

Cain Hibbard & Myers PC
Counselors at Law

66 West Street, Pittsfield, Massachusetts 01201-5764, 413-443-4771 Fax 413-443-7694
Direct Extension: 413-629-1304 email: fssmithers@cainhibbard.com

F. Sydney Smithers

April 3, 2013

Richard K. Sullivan, Jr., Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02144

Re: Williamstown Conservation Lands

Dear Secretary Sullivan:

This office represents Stratton Hills Condominium Association ("Stratton Hills"), an association of fifty-four (54) condominium unit owners in Williamstown, Berkshire County, Massachusetts. We write on behalf of Stratton Hills regarding a recent controversy over certain parcels of land, the so-called Lowry parcel, consisting of approximately 30 acres, and the so-called Burbank parcel, consisting of approximately 139 acres, both located in Williamstown.

Acquired by the Inhabitants of the Town of Williamstown in the 1950's (a copy of the Lowry deed is enclosed), the two parcels were placed into the care, custody and management and control of the Williamstown Conservation Commission by vote of town meeting on May 12, 1987 (the "1987 Vote"). A copy of the relevant warrant articles and minutes recording the vote on the parcels are enclosed. It is our opinion that, in 1987, the Conservation Commission acquired custody of the parcels for conservation purposes consistent with Article 97 of the Amendments to the Massachusetts Constitution.

The vital interests of Stratton Hills are implicated by the location and appurtenant rights of the Lowry parcel in that the Lowry parcel has, as its sole means of practical access, a fifty (50) foot wide easement encumbering the Stratton Hills Condominium land.

The Williamstown Affordable Housing Trust has recently announced its intention to use a ten and one-half (10.5) acre portion of the Lowry parcel for affordable housing purposes, which use is to be considered and voted upon at a special town meeting on April 24, 2013. In two separate opinion letters, Town Counsel Kopelman & Paige, P.C. has opined that Article 97 does not apply to the Lowry parcel. Copies of these opinion letters are enclosed.

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It is Stratton Hills' position that Article 97 does in fact apply, and the Lowry parcel cannot be used for affordable housing, or any other non-conservation purposes, without complying with the proper procedure for releasing land from its dedication as conservation land, including obtaining approval by two-thirds of the legislature. We seek your guidance in connection with our position on the matter in advance of the special town meeting.

Town Counsel takes the position that, because the Lowry parcel was not originally acquired for conservation purposes, but rather for school purposes, Article 97 is inapplicable. Despite the original purpose, the fact is that the parcel was placed in the care, custody and management and control of the Conservation Commission at a subsequent date. The intent of town meeting in 1987 was very clearly to place a restriction on the parcels for conservation and open space preservation purposes. M.G.L. ch. 184 § 31.¹

Stratton Hills relies upon both case law and your office's policy guidance regarding the applicability of Article 97 to these parcels. *Toro v. Mayor of Revere*, 9 Mass.App.Ct. 871 (1980) states, "If as alleged, the city council conveyed the land in question to the conservation commission (see G. L. c. 40, Section 3) to maintain and preserve it for the use of the public for conservation purposes (compare *Muir v. Leominster*, 2 Mass. App. Ct. 587, 591-592 [1974]), the later transfer by the city to a private party without compliance with the relevant statutory and constitutional provisions was unauthorized and illegal." The Court insisted on the applicability of Article 97, even though the land was first acquired by the city council and later transferred to the conservation commission.

The recent *Mahajan* case, cited by Town Counsel, concerned an assertion that land taken for urban renewal purposes merited Article 97 protection. The SJC posed the critical question to be answered as, "whether the land was taken for those purposes, or *subsequent to the taking was designated for those purposes* in a manner sufficient to invoke the protection of art. 97." (emphasis added) *Mahajan v. Dept. of Env. Protection*, 464 Mass. 604 (March 15, 2013).

Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005) is discussed extensively in *Mahajan*, and relied upon by Town Counsel. In that case, the parcel was in fact acquired initially as a tax taking. However, the flaw was not that there was a subsequent designation as conservation land, but rather, that a bona fide purchaser of the land had no knowledge that town meeting had taken a vote to designate the land as such. There is no case law or commentary to suggest that land originally acquired for one public purpose, but then subsequently properly designated for conservation purposes, would not still fall within the purview of Article 97 protection. Unlike *Hanson*, there is no question of a bona fide

¹ "A conservation restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition..."

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purchaser at issue with the Lowry parcel, because it is the Town itself which seeks to convert the use of the parcel, and the Town adopted the 1987 Vote, is on notice of that vote and is bound by its intention, notwithstanding that the 1987 Vote is not recorded at the Registry of Deeds.

As stated in *Mahajan*, "the ultimate use to which the land is put may provide the best evidence of the purposes of the taking." *Mahajan* at 620. Since the 1987 Vote to place the land in the custody of the Conservation Commission, the land has been used for open space and agricultural purposes. Indeed, the Conservation Commission has negotiated with Stratton Hills to create a public parking area on the condominium land for use of the Lowry parcel by members of the public for open space and conservation purposes. A local farmer currently hays 22 of the 30 acres for purposes of feeding his beef cattle, and has been doing so since 1991. The land yields about 4,200 bales of hay each year.

Should town meeting approve the conversion of 10 acres of the Lowry parcel to non-conservation purposes without following the appropriate procedure for the disposal of Article 97 lands, it is Stratton Hills' position that the vote will be in error. All options will be considered to prevent the parcel from being erroneously transferred for affordable housing purposes.

We respectfully ask that you confirm that the Lowry and Burbank parcels are in fact within the purview of Article 97 protection, so that all parties may be informed of the proper procedure required for the disposition of these 10 acres of the Lowry parcel.

Thank you in advance. Please feel free to contact me should you have any questions or would like to discuss this matter further.

Very truly yours,

CAIN HIBBARD & MYERS PC



F. Sydney Smithers

Enclosures

Cc: Gary Davis, General Counsel
Joel Bard, Esq.
Sarah Thurston (via email, w/o encl.)
Robert Scerbo (via email, w/o encl.)

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F. Sydney Smithers

April 3, 2013

Town of Williamstown Conservation Commission
Williamstown Municipal Building
31 North Street
Williamstown, MA 01267

Re: Williamstown Conservation Lands

Dear Dr. Art and Members of the Conservation Commission:

This office represents Stratton Hills Condominium Association ("Stratton Hills"), an association of fifty-four (54) condominium unit owners in Williamstown, Berkshire County, Massachusetts. We write on behalf of Stratton Hills regarding the recent controversy over the so-called Lowry parcel, consisting of approximately 30 acres, and the so-called Burbank parcel, consisting of approximately 139 acres. We understand you have sought clarification from Irene Del-Bono on the applicability of Article 97 of the Amendments to the Massachusetts Constitution to the parcels, and we write to offer our opinion on the question.

As you know, the parcels were acquired by the Town in the 1950's (a copy of the Lowry deed is enclosed), the two parcels were placed into the care, custody and management and control of the Williamstown Conservation Commission by vote of town meeting on May 12, 1987 (the "1987 Vote"). A copy of the relevant warrant articles and minutes recording the vote on the parcels are enclosed. It is our opinion that, in 1987, the Conservation Commission acquired custody of the parcels for conservation purposes consistent with Article 97.

The vital interests of Stratton Hills are implicated by the location and appurtenant rights of the Lowry parcel in that the Lowry parcel has, as its sole means of practical access, a fifty (50) foot wide easement encumbering the Stratton Hills Condominium land.

We understand that in two separate opinion letters, Town Counsel Kopelman & Paige, P.C. has opined that Article 97 does not apply to the Lowry parcel. We thank you for seeking guidance from the Commonwealth Executive Office of Energy and Environmental Affairs before relying solely on these opinion letters. In the event that you do not receive this guidance in advance of the Special Town Meeting on April 24, we ask that the Commission

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be guided by the clear intent of the 1987 Vote, and insist upon the proper procedure for disposing of Article 97 lands.

It is Stratton Hills' position that Article 97 does in fact apply to the land, and the Lowry parcel cannot be used for affordable housing, or any other non-conservation purposes, without complying with the proper procedure for releasing land from its dedication as conservation land, including obtaining approval by two-thirds of the legislature.

Town Counsel takes the position that, because the Lowry parcel was not originally acquired for conservation purposes, but rather for school purposes, Article 97 is inapplicable. Despite the original purpose, the fact is that the parcel was placed in the care, custody and management and control of the Conservation Commission at a subsequent date. The intent of town meeting in 1987 was very clearly to place a restriction on the parcels for conservation and open space preservation purposes. M.G.L. ch. 184 § 31.¹

Stratton Hills relies upon both case law and the Executive Office of Energy and Environmental Affairs' policy guidance regarding the applicability of Article 97 to these parcels. *Toro v. Mayor of Revere*, 9 Mass.App.Ct. 871 (1980) states, "If as alleged, the city council conveyed the land in question to the conservation commission (see G. L. c. 40, Section 3) to maintain and preserve it for the use of the public for conservation purposes (compare *Muir v. Leominster*, 2 Mass. App. Ct. 587, 591-592 [1974]), the later transfer by the city to a private party without compliance with the relevant statutory and constitutional provisions was unauthorized and illegal." The Court insisted on the applicability of Article 97, even though the land was first acquired by the city council and later transferred to the conservation commission.

The recent *Mahajan* case, cited by Town Counsel, concerned an assertion that land taken for urban renewal purposes merited Article 97 protection. The Supreme Judicial Court posed the critical question to be answered as, "whether the land was taken for those purposes, or *subsequent to the taking was designated for those purposes* in a manner sufficient to invoke the protection of art. 97." (emphasis added) *Mahajan v. Dept. of Env. Protection*, 464 Mass. 604 (March 15, 2013).

Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005) is discussed extensively in *Mahajan*, and relied upon by Town Counsel. In that case, the parcel was in fact acquired initially as a tax taking. However, the flaw was not that there was a subsequent designation as conservation land, but rather, that a bona fide purchaser of the land had no knowledge that town meeting had taken a vote to designate the land as such. There is no

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case law or commentary to suggest that land originally acquired for one public purpose, but then subsequently properly designated for conservation purposes, would not still fall within the purview of Article 97 protection. Unlike *Hanson*, there is no question of a bona fide purchaser at issue with the Lowry parcel, because it is the Town itself which seeks to convert the use of the parcel, and the Town adopted the 1987 Vote, is on notice of that vote and is bound by its intention, notwithstanding that the 1987 Vote is not recorded at the Registry of Deeds.

As stated in *Mahajan*, "the ultimate use to which the land is put may provide the best evidence of the purposes of the taking." *Mahajan* at 620. Since the 1987 Vote to place the land in the custody of the Conservation Commission, the land has been used for open space and agricultural purposes. Indeed, the Conservation Commission has negotiated with Stratton Hills to create a public parking area on the condominium land for use of the Lowry parcel by members of the public for open space and conservation purposes. A local farmer currently hays 22 of the 30 acres for purposes of feeding his beef cattle, and has been doing so since 1991. The land yields about 4,200 bales of hay each year.

Before any disposal of the Lowry property may occur, the Conservation Commission must unanimously declare the land as surplus in accordance with Article 97. Should town meeting approve the conversion of 10 acres of the Lowry parcel to non-conservation purposes before proper consideration by the Conservation Commission, it is Stratton Hills' position that the vote will be in error. All options will be considered to prevent the parcel from being erroneously transferred for affordable housing purposes.

Please feel free to contact me if you wish to discuss this matter further.

Very truly yours,

CAIN HIBBARD & MYERS PC



F. Sydney Smithers

Enclosures

Cc: Joel Bard, Esq.
Sarah Thurston (via email, w/o encl.)
Robert Scerbo (via email, w/o encl.)

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April 3, 2013

Hon. David Rempell and
Members of the Board of Selectmen
Williamstown Municipal Building
31 North Street
Williamstown, MA 01267

Re: Williamstown Conservation Lands

Dear Chair Rempell and Members of the Board of Selectmen:

This office represents Stratton Hills Condominium Association ("Stratton Hills"), an association of fifty-four (54) condominium unit owners in Williamstown, Berkshire County, Massachusetts. We write on behalf of Stratton Hills regarding the recent controversy over the so-called Lowry parcel, consisting of approximately 30 acres, and the so-called Burbank parcel, consisting of approximately 139 acres.

As you know, the parcels were acquired by the Town in the 1950's (a copy of the Lowry deed is enclosed), the two parcels were placed into the care, custody and management and control of the Williamstown Conservation Commission by vote of town meeting on May 12, 1987 (the "1987 Vote"). A copy of the relevant warrant articles and minutes recording the vote on the parcels are enclosed. It is our opinion that, in 1987, the Conservation Commission acquired custody of the parcels for conservation purposes consistent with Article 97 of the Amendments to the Massachusetts Constitution.

The vital interests of Stratton Hills are implicated by the location and appurtenant rights of the Lowry parcel in that the Lowry parcel has, as its sole means of practical access, a fifty (50) foot wide easement encumbering the Stratton Hills Condominium land.

We understand that you are relying upon two separate Town Counsel opinion letters, in which Town Counsel Kopelman & Paige, P.C. has opined that Article 97 does not apply to the Lowry parcel.

It is Stratton Hills' position that Article 97 does in fact apply, and the Lowry parcel cannot be used for affordable housing, or any other non-conservation purposes, without complying

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with the proper procedure for releasing land from its dedication as conservation land, including obtaining approval by two-thirds of the legislature.

Town Counsel takes the position that, because the Lowry parcel was not originally acquired for conservation purposes, but rather for school purposes, Article 97 is inapplicable. Despite the original purpose, the fact is that the parcel was placed in the care, custody and management and control of the Conservation Commission at a subsequent date. The intent of town meeting in 1987 was very clearly to place a restriction on the parcels for conservation and open space preservation purposes. M.G.L. ch. 184 § 31.¹

Stratton Hills relies upon both case law and the Executive Office of Energy and Environmental Affairs' policy guidance regarding the applicability of Article 97 to these parcels. *Toro v. Mayor of Revere*, 9 Mass.App.Ct. 871 (1980) states, "If as alleged, the city council conveyed the land in question to the conservation commission (see G. L. c. 40, Section 3) to maintain and preserve it for the use of the public for conservation purposes (compare *Muir v. Leominster*, 2 Mass. App. Ct. 587, 591-592 [1974]), the later transfer by the city to a private party without compliance with the relevant statutory and constitutional provisions was unauthorized and illegal." The Court insisted on the applicability of Article 97, even though the land was first acquired by the city council and later transferred to the conservation commission.

The recent *Mahajan* case, cited by Town Counsel, concerned an assertion that land taken for urban renewal purposes merited Article 97 protection. The Supreme Judicial Court posed the critical question to be answered as, "whether the land was taken for those purposes, or *subsequent to the taking was designated for those purposes* in a manner sufficient to invoke the protection of art. 97." (emphasis added) *Mahajan v. Dept. of Env. Protection*, 464 Mass. 604 (March 15, 2013).

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and is bound by its intention, notwithstanding that the 1987 Vote is not recorded at the Registry of Deeds.

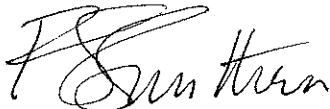
As stated in *Mahajan*, "the ultimate use to which the land is put may provide the best evidence of the purposes of the taking." *Mahajan* at 620. Since the 1987 Vote to place the land in the custody of the Conservation Commission, the land has been used for open space and agricultural purposes. Indeed, the Conservation Commission has negotiated with Stratton Hills to create a public parking area on the condominium land for use of the Lowry parcel by members of the public for open space and conservation purposes. A local farmer currently hays 22 of the 30 acres for purposes of feeding his beef cattle, and has been doing so since 1991. The land yields about 4,200 bales of hay each year.

We insist that you ensure that the Town adheres to the proper procedure for the disposal of surplus land under Article 97 protection. Before any such disposal may occur, the Conservation Commission must unanimously declare the land as surplus, followed by a two-thirds vote of town meeting and a two-thirds vote of the state legislature. Should town meeting approve the conversion of 10 acres of the Lowry parcel to non-conservation purposes without following the appropriate procedure for the disposal of Article 97 lands, it is Stratton Hills' position that the conversion will be in error. All options will be considered to prevent the parcel from being erroneously transferred for affordable housing purposes.

Please feel free to contact me if you wish to discuss this matter further.

Very truly yours,

CAIN HIBBARD & MYERS PC



F. Sydney Smithers

Enclosures

Cc: Peter Fohlin, Town Manager
Joel Bard, Esq.
Irene Del Bono
Sarah Thurston (via email, w/o encl.)
Robert Scerbo (via email, w/o encl.)

Stratton Road as shown on a plan entitled "Plan Showing Land to be Conveyed to The Inhabitants of Williamstown, Mass. by Floyd P. Lowry" from the office of Gordon E. Ainsworth, dated February, 1956, which plan is to be filed in the Northern Berkshire Registry of Deeds, and to which plan reference is hereby made; said land being more particularly bounded and described as follows:

Beginning at a point in the westerly line of said Stratton Road at the northeast corner of land of one, Roberts, said point of beginning being South $21^{\circ}39'30''$ West 31.07 feet from a Town highway bound;

thence North $68^{\circ}21'50''$ West 200.29 feet along the northerly line of land of said Roberts to a point marked by a half-inch iron pipe;

thence South $63^{\circ}37'00''$ West 333.87 feet to a point;

thence South $18^{\circ}31'50''$ West 375 feet to a point;

thence South $78^{\circ}52'50''$ West 245.60 feet to a point;

thence South $16^{\circ}36'30''$ West 488.22 feet to a point;

thence South $70^{\circ}32'40''$ East 71.63 feet to a point;

thence South $14^{\circ}42'20''$ West 700.60 feet to a point;

thence North $75^{\circ}17'40''$ West 450.00 feet to a point;

thence North $14^{\circ}42'20''$ East 738.00 feet to a point;

thence North $70^{\circ}32'40''$ West 151.90 feet to a concrete bound;

thence South $70^{\circ}58'50''$ West 214.77 feet to a point;

thence North $25^{\circ}34'00''$ West 206.30 feet to a point;

thence North $10^{\circ}36'00''$ East 179.71 feet to a point;

thence North $42^{\circ}03'20''$ East 167.37 feet to a point;

thence North $28^{\circ}04'40''$ East 275.97 feet to a point;

thence North $47^{\circ}02'40''$ East 247.03 feet to a point;

thence North $35^{\circ}34'00''$ East 341.91 feet to a point;

thence South $88^{\circ}30'10''$ East 14.55 feet to a point;

thence South $68^{\circ}10'35''$ East 456.68 feet to a point;

thence South $25^{\circ}35'20''$ East 210.12 feet to a point;

thence North $58^{\circ}29'20''$ East 391.86 feet to a point;

thence South $68^{\circ}21'50''$ East 310.00 feet to a point in the westerly line of Stratton Road;

thence South $21^{\circ}39'30''$ West 43.93 feet along the westerly line of said Stratton Road to a highway bound;

thence South $21^{\circ}39'30''$ West 31.07 feet to the point and place of beginning.

There is further conveyed as appurtenant to the above described premises, the right to use in common with the grantor, his heirs and assigns, for the purposes of ingress and egress, a strip of land bounded and described as follows:

Beginning at a point in the westerly line of said Stratton Road, located 11.04 feet South $17^{\circ}09'30''$ West of a concrete highway bound #13,

thence North $70^{\circ}32'40''$ West 550.90 feet to a point;

thence South $14^{\circ}42'20''$ West 50.17 feet to a point;

thence South $70^{\circ}32'40''$ East 548.76 feet to a point in the westerly line of said Stratton Road;

thence North $17^{\circ}09'30''$ East 50.04 feet to the point and place of beginning.

NOT 51756 - to Ruthann Deed of Rachel Lowry Rosenberg, re-
corded in the Northern Berkshire Registry of Deeds, in Book 415,
Page 271.

I, RUTH A. LOWRY, wife of said grantor; release to said grantee
all rights of dower and homestead and other interests in the granted premises

WITNESS our hands and seals this 11th day of June, 1956

In the presence of:

O. Dixon Marshall

Floyd P. Lowry
Ruth A. Lowry

COMMONWEALTH OF MASSACHUSETTS

Berkshire, ss.

Williamstown, June 11th 1956

Then personally appeared the above-named FLOYD P. LOWRY and
acknowledged the foregoing instrument to be his free act and deed, before me
S. Revenue Stamps in the sum of \$ 31.94
affixed and cancelled on this instrument.

Mass. Deed Excise Stamps in the sum of
\$ 32.25 affixed and cancelled on this
instrument.

O. Dixon Marshall
Notary Public

My commission expires March 12, 1960.

Received & entered for record June 12, 1956 at 1h 09m P.M.

ADAMS CO-OPERATIVE BANK of Adams, Massachusetts, holder ^{by assignment} of a mortgage from
Henry J. Breault and Alice Breault

The First National Bank of Adams
to Adams Co-operative Bank dated August 24, 1955

recorded with Northern Berkshire Registry of Deeds, Book 505 Page 462

acknowledges satisfaction of the same

In witness whereof, the said Adams Co-operative Bank has caused its corporate seal
to be hereunto affixed and these presents to be signed, acknowledged and delivered in its name and behalf by
HARRY J. SHELDON, its Treasurer, this 12th day of June A. D. 1956

Signed and sealed in presence of

Arleigh A. Rancourt

ADAMS CO-OPERATIVE BANK
Adams, Massachusetts

By

Harry J. Sheldon
Treasurer



Annual Town Mtg 5/12/87

Article 20. To see whether or not the entire Town of Williamstown shall be included in the Fire District of the Town of Williamstown, or take any other action in relation thereto.

Article 21. To see if the Town will vote to exclude members of the Prudential Committee of the Williamstown Fire District from being members of the Gale Hose Company, or take any other action in relation thereto.

Article 22. To see if the Town will vote to exclude the Fire Chief of the Williamstown Fire District from membership in the Gale Hose Company while in Office, or take any other action in relation thereto.

Article 23. To see if the Town will vote to have the first, second, third and fourth engineers, as well as the Foreman(s) of the Williamstown Fire District appointed by the Fire Chief of the Fire District and to exclude them from membership in the Gale Hose Company while in office, or take any other action in relation thereto.

Article 24. To see if the Town will vote to accept the provisions of Chapter 71, Section 71F of the Laws of the Commonwealth of Massachusetts, or take any other action in relation thereto.

Article 25. To see if the Town of Williamstown will vote to transfer to the care, custody, and management and control of the Conservation Commission for all purposes included in G.L. Ch. 40, Section 8C as it now reads or may hereafter be amended the following parcels of land:

1. The so-called Lowry Property consisting of approximately 30 acres conveyed by Floyd P. Lowry to the Inhabitants of the Town of Williamstown by deed recorded at the Northern Berkshire Registry of Deeds: Book 521, Page 79.
2. The so-called Stone Hill Lot consisting of approximately 54 acres conveyed by Charles Denison Crockett to the Inhabitants of the Town of Williamstown by deed recorded at the Northern Berkshire Registry of Deeds: Book 434, Page 518.
3. The so-called Burbank Property consisting of approximately 139 acres, owned by the Inhabitants of the Town of Williamstown, and registered and recorded in Land Court Records April 17, 1961: Doc. #2276 Ctf. #783 and shown as lots 1, 2, 3, and 4 on a plan drawn by G.E. Ainsworth, Surveyor, dated April 1954, as modified and approved by the Land Court, or take any other action in relation thereto.

Article 26. To see if the Town will vote to raise and appropriate, or appropriate from available funds, the sum of \$70,267.00, or any other sum, to be used to reduce the tax rate, or take any other action in relation thereto.

Article 27. To see if the Town will vote to adopt the following amendments to the Williamstown Zoning By-Law as recommended by the Planning Board.

1. Section V.D. 4. (Page 14):

DELETE the following wording from the last sentence of the first paragraph: "issuance of a special permit and".

2. Accessory Scientific Uses:

AMEND Section V.K.5. (Page 29) which now reads as follows:

In all Districts, activities accessory to activities otherwise permitted as a matter of right, which activities are necessary in connection with scientific research or scientific development or related production, whether or not on the same parcel as activities permitted as a matter of right, subject to Board of Appeals approval as provided in Section VIII, after submission of a site plan in accord with the provisions of Section VI.F., provided that the provisions of disposal of waste products is approved by the Board of Health and parking is provided as required in Section VI.D.

to read as follows:

In Limited Industrial Districts, accessory uses whether or not on the same parcel as the principal use, provided the principal use is permitted as a matter of right and is necessary in connection

Article 7. The Finance Committee Chairman moved, and it was seconded, the Town vote to raise and appropriate from taxation the sum of \$76,167.00 to establish an Enterprise Fund for Landfill Service.

Following a short discussion, the Moderator declared the article passed by unanimous voice vote.

Article 8. The Finance Committee Chairman moved, and it was seconded, the Town vote to approve a sanitary sewer rate of \$1.64 per 100 cubic feet of water, as fixed by the Board of Selectmen at their meeting of April 24, 1987, to be effective for Fiscal Year 1988 and simultaneously direct the Hoosac Water Quality District to immediately eliminate infiltration on the transmission line from North Adams in order to reduce the rate of \$1.26 per 100 cubic feet of water for Fiscal Year 1989.

Following a discussion, an amendment was made, and seconded, to change the wording to "to reduce the rate to \$1.26 per 100 cubic feet of water for Fiscal Year 1989."

Upon hearing voice vote, the Moderator declared the amendment passed unanimously.

The Moderator then returned to the original article with the amendment and declared the article passed by voice vote, following a short discussion.

At this point, it was moved by the Chairman of the Board of Selectmen, and seconded, that Article 25 be moved up to this time for consideration.

Upon hearing voice vote, the Moderator declared the request granted and Article 25 was read and acted upon.

The Moderator admonished the residents that No. 1 (Lowry Property) needed two thirds vote to pass and Nos. 2 (Stone Hill) and 3 (Burbank Property) simple majority.

At this point, an amendment from the floor was moved, and seconded, to divide Article 25 into two parts. As voice vote was not clear, the Moderator declared the division of the article passed by a count of 198 yes, 185 no.

Following a lengthy discussion, the Lowry property portion was transferred to the care, custody, management and control of the Conservation Commission for all purposes included in G.L. Chapter 40, Section 8C as it now reads or may hereafter be amended. The standing vote was 311 yes, 92 no.

There ensued another lengthy discussion on the remaining two properties; so-called Stone Hill lot consisting of approximately 54 acres conveyed by Charles Denison Crockett to the Inhabitants of the Town of Williamstown by deed recorded at the Northern Berkshire Registry of Deeds: Book 434, Page 518; and the so-called Burbank Property consisting of approximately 139 acres, owned by the Inhabitants of the Town of Williamstown, and registered and recorded in Land Court Records April 17, 1961: Doc. #2276 Ctf. #783 and shown as lots 1, 2, 3 and 4 on a plan drawn by G.E. Ainsworth, Surveyor, dated April 1954, as modified and approved by the Land Court.

The Moderator declared these two parcels transferred to the care, custody, management and control of the Conservation Commission for all purposes included in G.L. Chapter 40, Section 8C as it now reads or may hereafter be amended. The standing vote was 293 yes, 87 no.

At this time the Moderator returned to Article 9.

Article 9. The Moderator stated he would expedite the proceedings of this article by reading each line item and, if there was a question on any line item, to say "question" or "hold" and a vote for each group and questioned item would be taken as they appear in the Warrant. Having voted on several motions by the Chairman of the Finance Committee, properly seconded, the Moderator declared the following appropriations carried:

EXECUTIVE

Item No.	Fiscal Year 7/1/87 to 6/30/88
1 Selectmen	\$ 2,450.00
2 Town Manager	102,954.00
Out of state travel	1,200.00
3 Insurance	120,600.00
Total	\$ 227,204.00

* \$9,200.00 from Estimated Water receipts
5,500.00 from Estimated Sewer Receipts



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November 20, 2012



Joel B. Bard
jbard@k-plaw.com

Mr. Peter L. Fohlin
Town Manager
Williamstown Municipal Building
31 North Street
Williamstown, MA 01267

Re: Lowry Property

Dear Mr. Fohlin:

You have requested an opinion as to how the Town may use the so-called "Lowry Property" (the "Property") for affordable housing purposes. You forwarded copies of the relevant Town Meeting votes. The Property was acquired by the Town in 1955-1956 for school purposes. By the vote taken under Article 25 of the 1987 Annual Town Meeting, the Property was transferred to the custody of the Conservation Commission for the purposes set forth in G.L. c. 40, §8C.

In order to use the Property for affordable housing purposes, two steps must be taken: First, the Conservation Commission must vote that it no longer needs the Property for conservation purposes and that it is surplus property. Suggested wording for the surplus vote to be taken by the Conservation Commission is attached. Second, Town Meeting must vote to transfer the property from the Conservation Commission for conservation purposes to the Board of Selectmen for affordable housing purposes (or general municipal purposes). Unless the Town has accepted the provisions of the last paragraph of G.L. c. 40, §15A, the vote to transfer the Property must pass by a two-thirds majority. While the vote of the Conservation Commission can occur before or after the Town Meeting vote, I recommend that the Conservation Commission make its determination prior to Town Meeting.

In terms of preparing a warrant article, you may want to consider the following issues:

1. How much flexibility does the Town intend to retain with regard to the use of the Property? The warrant article could specify affordable housing as the sole use of the Property, in which case the Town will not be able to use the Property for any other purpose without another two-thirds vote of Town Meeting. Alternatively, the Town Meeting warrant article could state that the Property is being transferred for general municipal purposes (including affordable housing), in which case the Property could be used for any purpose as the Selectmen deem appropriate without any further Town Meeting vote. Such a vote would require a 2/3 majority, even if the Town has accepted c.40/15A, last sentence;

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Town Manager
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2. How does the Town anticipate developing the Property for affordable housing? Does the Town intend to construct such housing itself? If so, the Town may seek an appropriation of funds from Town Meeting, either now or later. If the Town does not intend to construct the housing itself, the Town could convey the Property to the Affordable Housing Trust, or to a third party who will develop the Property for affordable housing purposes. If a conveyance is contemplated, I recommend that the Town Meeting vote authorize the Selectmen to convey the Property. It is not unusual for such properties to be conveyed for less than their fair market value, as the buyer/tenant will undertake the construction at its own expense; accordingly, the attached sample article authorizes the conveyance of the Property for nominal consideration (which can readily be changed, of course). Also, I assume that the Town would want to convey the Property subject to an affordable housing restriction, in which case Town Meeting should vote to authorize the Board of Selectmen to accept such a restriction. Alternatively, the Town may simply vote to transfer the Property at the moment, with any decisions on conveyance to occur at a later Town Meeting.

We have prepared versions of warrant articles that the Town may use, depending on the answers to the aforementioned questions.

As we discussed, it is our opinion that neither the transfer of the Property from the Conservation Commission nor the conveyance of the Property requires the approval of the General Court under Article 97 of the Massachusetts Constitution. The protections of Article 97 only apply to land that was originally acquired for an Article 97 purpose (for example, for conservation, recreation, water supply protection, among others). Here, the Town originally acquired the Property for school purposes. As such, Article 97 does not apply to the Property and a 2/3rds vote of the Legislature is not required to change the use of or to convey an interest in the Property.

Lastly, I recommend you confirm the deed reference to the Lowry property. The 1987 Town Meeting vote refers to a deed at Book 521, Page 79. The deed is not available at the Registry's on-line records. The deed should also be reviewed to ensure it does not contain any restrictions on the use of the Property.

Very truly yours,



Joel B. Bard

JBB/ckb
Enc.

LOWRY PROPERTY

SURPLUS VOTE

Surplus Vote of the Conservation Commission

The Williamstown Conservation Commission hereby declares that the so-called Lowry property, containing 30 acres, more or less, and described in a deed recorded with the Berkshire North District Registry of Deeds in Book 521, Page 79, currently held by it for the purposes set forth in G.L. 40, §8C, is no longer needed by the Town for such purposes and that said property may be transferred by Town Meeting.

TOWN MEETING WARRANT ARTICLES

Transfer for General Municipal Purposes

To see if the Town will vote to transfer from the Conservation Commission for the purposes set forth in G.L. 40, §8C to the Board of Selectmen for general municipal purposes, including, without limitation, for affordable housing purposes, the care, custody and control of the so-called Lowry property, containing 30 acres, more or less, and described in a deed recorded with the Berkshire North District Registry of Deeds in Book 521, Page 79 *[please confirm the deed reference]*; or take any other action in relation thereto

Transfer for Affordable Housing Purposes

To see if the Town will vote to transfer from the Conservation Commission for the purposes set forth in G.L. 40, §8C to the Board of Selectmen for affordable housing purposes, the care, custody and control of the so-called Lowry property, containing 30 acres, more or less, and described in a deed recorded with the Berkshire North District Registry of Deeds in Book 521, Page 79 *[please confirm the deed reference]*; or take any other action in relation thereto

Transfer and Authorize Conveyance

To see if the Town will vote to transfer from the Conservation Commission for the purposes set forth in G.L. 40, §8C to the Board of Selectmen for *[choose one: affordable housing purposes / general municipal purposes, including, without limitation, for affordable housing purposes]*, the care, custody and control of the so-called Lowry property, containing 30 acres, more or less, and described in a deed recorded with the Berkshire North District Registry of Deeds in Book 521, Page 79 *[please confirm the deed reference]*, and, further, to authorize the Board of Selectmen to convey or lease, for a term of up to ninety-nine (99) years, all or a portion of said property for affordable housing purposes, on such terms and conditions, and for such consideration, *[if appropriate: which may be nominal consideration]*, as the Board of Selectmen deems appropriate, and authorize the Selectmen to accept, on behalf of the Town, an affordable housing restriction on said property, or take any other action in relation thereto.



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March 25, 2013

Joel B. Bard
jbard@k-plaw.com

Hon. David Rempell and
Members of the Board of Selectmen
Williamstown Municipal Building
31 North Street
Williamstown, MA 01267

Re: Lowry property and the Article 97 Questions

Dear Members of the Board of Selectmen:

I understand that there continue to be questions as to whether the Lowry property (the Property) is subject to the provisions of Article 97 of the Amendments to the Massachusetts Constitution (Article 97). The acquisition of the Property was discussed and authorized under two 1955 Town Meeting votes. Article 14 of the 1955 Special Town Meeting, captioned "school land purchase," appropriated funds for "preliminary drawings and plans for additional school sites to be located on the Frank Lowry farm or at any suitable site," while Article 15 of the same Town Meeting, captioned "Purchase Additional School Land," appropriated funds to purchase the Property or any other suitable site. The Property was acquired in 1956 by the Town by deed of Floyd P. Lowry and recorded with the Berkshire North District Registry of Deeds in Book 521, Page 79. The deed recites no purpose for the acquisition. By a vote taken under Article 25 of the 1987 Annual Town Meeting, the Property was transferred to the Conservation Commission "for all purposes included in G.L. c. 40, Section 8C."

Article 97, adopted on November 7, 1972, provides, in part, that: "The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court" (emphasis added).

In my opinion, the Property is not subject to the provisions of Article 97 because it was not originally "taken or acquired" for a purpose protected under Article 97. By the terms of the 1955 Special Town Meeting votes, the Town acquired the Property for school purposes which, in my opinion, is not an Article 97 protected use. It is my further opinion that the transfer of the Property to the Conservation Commission in 1987 by Town Meeting did not make the Property subject to Article 97, as the Town was not "acquiring" the Property for an Article 97 purpose.

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Earlier this month, the Supreme Judicial Court re-emphasized this very point. In Mahajan v. DEP, 464 Mass. 604 (March 15, 2013), the court was asked whether a certain parcel of land which had been taken by eminent domain for urban renewal purposes was protected by Article 97. The court began its inquiry by asking, "... whether the project site, which the BRA took by eminent domain in 1970, was "taken" for art. 97 purposes." The court followed with a citation to the case which has guided the analysis of this issue, stating, "See *Selectmen of Hanson v. Lindsay*, 444 Mass. 502, 504-506 (2005) (in order for art. 97 vote requirement to apply, land must have been taken or acquired for art. 97 purposes)." (slip opin. at 3). The court returns to the Hanson v. Lindsay case many times in Mahajan. On page 4, the court states, "In *Selectmen of Hanson v. Lindsay*, *supra*, we held that a town meeting vote to designate for conservation purposes land that had originally been taken for tax purposes did not subject that land to art. 97 protections absent recordation of a restriction on the title." The facts in Hanson v. Lindsay are the same as the facts for the Lowry property: property acquired for one purpose and subsequently designated for conservation purposes.

Our firm represented the Town of Hanson in the Lindsay case. The Town was hoping for the opposite outcome, but the court was clear in its ruling. By chance, the SJC has now, very recently, reaffirmed the clear principle that land acquired for a "non-Article 97" purpose and subsequently transferred to an Article 97 purpose is not governed by Article 97. It is my opinion that the Lowry property was acquired for a school purpose, which is not an Article 97 purposes. It is my further opinion that the 1987 Town Meeting vote transferring the Property to the Conservation Commission was not sufficient to bring the Property within the protections of Article 97.

Very truly yours,



Joel B. Bard

JBB/ckb

cc: Town Manager
Conservation Commission
Planning Board
Affordable Housing Committee
Agricultural Committee
Irene Del Bono (by email)