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Mr. Brendhan Zubricki
Town Administrator
Essex Town Hall
30 Martin Street
Essex, MA 01929

Re: Conomo Point Lease Expiration Issues

You have requested two opinions regarding the rights of lease holders upon the expiration of leases of land at Conomo Point. Specifically, you have asked for an interpretation of the Right of first refusal provision in Paragraph 10 of the leases, and you have asked for an opinion as to the ownership status of buildings and other improvements placed on the land by tenants. Your request comes in the context of a pending Town Meeting vote to consider whether to authorize the Board of Selectmen to seek special legislation to allow the Town to develop a procedure for the future potential sale or leasing of the property.

For the detailed reasons set forth in this letter, as to the first issue, it is my opinion that the right of first refusal provision in the leases can only be triggered if Town Meeting votes, prior to expiration of the leases on December 31, 2011, to sell any or all of the lots at Conomo Point. If no such vote is taken during the lease term, it is my opinion that the Right of First Refusal will be rendered null and void. As to the second issue, it is my opinion, based on the facts and circumstances known to me at this time, that the dwellings and other improvements built on the Conomo Point Property by tenants is part of the real estate and is owned by the Town.

The Right of First Refusal

Paragraph 10 of the Standard Lease (the "Lease") contains the following language: "[i]f the Town, at any time, shall *vote to sell* any or all of the lots at Conomo Point, Lessee shall have the right of first refusal to purchase their leased lot(s) upon such terms and conditions as the Town shall have prescribed for such sale." [emphasis supplied]. Although the right of first refusal may not be enforceable at any time in light of General Laws, Chapter 30B, §16, you have requested an opinion as to what circumstances would trigger the right of first refusal as a matter of contract law. Although I am not aware of any case law interpreting similar language, for the reasons stated below, it is my opinion that the right of first refusal will expire and be rendered null and void unless Town Meeting votes, prior to Lease expiration on December 31, 2011, to sell any or all Conomo Point lots.

The general common law rule is that a right of first refusal provision in a lease becomes effective when the owner of the property receives a bona fide and enforceable offer to purchase from the third-party. Roy v. Greene, Inc., et al., 404 Mass 67, 69-70 (1989). Under the general rule, "[a] property owner's obligation under a right of first refusal is not to sell at such time that the holder of

the right may demand (as in option to purchase), or to sell to the holder at a fixed price at such time as the owner should wish to sell (as in a fixed price right of first refusal), but merely 'to provide the holder of the right seasonable disclosure of the terms of any bone fide third-party offer.'" Bortolotti v. Hayden, 449 Mass. 193, 201 (2007)(quoting, Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 382-83 (2004)). Thus, under the common law rule, the RFR would not be triggered unless and until the Town received a bona fide third-party offer to purchase any part or all of the Conomo Point property.

The general common law rule, however, may be altered by the language chosen by the parties. HRPT Advisors, Inc. v. MacDonald, Levine, Jenkins & Co., P.C., 43 Mass.App.Ct. 613, 624, n. 15 (1997). In such an instance, the lease must be interpreted according to the plain meaning of the terms agreed-to by the parties. See, e.g., Freelander v. G. & K. Realty Corp., 357 Mass. 512, 516 (1970); Hiller v. Submarine Signal Co., 325 Mass. 546, 550 (1950). Based on the language used in the Lease, the right of first refusal provision may be interpreted as altering the common-law rule and giving the tenants a right that is triggered by any vote to sell any or all of the lots at Conomo Point.

Even if the right of first refusal is interpreted as being triggered by a "vote" to sell the property, there remains the question of what constitutes a triggering vote and when that vote must be taken? As to the trigger, the language of the right of first refusal specifically states "[i]f the *Town*, at any time, shall *vote to sell* . . ." [emphasis supplied]. Where the Lease provides no specific definition or explanation of a key term, such term is to be interpreted according to its ordinary and usual sense. Chapman v. Katz, 65 Mass.App.Ct. 826, 830 (2006). In the context of municipal law, when a document refers to a vote of the Town, it is commonly referring to Town Meeting, unless another specific board or commission is designated. See, e.g. G.L. c. 39, §15; G.L. c. 40, §9. Moreover, pursuant to Massachusetts law, a vote of Town Meeting is a necessary prerequisite to any sale of real property. Harris v. Town of Wayland, 392 Mass. 237, 243 (1984); G.L. c. 40, §15A.

It is my opinion that a reviewing court would likely find that a Town Meeting vote to sell any or all of the lots during the lease term is sufficient to trigger the right of first refusal (subject to any statutory defenses that may be available). Unlike a private party that can simply decide to sell property at any time, the Town cannot sell real property unless the sale is first authorized by a Town Meeting vote. The Town Meeting vote manifests the Town's intent to sell the property and, in my opinion, would provide an appropriate trigger for a right of first refusal. It is my further opinion, however, that other votes concerning the property or its future use or disposition will not trigger the right of first refusal. This opinion is based on the qualifying language in the lease that the right of first refusal is triggered by a "vote to sell" any or all of the lots at Conomo Point. Therefore, in my opinion, because the pending Town Meeting vote to authorize the selectmen to seek special legislation does not actually authorize the sale of any lots, such a vote would not trigger the right of first refusal.

As to timing, it is my opinion that the trigger vote to sell would have to be taken during the lease term because the right of first refusal will not survive the expiration of the Leases. Generally, a tenant maintains no rights, either contract or property, once a lease expires. Michael Chevrolet v. Institution for Savings in Roxbury, 321 Mass. 215, 218 (1947); Giuffrida v. High Country Investors, Inc., 73 Mass.App.Ct. 225, 233 (2008). Thus, where a right of first refusal is dependent upon the existence of the lease, the provision is not enforceable after the lease expires. See Seward v. Weeks, 360 Mass. 410, 414 (1971). As observed by the Supreme Judicial Court, "provisions in leases relating to sales to the lessee or to others may be viewed as referring to sales during the term and as designed to protect the lessor or lessee during the term." Id.

As previously discussed, however, leases must be interpreted based on the language actually used. The typical right of first refusal provision will specifically provide that the landlord's decision to sell must be made within the lease term. See, e.g. Cities Service Oil Co. v. National Shawmut Bank of Boston, 342 Mass. 108 (1961) (lessee's option to purchase could not be exercised after expiration of the lease where lease specifically limited the option to "during the term of the lease"); see, also T.W. Nickerson, Inc. v. Fleet National Bank, 2004 WL 1195310 (Mass.Super. 2004) (same); Seward, 360 Mass. at 414. Here, the language of the Lease states "[i]f the Town, *at any time*, shall vote to sell . . ." [emphasis supplied]. I am unaware of any case law interpreting similar language.

When a dispute arises over the meaning of words used in a lease, such words must be interpreted in light of the facts to which they apply. Saugus Auto Theatre Corp. v. Monroe Realty Corp., 366 Mass. 310, 311 (1974). A lease, like any other written contract, must be interpreted in such a way as "to give it effect as a rational business instrument and in a manner that will carry-out the intent of the parties." Starr v. Fordham, 420 Mass. 178, 192 (1995). Here, although I cannot predict how a reviewing court would rule, it is my opinion that it is unreasonable to interpret the right of first refusal as giving the tenants' rights after the leases expire. If this were the case, the Town would be forever obligated to honor the right of first refusal, no matter how far in the future the vote to sell is taken. In my opinion, no reasonable business person would have entered into such an arrangement. This opinion is supported by the Land Court Settlement Agreement, which specifically provides that "a new lease for a long and definite term, though at an increased rent, is in the best interests of the Class as a whole." (Settlement Agreement, ¶22). In my opinion, this language supports the view that the parties intended for their relationship to end at the expiration of the Leases, and enforcement of the right of first refusal after that date would seem contrary to the intent of the parties.

Ownership of Dwellings and Improvements

You have also asked whether the dwellings and other improvements on the Conomo Point property, which I understand have been built by the tenants at their own expense, belong to the Town as part of the real estate or the tenants as personal property. The Leases are silent on this issue. The general rule is that the erection of a building on the land of another makes it part of the realty, unless there is an agreement, express or implied, that the building will remain the personal property of the tenant. Ward v. Perna, 69 Mass.App.Ct. 532, 537 (2007); Meeker v. Oszust, 307 Mass. 366, 369 (1940). In instances where there is no express agreement regarding ownership of a structure, the determination of ownership "is a mixed question of fact and law, depending upon other facts and circumstances and the reasonable inferences to be drawn therefrom, including the manner in which the buildings were attached to the land and the intention of the parties." Noyes v. Gagnon, 225 Mass. 580, 584 (1917). Although the physical facts relating the how the building is attached to the land are entitled to some weight as tending to show the intention of the parties, this factor is not dispositive. Titcomb v. Carroll, 287 Mass. 131, 136 (1934). More recently, however, the Appeals Court found that a where a cottage became so affixed to the land that it could not be removed without damaging the building, the building became part of the real estate. Ward, 69 Mass.App.Ct. at 537.

As evidence of the highly fact specific nature of this inquiry, over the years, the Massachusetts appellate courts have reached different conclusions in several cases. See, e.g. Noyes v. Gagnon 580 (1917) (houses built on sand and resting on posts remained personal property of the tenant); Titcomb v. Carroll, 287 Mass. 131 (1934) (dining car weighing seven tons and partially resting on wall built into the ground was the personal property of the tenant); Meeker v. Oszust, 307 Mass. 366 (1940) (school building equal in height to one and one-half story house on brick foundation part of the real estate); Ward v. Perna, 68 Mass.App.Ct. 532 (2007) (cottage with poured foundation and finished basement was part of the real estate). In each of these cases, the courts not only examined the manner in which the building was affixed to the property but also the facts and circumstances leading to the erection of the buildings, including the dealings between the parties and how the buildings were regarded and improved over time.

In 1999, the Town retained the services of Attorney Stephen H. Olesky of Hale and Dorr, LLP, who authored a March 18, 1999 opinion letter on this subject. Attorney Olesky opined that the dwellings may be considered personal property of the tenants. His opinion was based on the following:

> We are informed, however, that the Town in various ways may have explicitly recognized that the structures were the personal property of the tenants and were not claimed to be part of the land. In short, it

> appears that the Town may not have consistently made express claims that the structures were Town property, but on the contrary, may have regarded them as the personal property of the tenants.

The specific information relied upon by Attorney Olesky is not disclosed in his letter and I have not been made aware of any facts or circumstances which suggest that the Town has treated these dwellings as personal property. To the contrary, it is my understanding that the dwellings have been consistently taxed as part of the real estate. Moreover, it is my understanding that the dwellings are permanently attached to the land and that they are not of such nature that they can be easily moved without damaging the land and/or the structures. Therefore, in the absence of more specific evidence to the contrary, it is my opinion that the general rule applies, and that the structures and other improvements built by the tenants are the part of the real estate and are owned by the Town.

In further support of my opinion in this regard, I have recently discussed this matter with officials from the Commonwealth's Inspector General's Office in the context of the proposed special legislation to exempt the Town from the public bidding laws with respect to potential future sales or leases of individual lots. According to these officials, the Inspector General's Office expects that the Town's procedures for disposition of the property will result in the Town obtaining fair market value for both the land and the buildings. Therefore, based on my discussions with them, I believe that the Inspector General's Office would take the position that the dwellings are part of the Town's real estate.

If you have any further questions in this regard, please do not hesitate to contact me.

Very truly yours,

Gregg J. Corbo

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