction shall not prohibit the demolition and reconstruction of the relocated Station Master's House in the event of substantial damage to the relocated Station Master's House by fire or other casualty.

2. **DURATION.**

The restrictive covenant set forth herein shall expire on January 5, 2054, unless sooner amended or terminated by written agreement of the Town and the Trust, it being understood and agreed that, pursuant to M.G.L. c. 184, § 27, the initial term of this Restriction shall be thirty years from the date hereof and that the Town shall have the right to extend this Restrictive Covenant for an additional 20 years to and including January 5, 2054, by written notice pursuant to M.G.L. c. 184, § 27(b)(2), recorded with the Middlesex South Registry of Deeds.

3. **TRUST.**

The term "Trust" as used herein shall include all current and future Trustees and Beneficiaries of the Trust, all parties acting by or through the Declaration of Trust referenced above, and their respective heirs, successors and assigns.

4. **BENEFIT.**

This Declaration of Restrictive Covenant and all provisions contained herein shall run with the Subject Land and bind the owners of the Subject Land and their respective heirs, devisees, legal representatives, successors and assigns, and shall be for the benefit of and enforceable by the Town of Acton acting by and through its Board of Selectmen.

5. **ENFORCEMENT.**

The Town may prosecute all necessary and appropriate proceedings at law and in equity against any person violating or attempting to violate the provisions hereof either to restrain any violation hereof and/or to obtain specific performance hereof. The Trust acknowledges that there is no adequate remedy at law available to the Town for enforcement of its rights hereunder. This Declaration shall be governed by the laws of the Commonwealth of Massachusetts. The Trust

hereby consents to the jurisdiction of the Middlesex Superior Court in any action brought by the Town hereunder.

6. **NON-WAIVER.**

The failure of the Town to enforce any restriction, covenant, or provision hereof, or right derived hereunder, shall not be deemed to be a waiver of the right to do so thereafter as to the same breach or to any other breach occurring prior or subsequent thereto.

8 **SEVERABILITY.**

If any provision hereof or the application of any such provision to any person or circumstance shall be held invalid, the remainder of this declaration or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

WITNESS the execution hereof under seal this 22 day of January, 2004.

TOWN OF ACTON, MASSACHUSETTS
By its Board of Selectmen

Walter B. Foster, Chairman

Peter K Ashton

William H. Shupert, III

F. Dore Hunter

Robert A. Johnson

HAWTHORNE REALTY TRUST

Jane A. Bertolami, Trustee
By: Jane A. Bertolami, Trustee as aforesaid

TOWN ACKNOWLEDGEMENT

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

On the ____ day of January, 2004, before me personally appeared the above named members of the Board of Selectmen of the Town of Acton the Municipal Corporation named in the attached instrument, and as such were authorized to execute this instrument on behalf of the Town of Acton, Massachusetts.

Notary Public
My Commission Expires:

TRUST ACKNOWLEDGMENT

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

I certify that on January 22, 2004, Jane A. Bertolami, Trustee, as aforesaid, personally came before me and acknowledged under oath that she:

- (a) is the sole Trustee of the Hawthorne Realty Trust named in the attached instrument,
- (b) is authorized to execute this instrument on behalf of the Trust, and
- (c) executed the instrument as her free act and deed as trustee and as the free act and deed of the Trust.


Notary Public
My Commission Expires: 4-7-06

EXHIBIT A

PARCEL ONE (Lot A on said Plan)

- SOUTHWESTERLY by Great Road, as shown on said plan, by two (2) courses measuring one hundred sixty nine and 40/100 (169.40) feet and thirty and 60/100 (30.60) feet, respectively;
- NORTHWESTERLY by land of Paul Welch, as shown on said plan, four hundred one and 76/100 (401.76) feet;
- NORTHEASTERLY by land now or formerly of Elbridge Robbins, as shown on said plan, two hundred sixteen and 50/100 (216.50) feet;
- SOUTHEASTERLY by land now or formerly of B.W. Pennock, as shown on said plan, three hundred thirty four and 76/100 (334.76) feet;
- SOUTHWESTERLY by Lot B, as shown on said plan, seventy one and 00/100 (71.00) feet;
- SOUTHEASTERLY by Lot B, as shown on said plan, one hundred fifteen and 00/100 (115.00) feet; and
- EASTERLY by Lot B, as shown on said plan, eighty four and 26/100 (84.26) feet.

Containing 91,600 square feet, more or less, all as shown on said plan.

PARCEL B (Lot B on said Plan)

- SOUTHWESTERLY by Great Road as shown on said plan, sixty five and 00/100 (65.00) feet;
- WESTERLY by Lot A, as shown on said plan, eighty four and 26/100 (84.26) feet;
- NORTHWESTERLY by Lot A, as shown on said plan, one hundred fifteen and 00/100 (115.00) feet;
- NORTHEASTERLY by Lot A, as shown on said plan, seventy one and 00/100 (71.00) feet; and
- SOUTHEASTERLY by land now or formerly of B.W. Pennock, as shown on said plan, one hundred eighty eight and 00/100 (188.00) feet.
- PROPERTY ADDRESS: 107 - 111 Great Road, Acton, Massachusetts