

TOWN OF ARLINGTON
LEGAL DEPARTMENT

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March 31, 2016

By First Class Mail

Mr. John Belskis
196 Wollaston Ave.
Arlington, MA 02476

Re: 1 Gilboa Road Article 97 Status

Dear John,

I write to respond to your letter dated March 22, 2016 regarding 1 Gilboa Road and Warrant Article 30, on which the Board of Selectmen issued a vote of no action at its March 21, 2016 Meeting. In your letter, you registered concern about my legal opinion that parcel in question is presently subject to Article 97 of the Massachusetts Declaration of Rights ("Article 97") protection. Specifically, citing Town of Hanson v. Lindsay, 444 Mass. 502 (2005) you expressed your view that because a conservation restriction was not recorded, the parcel is not entitled to conservation protection. For the reasons set forth fully herein, I maintain my view that 1 Gilboa Road is subject to Article 97's process and protections.

At the outset, permit me to note again my appreciation of our open and frank discussions about your proposal and your overall efforts to place it before the Selectmen, the Conservation Commission, and others. Your intentions here are clearly to ensure the Town is in the best position it can be relative to c. 40B applicants. Our disagreement is purely over the legal requirements to achieve the outcome you desire relative to the property in question.

In short, 1 Gilboa Road is subject to Article 97 protections because the Town indisputably acquired the parcel in question without any qualification for conservation purposes. The case you cite, Town of Hanson v. Lindsay, 444 Mass. 502 (2005), presents very different facts with distinct consequences. In that instance, the Town of Hanson acquired the parcel at issue via tax taking roughly 14 years before a vote of its Town Meeting in 1971 attempted designate such land as subject to a conservation restriction. The 1971 Hanson Vote specifically stated that the town would "accept for conservation purposes, a deed, or deeds," but no such

deed or deeds were ever generated or recorded to accept. *Id.* at 503. Subsequently, the Town of Hanson (through its Treasurer) sold the property at auction in 1998 to a bona fide purchaser of value who had no notice of any restriction of any kind.

Hence, both practically and legally, the property at issue in Hanson remained in ambiguous status because it was still considered a tax possession of that Town, leading the Court to find the “[t]he 1971 Vote [of Town Meeting] merely expressed the town’s interest in dedicating the locus to conservation purposes.” *Id.* at 508-509. As the Hanson Court described, “[n]othing in the specific language of this vote and no related circumstances suggest that the locus was placed under the custody and control of the [conservation] commission.” *Id.* at 506.

Here, the Town did not own 1 Gilboa Road when it voted to acquire it (rather than designate land it already owned) specifically for conservation purposes, which places the parcel in an entirely distinct posture from the start. Article 97 provides, in pertinent 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...

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.)

Meanwhile, Arlington Town Meeting’s vote relative to 1 Gilboa Road stated in relevant part:¹

“That the sum of \$675,000 be and hereby is appropriate for the acquisition for conservation purposes of that property commonly referred to as Mount Gilboa, said property after acquisition to be placed under the jurisdiction of the Conservation Commission...”²

This, in and of itself is overwhelmingly likely to serve as sufficient basis for the courts, the legislature, the Executive Office of Energy and Environmental Affairs (“EOEA”), and our local Conservation Commission to deem 1 Gilboa Road protected by Article 97 with or without a restriction asserted in the deed, because under most circumstances Article 97 status only requires a land, “acquired for [conservation] purposes.”

¹ The full text of this vote, previously provided, is attached hereto.

² The vote continues to describe the property in question in further detail.

Furthermore, even if more were required, Arlington's intent to convey jurisdiction upon the Conservation Commission was unqualified and crystal clear. The Hanson Court took pains to contrast Arlington's present position from that of the Town of Hanson's, citing Harris v. Wayland, 392 Mass. 237, 241, (1984) and explaining "property placed under control of [Wayland's] school committee where warrant for special town meeting, 'coupled with all the attendant circumstances, was sufficient to indicate that the town intended to place the property in the charge of the school committee.'" Town of Hanson, at 506.

Thus, the three important distinctions between the circumstances here in Arlington and the facts presented in Hanson are:

- 1) Arlington's Town Meeting vote was to *acquire* 1 Gilboa Road specifically as conservation property;
- 2) Arlington's vote was unqualified, where Hanson's vote asserted the intent to "accept a deed, or deeds" which never came to fruition; and
- 3) Article 97 status is a specific kind of conservation protection which can be concurrent, but is not necessarily so, with the types of conservation restrictions which must be reflected in the type of deed contemplated by Hanson.

As such, a thorough reading of Hanson makes clear that the Hanson property was not subject to Article 97, *and also* not subject to a properly recorded conservation restriction of some other ilk. Moreover, Hanson does not and never has implied that a clear Town Meeting vote to acquire land for conservation purposes requires a recorded deed to afford Article 97 protection on such land.

I well appreciate the significance of this opinion to your article, the Selectmen's vote, and broader issues in Arlington. Accordingly, though I continue to be confident in my position on this matter, I took the unusual step of obtaining the opinion of the Town's Special Counsel for c. 40B matters, attorney Jon Witten. Mr. Witten concurs with this analysis and its conclusions on both the impact of Hanson and the status of 1 Gilboa Rd.

As a final matter, you noted at hearing additional concerns about other Town properties for which you could find no conservation restrictions. As noted above, whether or not a recorded conservation restriction is *necessary* to afford conservation protections depends on the details of how and why a given parcel was acquired or designated.³ If there are parcels which do not have recorded restrictions and are not clearly protected under Article 97, it is imperative to either file corrective or confirmatory deeds. Therefore, I would very much appreciate an opportunity to further discuss your findings and compare them with Conservation Commission files. This Office will also examine whether or not confirmatory deeds or recording Town Meeting votes as

³ Similarly, the sources of pertinent information may vary. With respect to 1 Gilboa Road, this Office performed a title search, reviewed past votes of Town Meeting, and examined archived files regarding the acquisition of the parcel.

adjunct to the deeds would be feasible for Article 97-covered properties, so as to avoid any ambiguities in the future.

Please contact me at your convenience so we may discuss your findings further.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. Heim', with a stylized flourish at the end.

Douglas W. Heim, Esq.
Arlington Town Counsel

cc: Arlington Board of Selectmen
Adam Chapdelaine, Town Manager