

Don Johnson

11/14 (10)

From: Don Johnson
Sent: Monday, November 07, 2005 5:30 PM
To: Stephen Anderson
Cc: John Murray
Subject: Buxton Property Conservation Restriction(s)
Importance: High

Steve:

I have a bit of a problem. It seems that I misunderstood actions that were taken while I was on vacation in September and I was of the mistaken belief that the attached inquiry letters had been sent to you at that time. The petitioners recently called to find out where their answers were. That was when I discovered my misunderstanding. I am now (belatedly) sending this to you for your review and opinion.

You will recognize this as a subject you have already reviewed, albeit with a different twist. The second attachment in the list above is your opinion with respect to another interested party's proposed use in January, 2004. The first attachment is the correspondence that should have come to you earlier. Belle Choate's letter (second page of the attachment) spells out the specifics of the current inquiry. The essence of this proposal is that Westchester Company, Inc. (Stephan Marsh) would like to develop the unrestricted property as a 40B and use the restricted portion for their septic disposal. The balance of the attachments are, respectively, the actual recorded Conservation Restriction, the Plan of the Land that goes with the restriction and the first, non-recorded Conservation Restriction.

I have reviewed the restrictions with regard to Belle's questions and have the following thoughts – numbered per her paragraphs: (I do this not to lead you toward a particular conclusion but, rather, to hopefully assist you and shorten the time you need to spend on this matter.)

Q1. Can the unrestricted portion, shown on the plan as Area 1, be developed under Chapter 40B? Is there anything in the Conservation Restriction which would prohibit its use?

A1. I don't see anything that would prohibit a 40B, or any other use permitted by zoning, on the unrestricted portion of the land.

Q2. Do we have two active CR's? One under the old form and one under the new? One signed in January of 1978 and one executed in December 11, 1978 as recorded in the Registry of Deeds? If both are in effect how do they relate to each other?

A2. From the information I have I would think that we do have two active restrictions. The operative terminology in both is almost identical. The single exception I see is in the recorded version at paragraph B.2. where an easement is granted to the public to pass and repass on foot. This was not included in the earlier version but it would appear to do little more than to open the land for foot traffic under certain conditions. Since this provision came later, I would assume it is not trumped by the more restrictive (as to the Town's rights) provisions of the first restriction. Otherwise, the differences from the first to the second restriction seem to be more for clarity and legal purposes than for restrictive purposes.

Q3. Can the parcel be subdivided to create two new lots using the entire frontage? Is the frontage considered frontage for access purposes given the terms of the CR regarding use?

A3. I take the "subdivide" portion of this question to mean "ANR", not subdivision. I think the entire frontage can be, and is, used to satisfy the frontage and access requirements for the unrestricted portion of the lot. I do not think it can be used to provide frontage for a second ANR lot because restriction A.1. prohibits construction of "roads" on the restricted portions of the property. Therefore, access can only be provided over frontage that includes the unrestricted portion of the land. Frontage that does not include the unrestricted portion does not provide access. It is hard to see on this plan but the unrestricted portion of the frontage is only 25.50 feet long. This is not enough for a normal subdivision but I do not know whether there are other provisions in today's ZBL that would somehow allow a subdivision using this small amount of access.

Q4. Can the area under the CR, specifically the Areas 2 & 3 shown on the plan dated November 30, 1978, be used for a subsurface disposal system? Would that be considered an allowable conservation use under the terms of the CR? Would the excavation be considered an alteration of the surface of the property as described under Section A.4 of the CR?

A4. For several reasons I believe the installation of a subsurface disposal system would violate the terms of these restrictions. The basic question here is whether a subsurface disposal system is even permitted on the restricted land. There are paragraphs related to (1) utilities that are not "on or above the ground" (paragraph A.1.) and (2) "excavation ... removal of loam ... gravel, soil ... in such a manner as to affect the surface of said land" (paragraph A.4.) that one might argue are sufficient to allow this use. I believe, however, that paragraphs A.5. and A.3. are the important restrictions with regard to this question. I believe the threshold question is contained in Paragraph A.5. which says the restricted land can only be used for "agricultural, forestry or outdoor recreational purposes" (it does not say "conservation"). It then further restricts those uses by requiring them to allow the land to "remain predominately in its natural condition". Use of the land for subsurface disposal is neither agricultural, forestry nor outdoor recreation. Consequently, I do not think it is permitted under the restriction. If that were not enough, I note that paragraph A.3. prohibits the "removal or destruction of trees, shrubs or other vegetation except for proper forestry and landscape practices ... or to improve the scenic view". Again, removal of trees (some portions of the restricted land are open and some are wooded) to facilitate the installation of a subsurface disposal system is neither for forestry, landscaping nor improved scenic views.

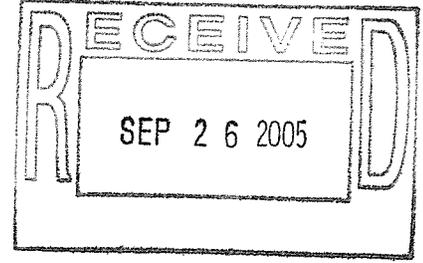
Q5. In the CR dated December 1978 Section B.2. gives "the Town and the public an easement to pass and repass on foot upon said premises", is this located in a defined area? Does it allow access across the unrestricted portions, i.e. Area 1, as well as the areas under the CR?

A5. My reading is that the easement is general to all of the restricted areas. I see no provision that locates it in any defined area. I do not think the CR's deal with the unrestricted land at all. Hence, I don't think the easement allows access across the unrestricted Area 1.

Steve, I hate to ask but could you take a look at this and let me know what you think, please? Due to the delay caused by my misunderstanding, I need to ask you to push this ahead of some of the other stuff you have from us - if you can, please.

Regards,
Don

Don



TOWN OF ACTON
Building Department

INTERDEPARTMENTAL COMMUNICATION

To: John Murray, Assistant Town Manager **Date:** September 23, 2005
From: Garry A. Rhodes, Building Commissioner
Subject: Buxton Property

Attached please find staff comments you requested.



Planning Department

TOWN OF ACTON
472 Main Street
Acton, Massachusetts 01720
Telephone (978) 264-9636
Fax (978) 264-9630
planning@acton-ma.gov

MEMORANDUM

To: Garry Rhodes, Building Commissioner **Date:** September 22, 2005
From: Roland Bartl, AICP, Town Planner *R.B.*
Subject: 484 Great Road (Buxton)

The Town of Acton through its Board of Selectmen holds a conservation restriction on land at 484-486 Great Road (the former Buxton property). In fact there are two restrictions. The first, dated 1/12/1978, has apparently not been recorded. The second, dated 12/11/1978 has been recorded in the Middlesex Registry of Deeds, BK 13615, PG 339 ff, and is signed by the Secretary of Environmental Affairs. For the purpose of this review, I have relied on the recorded conservation restriction. It delineates three restricted areas - Areas 2, 3, and 4. The restriction appears to apply equally to all three areas. There is also a plan that shows the area delineation. It is recorded in the registry as plan No.1513 of 1978 (stamped on 12/28/1978). Westchester Co., Inc. has inquired about the uses that might be allowed under the conservation restriction. Below are my comments following the list of inquiry in the 6/28/05 letter from Isabella Choate.

1. Can the unrestricted portion of the land, Area 1, be developed under Ch. 40B?
I cannot see any evidence that the conservation restriction affects the types of use allowed on Area 1. However, the configuration of the unrestricted land might create some practical limitations. Its development or re-development is subject to applicable laws and regulations, including M.G.L. Chapter 40B. The location is not within walking distance to any of Acton's village centers or Kelley's Corner, where higher residential densities would be desirable. But it is along the Great Road corridor where residential and commercial uses mix freely. This location is perhaps not a top-choice for a 40B project, but it does not seem inconsistent with the Town's planning objectives either.
2. How do the two conservation restrictions relate to each other?
As stated above, I have relied on the recorded restriction, which is signed and dated 11 months after the unrecorded restriction, and which bears the Environmental Secretary's signature. I am assuming that this later recorded restriction governs Areas 2, 3, and 4. Ultimately this is a question for an attorney.
3. Can the parcel be subdivided into two new lots using the entire frontage?
On the face of it there is enough frontage on Great Road for two lots. The question relates to case law that has examined lot access over street frontage. In order for the division of land not to be deemed a subdivision (rather than ANR lots) within the meaning of M.G.L. Chapter 41, such access must be possible; it cannot be illusory in nature. I think all these cases have assumed vehicular access as a qualifying standard. It seems that, as written, the restriction on the land makes access for two lots illusory since Area 2 occupies all but +/-25 feet of the Great Road frontage.

However I am not aware of case law that has examined this particular circumstance. Perhaps Town Counsel can shed light on this if necessary.

Looking at it differently: There are now two lots, each with a residence on it. One has all the land's frontage on Great Road, the other has none. They share a common driveway. A reconfiguration of these two lots would simply alter an existing nonconforming situation for another that is equally or less nonconforming. They could continue to share the driveway.

4. Can the restricted land, specifically Areas 2 and 3, be used for subsurface wastewater disposal facilities?

The Restriction prohibits among other things

- the placement of structures of all kinds and utilities above ground;
- the removal or destruction of trees, shrubs or other vegetation except for proper forestry or landscape practice or to improve the scenic view;
- excavation, dredging and removal of mineral substances so as to affect the surface of the land;
- use of the land except for agriculture, forestry, and outdoor recreation purposes.

Further, the restriction is written to be consistent with M.G.L. Ch. 184, S. 31-33 and its intended purposes, and it lists those purposes including watershed protection.

I conclude that a subsurface wastewater disposal system on the subject land areas seems to be inconsistent with the intent of the conservation restriction as presently written and recorded. The Selectmen could opt to amend the restriction, to allow such a facility. I am not familiar with the legal and procedural steps required for such an amendment. If we assume that the principal purpose of the restriction is to preserve the land for open space, wildlife habitat, and the enjoyment by the residents of Acton, then a surface of an underground wastewater disposal facility can fulfill that purpose if properly finished and graded, and left to re-grow as a natural meadow. The emphasis on watershed protection under Ch. 184 may mean that effluent must be treated to higher purity than a normal septic system would provide.

5. In allowing public access to the restricted land, does the conservation restriction designate specific trails or ways, and does it require public access over the unrestricted land?

I do not see anything in the restriction that limits access to specific trails or ways on the restricted land. Likewise, I do not see anything in the restriction that extends public access rights to the unrestricted land. Should the Board of Selectmen be inclined to modify the restriction, I would recommend retention of the unrestricted nature of public access, and I would recommend inclusion of a public access easement over the unrestricted Area 1 to connect Area 2, with Areas 3 and 4, and to gain public access from Great Road to Areas 3 and 4. There is a Town-owned pedestrian right of way from Beechnut Street (in the Acorn Park subdivision) to Area 4. Area 4 also abuts Town of Concord watershed land around Nagog Pond. This land is not open to the public.

Cc: Planning Board



INTERDEPARTMENTAL COMMUNICATION

Acton Board of Health - Telephone 978-264-9634 - Fax 978-264-9630

September 20, 2005

TO: Garry Rhodes, Building Commissioner

FROM: Doug Halley, Health Director

SUBJECT: 484 Great Road

The Health Department has reviewed the materials submitted by Westchester Company Inc. about the potential development of 484 Great Road and would have the following comments:

1. The Board of Health has no restrictions regarding the installation of wastewater disposal systems on open space. However, the applicant would have to provide evidence that they have the legal right to place the system there and that they have the long term ability to maintain and replace the system in the future.
2. Condition #1 of the covenant provided states that "Construction or placing of any buildings, mobil homes, roads, signs, bill boards or other advertisings, utilities or other structures on or above the ground" shall not be permitted by the grantors, their successors and assigns. The Board of Health has long maintained that a wastewater disposal system is a utility. The Septage Enterprise Fund was established on that exact premise and was reviewed thoroughly by Town Counsel at the time.
3. Condition #3 prohibits the "removal or destruction of trees". Wastewater Disposal Systems require a large area to be sited and invariably impact nearby trees.
4. Condition #4 prohibits the "excavation, dredging or removal of loam, peat, gravel, soil, rock, or other mineral substance or natural deposit in such a manner as to affect the surface of the land". The placement of a Wastewater Disposal System requires excavation of loam and soils. These materials do not have to be removed but at a minimum would affect the surface of the land by raising it one foot higher than its present elevation.

Cc: Roland Bartl
Bruce Stamski
Tom Tidman
Dean Charter
John Murray

ACTON MUNICIPAL PROPERTIES DEPARTMENT

INTERDEPARTMENTAL COMMUNICATION

To: Garry Rhodes, Building Commissioner *Date:* 9/20/05
From: Dean A. Charter, Municipal Properties Director
Subject: 484 Great Road

I have read the documents you sent to me regarding the possible development at #484 Great Road. I suggest that the original documents be reviewed by counsel, but I will submit my comments from an Arborist/Forestry point of view, as this seems to be the original intent of the Conservation Restriction.

In Ms. Choate's letter of June 28, 2005, she asks in item # 4 if the area under the Conservation Restriction can be used for a subsurface disposal system. This use, in my opinion, would conflict with the following sections of the Conservation Restriction:

- A.1. Prohibition against the installation of "Utilities". I would suggest that a subsurface disposal system could be deemed to be a "Utility" especially if the proposed 40B development had a condominium form of government.
- A.3. Prohibition against the removal of trees, shrubs, or other vegetation. Obviously, the construction of the subsurface disposal system would involve the destruction of trees, shrubs, and other vegetation, and clearly it would not be done for forestry or landscaping reasons. Moreover, Title 5 would prohibit replanting the surface of the system with forest type cover.
- A.4. Prohibition against Excavation...in such a manner as to affect the surface of the land. Obviously, the construction of a subsurface disposal system would involve excavation, and depending on the design, the topography might be permanently changed, regardless of how it would be revegetated.
- A.5. Land to be used only for Agricultural, Forestry, or outdoor recreational purposes. Even if the argument could be made that the surface could be used for growing a crop, such as grass, which could later be harvested for agricultural purposes, the creation of the system would have altered the land so that it would no longer be "predominantly in its natural condition".
- A. 7. Prohibition of "Other acts or uses detrimental to the preservation of said land in its present open and rural condition." This is sort of a "belt and suspenders" section that reaffirms that the land cannot be altered. Such alteration would be inevitable during the creation of a subsurface disposal system.

Acton Building Department

INTERDEPARTMENTAL COMMUNICATION

Date: September 16, 2005

To: Doug Halley Health Director, Roland Bartl Town Planner, ~~Bruce Stanski~~
Town Engineer, Tom Tidman Natural Resources Director, Dean Charter,
Municipal Properties Director

Cc: John Murray, Assistant Town Manager

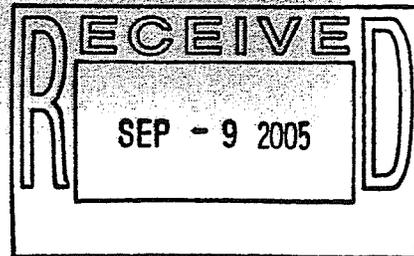
From: Garry Rhodes, Building Commissioner

Subject: 484 Great Road

John Murray, Assistant Town Manager requested I forward the attached documentation to you for comment. If you have any comments please forward them to me by September 23 and I will give them to John.

copy - please prepare a report 9/14

WESTCHESTER COMPANY, INC.



September 9, 2005

Board of Selectmen
Town of Acton
472 Main Street
Acton, MA 01720

Re: Conservation Restriction – 484-486 Great Road (AKA Buxton Property)

To the members of the Board:

We have placed an offer on the above referenced property and are looking for clarifications on allowed uses under the Conservation Restriction held by the Board of Selectmen. Specifically in order to proceed we need an answer to our question about locating subsurface disposal areas within the restricted areas.

On June 28th, our consultant, Ms Choate, met with the town manager to go over a series of questions we have per the potential development. See attached letter from that meeting.

We are seeking an official response from the board on these matters so we can determine how best to proceed. Time is of the essence.

Thank you for your assistance.

Sincerely,

Stephan Marsh
Westchester Company, Inc.

411 Massachusetts Avenue, Suite 304
PO BOX 672
Acton, MA 01720-0672

PHONE (978) 263-0428
FAX (978) 263-0447



ISABELLA V. CHOATE

CONSULTANT

June 28, 2005

Don P. Johnson
Town Manager
472 Main Street
Acton, MA 01720

Re: 484 -486 Great Road (AKA Buxton Property)

Dear Don,

Per our meeting this morning here are the questions I have on behalf of my client, Westchester Company.

1. Can the unrestricted portion, shown on the plan as Area 1, be developed under Chapter 40B? Is there anything in the Conservation Restriction which would prohibit its use?
2. Do we have two active CR's? One under the old form and one under the new? One signed in January of 1978 and one executed in December 11, 1978 as recorded in the Registry of Deeds? If both are in effect how do they relate to each other?
3. Can the parcel be subdivided to create two new lots using the entire frontage? Is the frontage considered frontage for access purposes given the terms of the CR regarding use?
4. Can the area under the CR, specifically the Areas 2 & 3 shown on the plan dated November 30, 1978, be used for a subsurface disposal system? Would that be considered an allowable conservation use under the terms of the CR? Would the excavation be considered an alteration of the surface of the property as described under Section A.4 of the CR?
5. In the CR dated December 1978 Section B.2 gives "the Town and the public an easement to pass and repass on foot upon said premises", is this located in a defined area? Does it allow access across the unrestricted portions, i.e. Area 1, as well as the areas under the CR?

I appreciate you taking the time to meet with me and I look forward to hearing back from you about these questions. As I mentioned my client currently has the property under agreement while he explores the development potential, however the Ch 40B option is the primary option he is considering at this time for this site.

Sincerely yours,

Isabella V. Choate

Garry Brian brought this to you. FYI

BK13615 PG339

*1719
14*

Conservation Restriction

DISC 8-72 PM 2:10 ZEDM: 11:00

husband & wife
Harold A. Buxton and Devana F. Buxton, of Acton, Middlesex County, Commonwealth of Massachusetts, for no consideration but as a gift grant to the Town of Acton, a municipal corporation of Middlesex County, Commonwealth of Massachusetts, (address of grantee: Town Hall, Acton, Massachusetts 01720) and its successors and assigns, with quitclaim covenances, a conservation restriction in perpetuity on the following described premises:

Three areas shown on a plan entitled "Compiled Plan of Land in Acton Owned by Harold A. & Devana Buxton" dated November 30, 1978 by the Town of Acton Engineering Department to be recorded herewith.

That area shown on said plan as Area 2 containing 29,958 sq. feet. Beginning at a point N 54-38-05W a distance 43.00 feet from a state highway bound on the southerly side of Great Road as shown on said plan, thence;

S 34-66W along a stone wall and land of C.B.C. Realty of Acton a distance of 197.50 feet, thence;

N 33-48-46W a distance of 176.49 feet, thence;
N 05-09-33E a distance of 66.34 feet, thence;
W 50-26-04E a distance of 80.00 feet, thence;

S 14-38-05E by Great Road a distance of 175.58 feet to the point of beginning.

Also those areas shown as Areas 3 and 4 on said plan containing a total of 13.26 acres more or less. Beginning at a point on the stone wall land of Elwood S. and Jean I. Wood, a distance of 137.43 feet from the southerly side of Great Road, thence;

S 21-48-46E a distance of 34.94 feet to a stone wall, thence;

E 50-55-40W along a stone wall and by land of Glenn W. Kiddy a distance of 152.23 feet, thence;

E 45-02-33E by land of Kiddy a total distance of 80.90 feet, thence;

13615 339

BK13615 P6340

S 16-17-41W a distance of 180.75 feet, thence;

S 34-12-00R a distance of 120.00 feet to a stone wall, thence;

S 35-38W along a stone wall and land of C.B.C. Realty of Acton a distance of 392.30 feet, thence;

S 35-16W along said wall and land of C.B.C. Realty a distance of 876.00 feet, thence;

S 89-25W along a stone wall and land of Town of Concord (Nagog Reservoir) a distance of 76.00 feet, thence;

N 34-21W along said land of Concord a distance of 468.00 feet to a corner in a stone wall, thence;

N 57-35E along a stone wall and land of Elwood S. And Joan E. Wood a distance of 392.00 feet, thence;

E 08-30W along said wall and land of Wood a distance of 167.00 feet, thence;

N 34-45E along said wall and land of Wood a distance of 227.00 feet, thence;

N 24-33E along said wall and land of Wood a distance of 282.00 feet, thence;

N 60-15E along said wall and land of Wood a distance of 176.00 feet, thence;

N 54-40E along said wall and land of Wood a distance of 380.57 feet to the point of beginning.

The terms of this Conservation Restriction are as follows:

- A. The Grantors, their successors and assigns shall neither perform nor permit others to perform any of the following:
 1. Construction or placing of any buildings, mobile homes, roads, signs, bill boards or other advertising, utilities or other structures on or above the ground;
 2. Dumping or placing of soil or other substance on the ground as landfill, or dumping or placing of trash, waste or unsightly or offensive material;
 3. Removal or destruction of trees, shrubs or other vegetation except for proper forestry and landscape practices including planting, cutting and pruning of trees, shrubs, and other vegetation, or to improve the scenic view and to implement disease prevention measures;

8K13615 PG341

- 4. Excavation, dredging or removal of loam, peat, gravel, soil, rock, or other mineral substance or natural deposit in such a manner as to affect the surface of said land;
- 5. Use of said land except for agricultural, forestry or outdoor recreational purposes permitting said land to remain predominantly in its natural condition;
- 6. Activities detrimental to drainage, flood control, water or soil conservation or erosion control; or
- 7. Other acts or uses detrimental to the preservation of said land in its present open and rural condition.

The foregoing restriction is authorized by G.L. c.184, ss.31-33, and is intended to retain said parcel predominantly in its natural, scenic and open condition, in order to protect the natural and watershed resources of said Town. The restriction shall be administered by the Board of Selectmen of said Town.

- B. The Conservation Restriction hereby conveyed shall not operate so grant to the Town or to the Inhabitants of the Town of Acton any right to enter onto said land except as follows:
 - 1. The Conservation Commission of said Town, established under Chapter 40A, §8C, of the Massachusetts General Laws as amended through one or more duly designated members, employees or agents, shall have the right to enter said land at reasonable times and in a reasonable manner, for the purposes of inspecting said land, insuring compliance with the terms of this Conservation Restriction and remedying any violations thereof;
 - 2. The Town and the public shall have an easement to pass and repass on foot upon said premises for the purpose of hiking, winter sports or nature study.
- C. This Conservation Restriction shall be binding upon and may be enforced against the Grantors, their successors, and assigns by the Inhabitants of the Town of Acton and its successors as holders of this Conservation Restriction.

BK13615 P6342

D. Notwithstanding the provisions of the foregoing, the placing by the Grantors or their successors and signs of a size not exceeding three feet by two feet on the premises conveyed for the purposes of indicating the ownership or said premises, and the restrictions on the use of said premises shall not be in violation of the terms of this Conservation Restriction.

Inasmuch as this Conservation Restriction is given as a gift no documentary stamps are needed for this instrument.

For title of Grantor see deed from Doris E. Sanders dated January 17, 1930 and recorded in Middlesex South Registry of Deeds, Book 7532, Page 410.

Witness the execution hereof under seal this 11th day of December, 1978.

Harold A. Burton
Harold A. Burton

Devens E. Burton
Devens E. Burton

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss,

December 11, 1978

Then personally appeared the above-named Harold A. Burton and Devens E. Burton and acknowledged the foregoing instrument to be their free act and deed, before me,

Christopher J. Farrell
Notary Public

My commission expires: Aug 20 1982



MIDDLESEX REG-OF DEEDS

11/99 11:54 FAX

BK13615 PG343

APPROVAL BY SELECTMEN

We, the undersigned Board of Selectmen of the town of Acton, hereby certify that we approve the receipt of the foregoing deed under G.L. c.30, s.3C, as it has been and may be amended, as requested by a vote of the Conservation Commission of the Town, for the protection of the natural and watershed resources of the Town.

Board of Selectmen

William F. [unclear]
George E. [unclear]
[unclear]
[unclear]

APPROVAL BY SECRETARY

The Secretary of Environmental Affairs of the Commonwealth of Massachusetts hereby certifies that she approves receipt of the within conservation restriction under G.L. c.184, s.32.

12/27/78
Dated

[Signature]
Secretary, Executive Offices
of Environmental Affairs