

McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 500
BOSTON, MASSACHUSETTS 02108
(617) 338-6464
FAX (617) 338-0737

MICHAEL J. O'NEILL, ESQ.
E-mail: moneill@mcgregorlaw.com
(617) 338-6464 ext. 125

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

February 14, 2019

Ebi Masalehdan
Westford Gateway, LLC
31 Progress Ave.
Tyngsboro, MA 01879

RE: Requirements for Town Meeting Vote to Amend Drew Gardens APR/ Response to Comments on McGregor & Legere January 18, 2017 Letter

Dear Mr. Masalehdan:

At your request, I am writing to respond to the question whether the Article on the March 23, 2019 Town Meeting Warrant to amend "APR3" on the Drew Gardens property requires a two-thirds rather than a simple majority vote of Town Meeting.

I am also writing to respond to comments written by Matthew Beaton, Secretary of the Executive Office of Energy and Environmental Affairs on March 23, 2017; Marilyn Gentry, Executive Director Massachusetts Land Trust Coalition, on February 24, 2017; and Memorandum by Jonathan Bockian, Esq., and others on February 10, 2017 (hereinafter "Comments" and "Memorandum"). These Comments and Memorandum purported to respond to the letter by Gregor I. McGregor of McGregor & Legere, P.C. (the "M & L Letter") dated January 18, 2017.

The Town Meeting Article to Amend APR 3 Requires a Simple Majority

Articles to amend APR3 were presented to and voted upon at two previous Town Meetings. In both cases, the Articles were presented as requiring a simple majority, not a two-thirds vote. This question has already been decided, twice, by the Moderator, Town Counsel, and the Town.

Town Counsel Gregg J. Corbo, of *Kopelman and Paige, P.C.*, wrote a five-page letter to the Selectmen dated June 13, 2016 before one of those votes, in which he concluded that the amendment to APR3 required a simple majority vote, not a two-thirds majority.



McGREGOR & LEGERE

Mr. Corbo discussed the background to the proposed amendment in his letter. On October 21, 1996, the Town voted to authorize the Selectmen to acquire the development rights to an agricultural preservation restriction over the period of three fiscal years on 8.97 acres on Boston Road known as Drew Farms, with "the remaining terms to be negotiated by the Board of Selectmen." Over the next three years the Board acquired the three APRs on the property, for which it paid \$125,000.00 each. APR1 and APR2 generally prohibit the use of the property for non-agricultural uses and APR3 generally prohibits the use of the property for non-agricultural purposes and allows continued use of an existing "country store" building. No State funds were used in the purchases of the APRs.

Mr. Corbo noted that, since the acquisition of the APRs, the property has been allowed to lie fallow for several years, and the "country store" building is vacant and in disrepair, such that they have become a blight on the surrounding neighborhood. He said that in 2015 Town officials were approached by a potential purchaser (you) who submitted a plan to reestablish the agricultural use, which plan is dependent on the ability to use a portion of the property for a farm-to-table restaurant. After consultation with Town officials and the Drew Farm Task Force, the Board of Selectmen found that the viability of the two parcels for sustained agricultural use was limited and use of one of the APR areas for a restaurant would have a positive effect on the public good and yield a substantial benefit to the agricultural resources of the Town.

Mr. Corbo concluded that the proposed amendment is not a "release" within the meaning of G.L. 184, sec. 32, and as such is not a disposition of the Town's interest in the land. He pointed out that, to the contrary, the Town expressly retains all of its rights under the three APRs, and the amendment to APR3 is specifically conditioned on the owner restoring the land of the two contiguous parcels to active agricultural use.

Mr. Corbo concluded that a two-thirds vote of Town Meeting is not required to authorize the Selectmen to amend APR3 because the proposed amendment is not a release of the APR.

Warrant Articles require a simple majority vote, unless a statute specifically requires a larger vote. *Massachusetts Practice, Massachusetts Law*, Douglas A. Randall and Douglas E. Franklin, Section 7.9 (2006) "Unless the law specifically requires a larger vote, the town meeting may act by majority vote." "Except as qualified by other statutes, a majority vote of a town is sufficient to grant an easement or convey any other interest in land." *Oliver v. Mattapoissett*, 17 Mass. App. Ct. 286, 288 (1983).

General Laws c. 39, sec. 15 sets forth specific requirements if a two-thirds [or larger] vote is "required by statute," including counting the votes and recording the count. The Town's Bylaws repeat this requirement for a count on matters "requiring a two-thirds vote by statute." Chapter 51.5 of the Town By-laws.

There is no statute specifically requiring a two-thirds vote to amend an APR. Consequently, a simple majority vote will suffice.



McGREGOR & LEGERE

Any argument that a two-thirds vote is required for any article dealing with real estate is defeated by the case of *Oliver v. Mattapoisett*, supra, in which the Appeals Court ruled that the town could vote to grant the easement at issue in that case by a simple majority.

Mr. Corbo said in his letter that he was not able to locate any case directly on point with the question presented here, and that litigation is possible with any matter of public interest, such as this. We agree.

The Comments Do Not Address Condition of the Property or Specifics of the M & L Letter

Comments to the M & L Letter include a March 23, 2017 letter from Matthew Beaton, Secretary of the Executive Office of Energy and Environmental Affairs. Secretary Beaton's letter reaffirmed the September 22, 2016 letter from John Lebeaux, Commissioner of the Massachusetts Department of Agriculture. The M & L Letter already answered and refuted the September 22, 2016 letter from Commissioner Lebeaux.

Comments to the M & L Letter also include a letter dated February 24, 2017 from Marilyn Gentry, Executive Director, Massachusetts Land Trust Coalition, attaching the Memorandum by Jonathan Bockian, Esq. and others, dated February 10, 2017.

The Warrant Article proposed for the March 23, 2019 Town Meeting is for a farm-to-table restaurant that is reduced in size from the previous Warrant Articles and eliminates the banquet facility entirely. The Comments include criticism of the size of the proposal which do not pertain to the current proposal. APR3 is different from APR1 and APR2.

Significantly, the Comments do not include any discussion or even show awareness of the current condition of the Drew Gardens property. For example, the September 22, 2016 letter from Commissioner Lebeaux says that the language of APR3 "maintains land in active agricultural use." None of the Drew Gardens property is in "active agricultural use," and has not been in such use for more than ten years.

The proposed Warrant Article provides that the proposed APR amendment is expressly conditioned upon the land covered by APR1 and APR 2 being maintained in agricultural use. It is necessary to enable agricultural use of the property.

The Comments do not recognize the facts on the ground. The Warrant Article to Amend APR3 is for the purpose of enabling and maintaining agricultural use of the Drew Garden property. The alternative is not maintenance of agricultural use, but no productive use of the property.



McGREGOR & LEGERE

Furthermore, the Comments do not rebut the M & L Letter. For example, the M & L Letter pointed out that APR3 is granted to the Town of Westford and is enforced by the Westford Board of Selectmen as they decide in their sole discretion. It includes the following:

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 decide. Nothing herein shall impose upon the Grantees any duty to maintain or require that the Premises be maintained in any form or condition, notwithstanding the Grantees' acceptance hereof.

The Memorandum ignores this entirely and instead cites, on page 2, the general proposition that the Attorney General has standing to enforce the laws of the Commonwealth. The Memorandum does not and cannot deny that APR3, by its terms, confers power to enforce it on the Town of Westford Board of Selectmen as they in their "sole discretion" decide.

Similarly, the M & L Letter cited a number of cases that held that the parties to an APR can bargain for rights in addition to the powers enumerated in G. L. c. 184, sec. 31. See, for example, *Bennet v. Commissioner of Food and Agriculture*, 411 Mass. 1 (1991). The Memorandum does not acknowledge this.

The M & L Letter cited numerous cases showing why the proposed amendment of APR3 is not a "release" of the APR. The Memorandum did not cite any cases to the contrary or explain why the cases cited in the M & L Letter are not controlling. The Memorandum simply said in conclusory fashion that an amendment which allows a previously prohibited structure is "plainly" a release. That begs the question and does not refute the M & L Letter.

The proposal is for a farm-to-table restaurant. The existence of a retail structure on a property is not inconsistent with agricultural use. *Prime v. Zoning Board of Appeals of Norwell*, 42 Mass. App. Ct. 796, 800 (1997).

The M & L Letter remains applicable, correct, and un rebutted.

Very truly yours,



Michael J. O'Neill