

LOUISON, COSTELLO, CONDON & PFAFF, LLP

ATTORNEYS AT LAW

101 SUMMER STREET  
BOSTON, MASSACHUSETTS 02110

DOUGLAS I. LOUISON\*  
PATRICK J. COSTELLO  
DAVID E. CONDON  
BRADFORD N. LOUISON\*\*  
STEPHEN C. PFAFF  
REGINA RYAN  
KATHLEEN E. CONNOLLY

TELEPHONE: (617) 439-0305  
FACSIMILE: (617) 439-0305  
www.lccplaw.com

JOSEPH A. PADOLSKY  
CHANTELLE D'ANGELO

\*ALSO ADMITTED IN MAINE  
\*ALSO ADMITTED IN RHODE ISLAND

July 7, 2015

VIA E-MAIL: [farmerhms@aol.com](mailto:farmerhms@aol.com)

H. Michael Smolak, Jr.  
Smolak Farms LLC  
315 South Bradford Street  
North Andover, MA 01845

**Re: Legal Advice re: Conservation Restriction and Allowed Uses of Property**

Dear Michael:

As I previously advised you, with respect to what activities may be allowed on your property located at 494 Ipswich Road, Boxford, Massachusetts, 01921, known as Small Oxx Farm, the activities are broadly-described in the Amended and Restated Conservation Restriction (CR) and in your forestry management plan. Under the CR, the allowed activities include agriculture, including cultivation and harvesting of vegetables and flowers, etc., razing and grazing of livestock and poultry, field expansion including clear cutting, provided that is not done in wetlands, creation of a farmstand, reconstruction of the dwelling provided it is on the same footprint, The property is further described in a deed to you from Janis Martha Bailey, Executrix under the will of Otis Edward Curtis, Jr., recorded as Document No. 443859 in the Southern Essex District Registry on august 13, 2004, as bounded and described as follows:

“Northerly by Ipswich Road 439 feet, Easterly and Northeasterly by Main Street 2,312.69 feet, Easterly 333.4 feet, Southerly 1,380.65 feet by land now or formerly of Myron E. Killam; and Westerly and Northwesterly by land now r formerly of Arvard P. Lyon 2, 523.90 feet.”

The property is subject to an Amended and Restated Conservation Restriction to the

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Town of Boxford recorded as Document 331944, recorded at the Southern Essex District Registry at Registration Book 69, Page 17057 on July 17, 1997. You have provided me with a Forest Management Plan prepared by Elizabeth McGuire of the USDA Westford Service Center, Massachusetts Association of Conservation Districts for the property located at 494 Ipswich Road, Boxford, MA 01921, identified as Assessors Map 17, Lot/Parcel 01-07, recorded at Deed Book 7561, Page 421, showing 41.5 acres, dated April 11, 2012, with plans prepared by Ruchard W. Kulis, TSP Forester, MA Foresters License No. 131, dated May 16, 2011.

You have informed me that you wish to clear-cut approximately 20 acres of the land for fields in accordance with a Natural Resources Conservation Service (NRCS) Plan, to have a farm stand, possibly to rebuild an existing house, to conduct forestry for the health of the forest land, and possibly to grow additional trees. You would like to know what restrictions may be posed by the Conservation Restriction.

The Amended and Restated Conservation Restriction form the previous owners to the Town of Boxford provides, in pertinent part:

“2. Prohibited Activities:

Constructing or placing of any buildings ... except as provided in Section 2c....

(g) Cutting, removal or destruction of trees, grasses, forbs, shrubs, or other vegetation; or

(h) Other acts or uses, which in the reasonable opinion of the Grantee are detrimental to the preservation of the Restriction Area consistent with the purpose of this Conservation Restriction.”

3. Reserved Rights. Notwithstanding anything contained in Paragraph 1 above, the Grantor reserves for himself and his successors and assigns, and others subject to prior approval and consent from the grantor, his successors and assigns, the right to conduct or permit the following activities on the Restriction Area:

(a) The right to conduct or permit for personal use of the Grantor and his successors agriculture, silviculture, horticulture and floriculture, as commonly construed and as restricted below, conducted in an ecologically sensitive manner, so as not to be

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detrimental to the Restriction Area, while recognizing that the existing fields have specific requirements for their productivity and with the intent of protecting the existing forest and wetlands. Such practices shall include but not be limited to:

(i) the cultivation and harvesting of vegetables, flowers, fruits, grasses, hay and legumes for private use or for the sale to the public, in accordance with recognized natural resource conservation and farm management practices. Any expansion of the existing 10 acres of farm fields shall not occur in any wetland, must be approved by the Grantee and shall be done in accordance with recognized natural resource conservation and farm management practices;

(ii) the planting, transplanting and cutting of forest products in the existing forested portion of the Restricted Area, for personal use but not for sale or commercial use...;

(iii) the cultivation, planting, transplanting, and harvesting of shrubs, bushes and trees but not for sale or commercial use;

(iv ) the raising and grazing of livestock and poultry...;

(v) with the prior written approval of the Grantee, which approval shall not be unreasonably withheld or delayed, the making of improvements, including the creation of a farm stand, sight pervious fencing and the maintenance and creation of water ponds and wells in the furtherance of the foregoing activities....

(b) The maintenance of the Restriction Area including, without limitation, the planting, selective cutting and pruning and periodic mulching with organic matter of trees, shrubs, or other vegetation to improve the scenic view and to implement disease prevention measures....

(c) The existing residential dwelling on the Restriction Area may be maintained , remodeled, expanded, or replaced within the limits of the existing foundation as a single family residence....”

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Based on the language of the CR, you will need to seek approval of the Grantee, that is the Town of Boxford, presumably through its Conservation Commission for all activities and certainly from the Conservation Commission for activities involving wetlands, for any clear-cutting, forestry or other agricultural activities, including the creation of a farm stand, but each of these activities is allowed under the CR, provided you conduct it in accordance with "recognized natural resource conservation and farm management practices," and that in the case of all farming activities except "the cultivation and harvesting of vegetables, flowers, fruits, grasses, hay and legumes," that is not be for sale or commercial use.

Massachusetts General Laws Chapter 128, § 1A provides definitions for "Farming" and "agriculture." Specifically, section 1A states:

'farming' or 'agriculture' shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

G.L. c. 128, §1A. Therefore, the language of the CR that purports to prohibit sale or commercial use is not only contrary to the intent of the Restriction to allow agriculture, but is contrary to state law which defines agriculture to include sale and commercial use, in fact agriculture is dependent on sale and commercial use to qualify as agriculture rather than simply personal gardening. Perhaps if we were to give any weight to the contrary language of the Restriction, it could be read to mean - where it provides that some of the agricultural uses may not be for "sale or commercial use" - that you may not lease the property to others for their sale or other commercial use, but rather may only cultivate and harvest for your own sale and commercial use under the definition of agriculture in Chapter 128, §1A. It can also be argued that that language prohibiting sale or commercial use is in conflict with state law and therefore void. The CR

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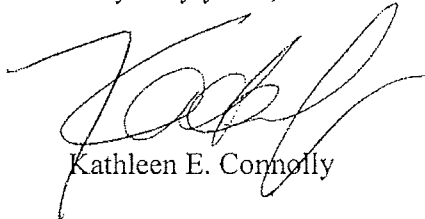
specifically allows agricultural uses in several provisions. Under the provision for reserved rights it allows various forms of agricultural involving harvesting and cultivating vegetables, flowers, etc., razing and grazing of livestock and poultry, establishing a farm stand, etc., and the expansion of fields (Reserved Rights 3.a.1) but then says that some of these uses may not be "for sale or commercial use." Thus, an argument can be made that all agricultural activities on the property can be for sale or commercial use (which are arguably the same). At the very least, the CR cannot be read to prohibit you personally from selling products grown on the property.

For example, you may more broadly sell (i.e. lease property for the sale of) items listed in (a)(i), but other agricultural activity must only be conducted by you and your farm, i.e. not be leased to others to conduct the agricultural uses. You may rebuild the single family residence on the property provided you do so within the same footprint without restriction. Further, the forest cutting plan will show more specifically what you are allowed to do with respect to forestry, clear cutting and field expansion.

Any review of the proposed uses that you intend must be done by the Conservation Commission and/or Agricultural Commission with the intent and purpose of the Conservation Restriction in mind; therefore, provided you conduct activities in accordance with your Forestry Management Plan and NRCS plan, there should be no basis for the town commissions to withhold approval."

Please free to contact me if you have further questions.

Very truly yours,



Kathleen E. Connolly

KEC

cc: Boxford Conservation Commission  
Kopelman and Paige, P.C., Town Counsel