



KOPELMAN AND PAIGE, P.C.

The Leader in Public Sector Law

101 Arch Street
Boston, MA 02110
T: 617.556.0007
F: 617.654.1735
www.k-plaw.com

July 30, 2015

Katharine Lord Klein
kklein@k-plaw.com

Conservation Commission
Boxford Town Hall
7A Spofford Road
Boxford, MA 01921

Re: Small Oxx Farm Conservation Restriction

Dear Members of the Conservation Commission:

You have requested an opinion regarding the Conservation Commission's discretion in considering the request of H. Michael Smolak, Jr. (the "Owner") to clear-cut 20 acres, more or less, of the approximately 41.5 acres of forested land on his 55 acre property known as Small Oxx Farm (the "Property"). The Property is subject to an Amended and Restated Conservation Restriction (the "Restriction"), conveyed to the Town, acting by and through its Conservation Commission, in 1978, as amended in 1997. The Property is further the subject of a Forest Management Plan, dated May 26, 2011 (the "Plan"). The Owner requested the opinion of his counsel, Louison, Costello, Condon & Pfaff, LLP, regarding his request, which is set forth in a letter to the Owner, dated July 7, 2015 (the "Letter").

In my opinion the Commission has broad latitude in evaluating the request of the Owner regarding clear-cutting of the forested portion of the Property. In my further opinion, despite the opinion given by the Owner's counsel, the Commission may deny the request of the Owner to clear-cut at the Property based upon the provisions of the Restriction.

The Restriction sets forth the intent of the grantor to preserve open space and conservation land in keeping with recognized Town planning. The Restriction states, in the recitations in Paragraph 1, that the land subject to the Restriction (the "Restricted Area") "has historically been maintained in agricultural and forestry use and contains open fields and upland forest, wetland and streams and is a distinctive Massachusetts landscape . . . embodying the special character of the region in which it is located." This language recognizes that the Restricted Area consists of both open space and forest land, and, in my opinion, the presence of both is an essential attribute of the Restricted Area.

Conservation Commission
July 30, 2015
Page 2

Paragraph 2 of the Restriction sets forth the prohibited activities, which include:

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

(h) Other acts or uses, which in the reasonable opinion of the [Commission] are *detrimental to the preservation of the Restriction Area consistent with the purposes of this Conservation Restriction.*
[Emphasis added]

Paragraph 3, however, sets forth certain rights reserved by the Owner of the Property, including:

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

[Emphasis added]

The Plan also addresses the preservation of the Property. In the section entitled "Property Overview, Regional Significance, and Management Summary," the Plan emphasizes, consistent with the Restriction, the importance of the presence of both open and forested lands on the Property. It states, "The aesthetic quality of the property is found in its rural land character, unique woodland

Conservation Commission
July 30, 2015
Page 3

highland plateaus, the adjacent extensive wetlands to the south, and the landscape of forested stands which originated from farmland and pasture abandonment.” The Plan identifies three (3) stands, and recommends, generally, light cutting, for the removal of diseased trees and to promote regeneration.

The Commission’s Discretion

Owner’s counsel agrees that approval of the Commission is clearly required for the proposed clear-cutting activity. This is evidenced in the limitation included in Paragraph 3(a)(i) of the Restriction as quoted above. The Restriction is not ambiguous in that the cutting, removal or destruction of trees is a prohibited activity. Restriction, Paragraph 2(g). Although Paragraph 3 provides for exceptions to the prohibition, in order for an exception to be invoked, the activity must be consistent with the overall objective of the Restriction. This goal is expressed, in part, at Paragraph 3(a) of the Restriction, as “protecting the existing forest and wetlands.” The Commission, in my opinion, may determine that altering the balance of open space and forest land in the significant manner proposed by the Owner is not consistent with the purposes of the Restriction, and so may deny the request of the Owner.

In my further opinion, contrary to that of the Owner’s counsel, the grantor of the Restriction may, and did, restrict the right to cut trees for commercial purposes at the Property. It is beyond dispute that an owner may relinquish rights relative to the use of property. This is the essence of a conservation restriction. The Owner’s counsel argues, incorrectly in my opinion, that the language of the Restriction prohibiting the commercial sale of forest products, is not only inconsistent with the definition of “agriculture,” as found at G.L. c. 128, §1A, but may also be “void” as contrary to state law. Letter, Page 4. Invocation of the definition of “agriculture” under state law as establishing the parameters of a property owner’s rights is, in my opinion, misplaced in this situation. Property owners may voluntarily cede rights, even if such rights are included in the statutory definition of the activity. The original grantor of the Restriction did just that by so clearly restricting the use of the Property. The intent of the Grantor as fully expressed in the Restriction makes clear that the Property is to be preserved in the manner as described in the Restriction. Notwithstanding the rights afforded under state law, the Grantor chose to further restrict the use of the Property and to grant to the Commission the ability to oversee that restriction.

The Commission’s role, in my opinion, is not merely to determine whether a proposed activity is generally permissible. Rather the Commission’s inquiry is governed by the plain language of the Restriction. The Commission has, in my opinion, broad discretion to decide if the proposed activity is consistent with the expressly stated objectives of the Restriction. In my opinion, the Commission may exercise that discretion and determine that significant clear-cutting at the Property is not consonant with those goals stated in the Restriction.

KOPELMAN AND PAIGE, P.C.

Conservation Commission
July 30, 2015
Page 4

Please do not hesitate to contact me or Attorney Mark Reich with questions regarding this matter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Katharine Lord Klein".

Katharine Lord Klein

KLK/lem
cc: Board of Selectmen

527527v4/BOXF/0001