

September 10, 2020

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Hon. Cherry C. Karlson and  
Members of the Board of Selectmen  
Wayland Town Hall  
41 Cochituate Road  
Wayland, MA 01778

Re: River's Edge Easement

Dear Members of the Board of Selectmen:

You have requested an opinion regarding the process for the granting of an easement to the developer of the River's Edge community, which will be situated on a 8.25 acre site currently owned by the Town of Wayland located at 490 Boston Post Road. River's Edge will be a rental housing development, consisting of 218 units, with 25% of the units to be affordable in perpetuity, and at least 25% to be age-restricted units, i.e., for persons over 55 years of age. The community will be accessed off of Boston Post Road, via a portion of an access road to the Town's transfer station, which will be improved pursuant to plans approved by the Zoning Board of Appeals. A drainage easement will also be required for the development, to be located primarily upon the access road, and partially on land under the control of the Board of Selectmen.

Chronology of the Access Road and Surrounding Property

The access road commences at Boston Post Road, and travels northerly, first along the eastern boundary of the River's Edge property, and then on other property of the Town. The road currently serves the transfer station and property under the custody of the Conservation Commission. The road starts on a parcel, containing one acre, more or less, acquired under an Order of Taking dated November 15, 1965, recorded with the Middlesex South Registry of Deeds in Book 11003, Page 389, and shown on a plan entitled "Plan of Land in Wayland Mass. Taken for General Town Purposes," dated December 12, 1962, recorded with the Registry of Deeds in Plan Number 1582 of 1965 (the "Selectmen's Parcel"). It then continues, northerly, to the transfer station, across property containing 24 acres, more or less, acquired by a deed from William W. Lord and Mary P. Lord, dated May 22, 1978, recorded with the Registry of Deeds in Book 13448, Page 394, and shown as "Lot B" on a plan entitled "Plan of Land in Wayland, Mass. Showing Land Owned by William W. and Mary P. Lord," dated February 28, 1978, recorded with the Registry of Deeds in Plan Number 482 of 1978 ("Lot B"). At the end of the access road are other properties owned by the Town, being Assessor's Parcels 17-18, 21-10A, 21-12 and 22-4.

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Lot B, along with other property, was acquired pursuant to a vote taken under Article 19 of the 1978 Annual Town Meeting. Motion 2 under this vote read, in pertinent part, as follows:

Mr. Jonathan Strong moved and was duly seconded that the Town transfer the care, custody, management, and control of Lot B, ... to the Conservation Commission for conservation purposes including outdoor recreation when the Selectmen shall have determined that said land shall no longer be required for other municipal purposes; namely, (a) that those portions of Lot B used for access to the Town's sanitary landfill shall be so transferred when no longer required for that purpose; (b) [t]hat those portions of Lot B used for removal of sand and gravel shall be so transferred at the conclusion of sand and gravel removal operation; and (c) that those portions of Lot B not required for either of the purposes cited above shall be so transferred at the earliest appropriate date.

Pursuant to the vote taken under Article 9 of the 2013 Annual Town Meeting, it was voted to amend the 1978 vote regarding the landfill access road and to designate certain parcels as conservation land. The 2013 vote stated, in pertinent part, as follows:

[The Town voted] to amend its vote under Article 19 of the [1978 Annual Town Meeting] to require that the care, custody, management and control of the Town-owned parcel of land containing 24 acres, more or less, and shown as Lot B ... immediately vest in the Conservation Commission, except for that portion of said Parcel B comprising the access way to land and facilities held in the care, custody, management and control of the Board of Public Works being approximately 50 feet wide and shown as "Roadway Area" on a plan entitled "Plan of Land in Wayland Massachusetts, Landfill/DPW Access Road 2013 ATM, Article 9," dated February 25, 2013, prepared by the Town of Wayland Surveying Department, ... which access way shall continue to [be] so held by the Board of Public Works for as long [as] the land accessible by it is used for public works purposes by the Town, provided that (i) the Board of Public Works shall, and is hereby authorized to transfer the care, custody, management and control of the portion of the parcel of land described in an order of taking dated March 29, 1971 and recorded with said Registry of Deeds in Book 11977, Page 704 shown as "Area C" on said unrecorded plan prepared by the Town of Wayland Surveying Department and in Appendix C to the warrant for the 2013 Annual Town Meeting to the Conservation Commission ...

A plan, labelled "Appendix C," attached to Article 9 of the 2013 Annual Town Meeting Warrant, depicts Lot B divided into three portions, the first labelled "Area 'A'", containing 10.0 acres, the second labelled "Area 'B'", containing 12.8 acres and the third labelled "'Roadway' Area", containing 1.98 acres, the Roadway Area being the access road, dividing Area A and Area B. The Roadway Area on Appendix C starts northerly of the Selectmen's Parcel.

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In 2014, the Town voted, under Article 16 of the 2014 Annual Town Meeting, to transfer and dispose of septage facility land and adjacent Town-owned land for purposes of conveyance for affordable and market rate housing and accessory uses and structure purposes. The vote authorized the Board of Public Works to transfer the care, custody, management and control of three parcels of land on Boston Post Road, as follows: (i) a parcel known and numbered as 490 Boston Post Road, containing 7.63 acres, more or less, as described in an Order of Taking dated January 11, 1971, recorded with the Registry of Deeds in Book 11943, Page 420; (ii) a parcel containing 4.5 acres and shown as Lot A on a plan entitled “Plan of Land in Wayland, Mass. Showing Land Owned by William W. and Mary P. Lord,” dated February 28, 1978, recorded with the Registry of Deeds as Plan 482 of 1978; and (iii) a parcel containing 1.0 acre, more or less, and described in an Order of Taking, dated November 15, 1965, recorded with the Registry of Deeds in Book 11003, Page 389, to the Board of Selectmen for purpose of conveyance, except for so much of said one acre lot which lies within the Wayland Landfill Access Road. A plan, entitled “Transfer and Dispose of Septage Facility and Adjacent Town-Owned Land on Boston Post Road,” shows Lot 22-3 (7.63 acres); Lot 22-6 (4.5 acres) and Lot 22-7 (1.0 acre). These three parcels now comprise the River’s Edge property – being a portion of Lot 22-3, all of Lot 22-6 and that portion of Lot 22-7 westerly of the access road.

In my opinion, the parcel containing 1.0 acre, being the Selectmen’s Parcel, described in the Order of Taking recorded with the Registry of Deeds in Book 11003, Page 389, was, at the time of the 2014 Town Meeting vote, already under the custody of the Board of Selectmen. Accordingly, since the Board of Public Works never had custody of this parcel, it was not necessary to transfer this property from the Board of Public Works to the Board of Selectmen for the purpose of conveyance for River’s Edge.

As required by Massachusetts General Laws Chapter 40, Section 15A, the Board of Public Works, on June 9, 2015, took what is known as a “surplus” vote, and voted that Lot 22-3 (7.63 acres), with the exception of the northerly portion thereof; all of Lot 22-6 (4.5 acres) and Lot 22-7 (1.0 acre), with the exception of the portions of the 1.0 acre parcel shown as “Lots D & F” on the plan entitled “ANR Subdivision Plan Assessors Map 22 Lot 3, Lot 6 & Lot 7,” dated June 1, 2015, prepared by WSP Transportation & Infrastructure, attached to the Board of Public Works vote, was no longer needed for municipal public works purposes.

The Board of Public Works further voted to transfer the custody of the above-described property to the Board of Selectmen, effective upon the execution of a land disposition and development agreement between the Town and a party acquiring an interest in and development of the property, for the purpose of conveying, selling, leasing or otherwise disposing of the parcels of land for affordable and market rate housing and accessory uses and structure purposes in accordance with the vote under Article 16 of the 2014 Annual Town Meeting.

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Once more, I note that, in my opinion, the Board of Public Works did not have custody of the Selectmen's Parcel (former Lot 22-7), and it was not necessary or proper for the Board of Public Works to assert jurisdiction over the Selectmen's Parcel, and its vote as to this parcel had no legal effect.

In my opinion, the Board of Public Works has care, custody, management and control of the access way, 50 feet in width<sup>1</sup>, running from Boston Post Road, to the property on which the transfer station is located.<sup>2</sup>

#### River's Edge Easement

In order to provide vehicular ingress and egress to the River's Edge property, access is required along the eastern boundary of the property, i.e., in the location of the access way to the transfer station property. In addition, a drainage easement, located primarily on the access way, and partially on the Selectman's Parcel, approximately 30 feet in width, the southerly boundary of which is about 75 feet from Boston Post Road, is required for the development of River's Edge. These easements are shown, respectively, as a "50.00 Wide Permanent Access Easement Area = 21,566± S.F." and a "30.00 Wide Permanent Drain Easement Area = 1,710± S.F." on a plan entitled "Alta at River's Edge 490 Boston Post Road Wayland, MA," dated June 20, 2019, revised through November 12, 2019, prepared by Allen & Major Associates, Inc.

#### Article 97 and the Rights of the Conservation Commission

The Conservation Commission has the care, custody, management and control of Lot B, an approximately 24 acre parcel, and Area C, an approximately 3.80 acre parcel, located along the northeastern boundary of Parcel 17-18.

The Conservation Commission has the right to use the access road to access its property. It is, I believe, generally accepted, that the Commission does not currently have custody of the access road. In my opinion, the Conservation Commission does not even have an inchoate, i.e., future, right to custody of the access road. Accordingly, in my opinion, the access road is not subject to Article 97 of the Articles of Amendment to the Massachusetts Constitution.

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<sup>1</sup> The width of the access way was established, in my opinion, in the 2013 vote of Town Meeting, which references the access way "to land and facilities held in the care, custody, management and control of the Board of Public Works [as] being approximately 50' wide."

<sup>2</sup> It is arguable that the Board of Public Works does not have custody of the access way where it crosses the Selectmen's Parcel. In my opinion, the better construction of the various votes is that the Board of Public Works has custody of the entirety of the access road.

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It has been posited that the access way is presently subject to Article 97, since the access road will “revert” to the Conservation Commission at some undetermined time in the future.

Article 97 states, in part:

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.

A road is not, in my experience, land that is protected by Article 97. The access way does not have any conservation value. Accordingly, even if the road came under the custody of the Conservation Commission, it would not, in my opinion, be subject to Article 97.

Moreover, in my opinion, the prior Town Meeting votes addressing the access road do not, individually, or collectively, establish that the access road will “revert” to the Conservation Commission at such time as the transfer station is no longer operating. First, the Conservation Commission never had custody of the access road, so, by definition, the road cannot revert to the Commission. Second, the votes do not create a certain future right in the Conservation Commission. Generally, the vote of an earlier Town Meeting cannot bind a future Town Meeting. For example, while at some point there may not be a need for a transfer station, the Town will still own multiple properties at the rear of River’s Edge to which access is needed. It is likely that this property will be put to some other municipal purpose. A subsequent Town Meeting vote may then transfer the road, for example, to the Board of Selectmen so access to this property may be maintained. Such a vote, in my opinion, would be proper.

In conclusion, since the access road is currently not under the custody of the Conservation Commission, and there is no guarantee it ever will be, the road is not subject to Article 97.

Grant of an Easement for the River’s Edge Property

In order to grant an easement for the benefit of the River’s Edge property, two events must occur. The Board of Public Works, which has custody of the access road, must vote that the way is no longer needed exclusively for public works purposes, and Town Meeting must vote to grant an easement to the owner of the River’s Edge property.

On August 17, 2020, the Board of Public Works voted that the portion of the travelled way located upon the Selectmen’s Parcel and Lot B, currently held for municipal public works purposes, shown within the 50 foot access way on the plan entitled “Alta at River’s Edge 490 Boston Post

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Road Wayland, MA,” dated June 20, 2019, revised through November 12, 2019, prepared by Allen & Major Associates, Inc. “may be utilized for non-exclusive easements for the benefit of the owner of 490 Boston Post Road; and for the development of 490 Boston Post Road, and for no other purpose.” In my opinion, this vote constitutes a proper surplus vote, and satisfies the first step in the process.

The other step is for Town Meeting to vote, by a two-third’s majority, to transfer from the boards having the care, custody, control and management of the 50 feet wide access road and the 30 foot wide drain easement<sup>3</sup> that will be used by the developer of River’s Edge, to the Board of Selectmen for the purpose of conveyance. Article 1 on the September 12, 2020 Special Town Meeting states as follows:

To determine whether the Town will vote to transfer from the boards having the care, custody, control and management of certain property, located to the east of 490 Boston Post Road (Route 20), and shown as a “50.00’ Wide Permanent Access Easement” and a “30.00’ Wide Permanent Drain Easement” on a plan entitled “ALTA at River’s Edge 490 Boston Post Road Wayland, MA,” dated June 20, 2019, prepared by Allen & Major Associates, Inc., a copy of which is on file in the office of the Town Clerk, to the Board of Selectmen for the purposes for which said property is currently held and for the purpose of conveyance of non-exclusive easement for the benefit of the owner of 490 Boston Post Road, and appurtenant to 490 Boston Post Road, for access, drainage and such other purposes as deemed necessary or convenient for the development of 490 Boston Post Road, and to take any and all related actions necessary or appropriate to accomplish the purposes of this Article and/or otherwise act thereon.

In my opinion, assuming this warrant article passes, the other prerequisite to granting an easement to River’s Edge has been satisfied.

### Conclusion

In summary, in my opinion, the Board of Public Works has custody of the 50 foot wide access way to the transfer station. The Board of Public Works has taken a vote to declare that the portion of the road needed for the development of River’s Edge is no longer needed exclusively for municipal public works purposes. Assuming Town Meeting passes Article 1 of the September 12, 2020 Special Town Meeting, the Board of Selectmen, in my opinion, will have the authority to convey an easement to the owner of the River’s Edge property for access, drainage and such other purposes as deemed necessary or convenient for the development of 490 Boston Post Road.

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<sup>3</sup> Please note that a portion of the 30 foot wide drain easement extends beyond the 50 foot wide access way. It is located on the Selectmen’s Parcel, however, and thus does not affect the properties held by the Conservation Commission. Accordingly, Article 97 is not implicated.



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Should you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink that reads "Katharine Lord Klein".

Katharine Lord Klein

KLK/jmp  
Enc.  
731834/WAYL/0001