

TOWN OF WELLESLEY



MASSACHUSETTS

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April 13, 2012

40 GROVE STREET  
WELLESLEY, MA 02482-7729

Board of Selectmen  
Hans Larsen, Executive Director  
Town Hall  
525 Washington Street  
Wellesley, MA 02482

RE: Purchase and Sale Agreement by and between Roman Catholic Archbishop of Boston and Town of Wellesley, MA signed April 2, 2012

Dear Board of Selectmen and Mr. Larsen:

You have asked me to provide an exposition of the issues relevant to the Selectmen's decision as a matter of policy to accept the Church's (Seller) land use restrictions contained in the Purchase and Sale Agreement signed April 2, 2012 on the St. James 8 acre parcel.

The use restrictions (which will also be in the deed) about which you have inquired are as follows:

"Use Restriction.

The Premises are conveyed subject to the following restrictions and agreements, which Grantee agrees to by its acceptance hereof.

Grantee covenants and agrees for itself, its successors and assigns and successors in title that it shall not use or permit the use of the Premises for: (a) a church, chapel or other house of religious worship; (b) a facility at which abortions, assisted suicide or euthanasia occurs; (c) the operations of professional counseling services which advocate abortion, euthanasia or suicide; (d) the operations of any embryonic stem cell research facility or services implementing embryonic stem cell research, or (e) a school or educational facility (but not including educational uses accessory to recreational uses of the Property, or a public elementary, middle or high school operated by the Town of Wellesley under the care and custody of the Wellesley School Committee, all of which shall be permitted) (the "Use Restrictions"). The Use Restrictions shall expire upon the ninetieth (90<sup>th</sup>) anniversary of the date of the recording of the Deed." (Purchase and Sale Agreement, para 7.2; the Grantee is the Town).

The issues that the Selectmen, Executive Director and I perceived to require attention prior to signing the Agreement included whether the use restrictions are legal under

Massachusetts law; whether, and to what extent, it could have been possible to successfully argue against the restrictions being part of the Agreement; whether the Town has any precedent itself for managing similar issues; and what, in fact, the final decision to accept the restrictions essentially came down to.

1. The use restrictions are legal and enforceable under Massachusetts law.

Massachusetts Law, c. 184, §23B, provides in relevant part, as follows:

“Section 23B.... Any condition, restriction or prohibition, ....., which directly or indirectly limits the use for occupancy of real property on the basis of ... religion, ... shall be void, excepting a limitation on the basis of religion on the use of real property held by a religious or denominational institution or organization or by an organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization.” (G.L. c. 184, §23B, emphasis mine).

We have accepted that the above referenced use restrictions on abortions, embryonic stem cell research, and the other restrictions are religion-based, although it is noted that no specific religion is identified in the Agreement.

The above quoted statute makes it clear that a limitation on the basis of religion on the use of real property owned by a religious institution is legal, and thus enforceable under Massachusetts law.

2. We have come to understand these limitations appear to be required by the Archdiocese under the Policy on the Sale of Church Buildings of the Archdiocese, interpreting Canon Law.

The most directly relevant (so far as I can see) provision in the Archdiocese’s public documents interpreting Canon law provides as follows:

“5. All properties sold: All properties sold (except to denominations deemed acceptable in the sole discretion of the Archbishop) will contain negative use restrictions prohibiting the use of the property for an abortion clinic, any organization that advocates for abortion or euthanasia or the operation of an embryonic stem cell research facility or services implementing embryonic stem cell research, specifically, nor to any use that would directly violate the consistent ethical and moral teachings of the Magisterium of the Roman Catholic Church.” (Policy and Procedure, paragraph 5, contained in the “Roman Catholic Archbishop of Boston, a Corporation Sole’s Policy on the Sale of Church Buildings”; The foregoing policy has been promulgated by the same Church official who will be signing the deed).

The education use restriction, as originally presented, was modified at the Town’s request prior to finalizing the Agreement to allow public elementary, middle and high schools under the care and jurisdiction of the Wellesley School Committee. The Archdiocese had explained that

the original, much broader, restriction was to avoid any school facility being constructed on this site coming into competition with the parochial schools in town. The Archdiocese very willingly accepted the modification requested by the Town.

While I am certainly not an expert, or even barely knowledgeable on Canon law, my reading of the above referenced Policy leads me to conclude that, except for the education use restriction, these restrictions are required to be included by the Seller as an integral part of the real estate transaction to sell the Church property.

### 3. Massachusetts Courts do not interpose themselves into matters of Canon law.

In a dispute over this very site, in a legal action brought by the Maffei family, the Massachusetts Supreme Judicial Court observed, in Maffei et al v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 243 (2007):

“Our consideration of the plaintiffs’ appeal is also informed, and limited, by bedrock principles of the First Amendment. It is axiomatic that the First Amendment protects an individual’s freedom to worship, or not to worship, as he or she chooses. It also places beyond our jurisdiction disputes involving church doctrine, canon law, polity, discipline and ministerial relationship. Williams v. Episcopal Diocese of Mass., 436 Mass. 574, 579 (2002). See Hiles v. Episcopal Diocese of Mass., 437 Mass. 505, 515 (2002); Wheeler v. Roman Catholic Archdiocese of Boston, 378 Mass. 58, 61, cert. denied, 444 U.S. 899 (1979).”

In my opinion there is no violation of Constitutional law nor is there any recognizable theory that some Massachusetts municipality can accept title to real estate only if it contains no use restrictions of the type being discussed here. The principles guiding the Seller are not an affront legally to the rights and obligations of the Town. The issue for the Town is one to be decided as a matter of policy and principle, to which the Selectmen have responded in their decision to accept the deal for the greater public good of acquiring this important piece of property. There has been no concern expressed by any of us that these restrictions would unduly restrict the Town’s options over the next 90 years. The restricted uses would not be possible under existing zoning, of course. There is no present intention to flip the site, but should future town leaders decide to do that, the present leaders see no reasonable likelihood that the Town might want to sell within the next century or for the future beyond that time frame, even, to an abortion clinic or an embryonic stem cell research facility, or to other restricted uses. It is not a practical concern.

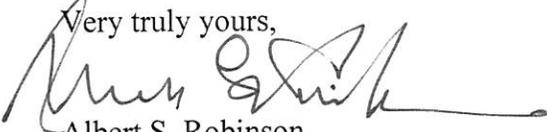
The Selectmen have considered whether it would be better to accept a deed restriction that the property always be held by the Town for municipal purposes. In my opinion that would have an effect and would actually hamper future town leaders who might want to sell the site for the benefit of the Town.

4. Wellesley has recognized when it has encountered a matter of principle in a similar context in the past, and has not yielded.

In 2001, when the former Main Library Building was due to be demolished and a new one was to be constructed on the same site, the trustees negotiated with the Archdiocese to lease the St. James parking lot for the purpose of relocating the library assets and staff there for the interim period. When presented with the lease itself, it was observed that it contained restrictions essentially to the point that no activity would be permitted contrary to the teachings of the Roman Catholic Church. The Trustees perceived a threat to the exercise of First Amendment free speech rights as library book content could be impaired. When the Archdiocese's lawyers (at the time) were asked if they would negotiate that limitation, and the answer came "no", the Trustees decided the use of restrictions would limit the freedom of expression, and as a matter of principle never did sign any lease and moved the temporary library to the DPW property instead. The Town did not yield its principles in that matter.

5. It boils down to whether the Town wants the deal.

The Selectmen in the present context have determined the restrictions against future use for an abortion clinic or embryonic stem cell laboratory or euthanasia are acceptable limitations for the next 90 years for the sake of the deal, and will be urging approval of it at the Special Town Meeting called for June 13.

Very truly yours,  
  
Albert S. Robinson

ASR: jsi  
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