



November 13, 2009

Lee Whitcomb, Chair  
Conway Board of Assessors  
P.O. Box 240  
Conway, MA 01341-0240

Re: Restrictions on Real Property  
Our File No. 2009-1302

Dear Ms. Whitcomb:

You have requested our opinion on the legal effect on certain restrictions imposed on a nine acre parcel of land retained by the grantors in a 1979 conveyance of a contiguous one acre house lot broken off from what had been a ten acre parcel acquired by the grantors in 1974. The 1979 deed gave the grantee of the one acre house lot a right of first refusal to acquire the retained nine acres "in the event of any disposition of all or any of said property at any time and on such terms as may pertain to any future disposition of all or any of said adjoining property." Moreover, the 1979 deed, a copy of which you supplied, "conveyed for the benefit of the tract conveyed by this deed a restriction ... on the remaining portion of the land of [the grantors] ... that said remaining land will be used only for agricultural purposes."

We assume your questions pertain to the identification and valuation of the nine acre lot retained by the grantors when they conveyed the house lot to the named grantee, in light of the right of first refusal and the agricultural restriction then imposed on the retained land. We will accordingly address your questions with a view to valuation and assessment concerns.

It is not clear whether the right of first refusal conveyed in the 1979 deed was required to be recorded with respect to the retained nine acre lot in order to be effective. We note that in a case construing a right of first refusal the Supreme Judicial Court expressly did not decide the effect of "the lack of recording of the plaintiff's right of first refusal," because the defendant did not raise that question. *See Roy v. George W. Greene, Inc.*, 404 Mass. 67, 71 (1989) ("We do not intimate whether such argument[] would have been successful had [it] been made.") However, it is unlikely that the grantee of the right of first refusal was entitled to transfer that right to another, given that the language creating the right "does not contain words such as heirs or assigns but speaks in personal terms of the ... specific grantee[]." *Fisher v. Fisher*, 23 Mass. App. Ct. 205, 206 (1986). Had the parties intended a transferable right of first refusal, "suitable language could have been inserted ... to accomplish that result." *Id.* at 207. (Citation omitted.)

In any event, the right of first refusal should have little if any impact on the value of the nine acre parcel. As the Supreme Judicial Court has explained,

Because the holder of a right of first refusal may only choose to purchase property on the same terms as a bona fide offer, if and when the owner decides to sell, there is no power either to compel an owner to sell the property at an unfavorable price, or to encumber an owner's

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ability to sell the property for a lengthy period of time. There is no casting of a cloud of uncertainty on the title to the property, and no potential to forestall a sale.

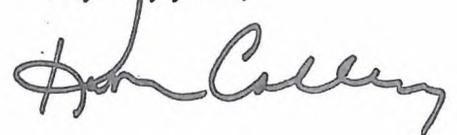
*Bortolotti v. Hayden*, 449 Mass. 193, 201-202 (2007). Indeed, in *Greenfield Country Estates Tenants Association, Inc. v. Deep*, 423 Mass. 81, 87 (1996), the Court stated that a “statutory right of first refusal cannot be said materially to affect the marketability of the property so as to deprive it of economic value.”

By contrast, the agricultural restriction “conveyed for the benefit of the [one acre house lot] conveyed by [the 1979] deed” would be likely to have an impact on the fair cash value of the burdened land, but only if it remains in effect. We note that the deed conveying the agricultural restriction is dated September 27, 1979, which is more than 30 years before the dates of your inquiry and this letter in response. Because the agricultural restriction conveyed by the deed was “unlimited as to time,” G.L. c. 184, § 23 “extinguishe[s]” the restriction after 30 years, *i.e.* September 27, 2009. See *The Stop & Shop Supermarket Co. v. Urstadt Biddle Properties, Inc.*, 433 Mass. 285, 289 (2001). Accordingly, the agricultural restriction is no longer in effect and is irrelevant to the fair cash value of the property after September 27, 2009.

You also asked whether “the inclusion of the phrase ‘remaining portion of the land of [the grantors] situated on the east side of North Poland Road and adjoining herein described ...’” in the 1979 deed gave adequate notice of the parcel subject to the right of first refusal. In construing the terms of a deed, the “task ... [is] to determine the true intention of the parties ...” *Ellis v. Wingate*, 338 Mass. 481, 485 (1959). If a deed is “ambiguous in effect ... reference [may be made] to relevant extrinsic evidence bearing upon this intent, such as the circumstances with respect to the ownership of adjacent parcels, the contents of other instruments in the chain of title, and the subsequent action of the parties.” *Id.* We note that the nine acres carved out of the 1979 conveyance for retention by the grantors could readily be identified by reference to the 1974 deed by which the grantors acquired their title to the ten acre lot.

Please do not hesitate to contact us if you have any further questions.

Very truly yours,



Kathleen Colleary, Chief  
Bureau of Municipal Finance Law

KC: DG