

Update to September 5, 2018 Letter to include additional County Resident signatories

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Plymouth MA 02360
508-259-9154

September 5, 2018

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Plymouth County Commissioners Office
44 Obery Street
Plymouth, MA 02360

VIA EMAIL ONLY

Re: Written Notification of Violation of Massachusetts General Law Ch. 34, § 14
Relating to Land Owned by the Inhabitants of Plymouth County,
Lot 088-000-054-00, Plymouth, MA—the County Woodlot

Dear County Commissioners:

This letter is from the undersigned concerned residents of Plymouth County to bring to your attention violations of Massachusetts General Laws, Chapter 34, § 14 resulting from the County's sale and lease of the County Woodlot via a contract dated May 25, 2010 with Kingstown Corporation ("Kingstown). The County violated Chapter 34, § 14 by failing to follow the procedures for sale and lease of real estate, thereby voiding the May 25, 2010 contract for the sale of mineral rights and timber and which also leases a portion of the site to Kingstown for its exclusive use for industrial mining operations (hereinafter "the Contract").

This letter requests that the County:

(1) immediately inform Kingstown to cease all activities on the County Woodlot,
and

(2) return to Kingstown the \$345,000 Kingstown paid to the County under the Contract.

On June 2, 1917, Warren and Emma Rickard sold a parcel of land to the Inhabitants of Plymouth County, identified as Lot 088-000-054-00, which became known as the County Woodlot. Plymouth County has held that land in trust since that time and the land is considered real estate of the County.

The County has violated three provisions of Chapter 34, § 14. This law imposes certain requirements on the County before it can sell or lease County property and states in relevant part:

[The County commissioners] shall have authority . . . to sell and convey any real estate of the county by deed, sealed with the county seal, signed and acknowledged by them, or to lease any real estate of the county . . . provided, further, that any real estate offered for sale or lease, by a county shall first be offered for sale or lease to the commonwealth and upon the non-acceptance by the commonwealth of any such offer, shall then be offered for sale or lease to the city or town where such land is located.

G.L. c.34, § 14.

Background. The Contract, signed by two of the three County Commissioners, the County Treasurer, and the County Attorney, is for the sale of sand and gravel at the rate of \$1.38 per cubic yard, a total of \$345,000. Contract, ¶ 7. This constitutes a sale and conveyance of real estate under M.G.L. c.34, § 14. See *Davisson v. Comm'r of Revenue*, 18 Mass. App. Ct. 748, 752, 470 N.E.2d 413, 416 (1984) (“A right to take minerals from land—something less than a fee interest in the minerals—has generally been included within the category of profits à prendre which are viewed as real estate.”). The Massachusetts Supreme Judicial Court confirmed this view in the context of another sand and gravel operation:

For at least the period dating from October 1, 1970, to December 31, 1972, Bates [Sand and Gravel Company] was granted a right of entry; a right to remove and take from the land sand, gravel, and stone; and a right to participate in the profits therefrom. This bundle of rights falls squarely within the definition of a profit à prendre, and we so designate it for the sake of historical accuracy.

Bates Sand & Gravel Co. v. Com., 380 Mass. 933, 933, 404 N.E.2d 81, 82 (1980). Similarly, the Contract in this matter grants Kingstown “right of entry,” the “right to remove” more than 200,000 cubic yards of sand and gravel, and the exclusive right to enjoy “the profits therefrom.”

The County’s November 29, 2009 Invitation for Bids (“Bid”) for the removal of 250,000 cubic yards of sand and gravel from the County Woodlot is further evidence that the Contract constitutes the sale and lease of real estate within the meaning of G.L. c. 34, § 14. The Bid states that the County seeks a “contract for the removal of sand and gravel”

from the Woodlot and that the County Commissioners “seek payment for two-hundred and fifty thousand (250,000) cubic yards of sand and gravel material from” the Woodlot.

The Contract also constitutes the lease of real estate within the meaning of Chapter 34, § 14 because it gives Kingstown use of a portion of the Woodlot for its mining operation for a fixed term. The term “lease” is not defined in M.G.L. c.34. However, the term “lease” is commonly defined as a legal document in which the terms of an agreement are set out for a person to use someone else’s property for a specific period of time. “Leases by definition grant rights of possession for a fixed . . . term.” *Town of Winchendon by & through Bd. of Selectmen v. Brandywine Farms Inc.*, No. 17 MISC 000332 (RBF), 2018 WL 2297177, at *1 (Mass. Land Ct. May 18, 2018). The term for performance of the contract is two years. *Id.* The Contract is a lease to Kingstown of five acres of the Woodlot at a time, Bid ¶ 8C, so that it may occupy the site to conduct sand and gravel removal operations , which includes parking industrial mining equipment such as gravel sorting machinery, stockpiling minerals on site, and maintaining a field office. This action by the County is the equivalent of leasing this portion of the Woodlot to Kingstown, regardless of whether the County characterizes it as such.

Accordingly, the Contract with Kingstown enabling it to remove minerals and timber, to irreversibly alter the site, to occupy the site for two years, and to sell the sand and gravel for Kingstown’s own profit constitutes a sale, conveyance, and lease of real estate.

1. Failure to offer real estate to Commonwealth and Town of Plymouth.

The County’s responses to multiple Public Records Requests and our research, it appears that the County failed to follow the procedures of G.L. 34, § 14, requiring it to offer the Woodlot land first to the Commonwealth and in the event of its non-acceptance, then to the Town. If evidence of such offers exists, it is had not been made available in response to multiple Public Records Requests.

2. Failure to comply with notice and appraisal provisions of Chapter 34, § 14.

The law requires the following notification at least 90 days prior to the sale or lease of County real estate:

the commissioners shall notify in writing the city council or board of selectmen of the city or town in which such real estate is located; the members of the general court representing said city or town; the advisory board on county expenditures of the county in which such real estate is located; and the regional planning agency of the region in which such real estate is located.

G.L. c. 34, § 14.

The notifications under G.L. 34, § 14 must include: “information as to the real estate's present use; the reason for its sale or lease; the new activity or purpose for which it will

be used; and a copy of an independent appraisal done within the past fiscal year. Such appraisal shall be by a qualified appraiser approved by the executive committee of the advisory board on county expenditures of the county in which such real estate is located.” Based upon the County’s responses to Public Records Requests to date, the County violated this provision because neither a qualified appraisal nor the required notifications occurred. If evidence of such offers exist, it has not been made available in response to multiple Public Records Requests.

3. Failure to hold a public hearing in Plymouth regarding County’s intent to sell mineral rights and lease the Woodlot land to Kingstown.

The law requires a public hearing “at least 45 days but not more than sixty days prior to contracting for the sale or lease of said real estate.” G.L. c. 34, § 14. The Commissioners were required to publish in at least two publications in Plymouth the time and place of the public hearing no later than 14 days prior to the hearing. Upon information and belief, the County did not hold such a public hearing in the required time frame, and if it did, it did not publish required notice.

In sum, the County Commissioners have violated their fiduciary duty owed to the Inhabitants of Plymouth County as trustees of the County Woodlot, and have also violated the laws of the Commonwealth governing Counties and County

Commissioners. For all of these reasons, the Contract with Kingstown is void, and Kingstown must cease mining activity (preparations for which have started) and the County must return the money paid to it under the Contract to Kingstown. The law specifically provides that when the County violates G.L. 34, § 14, any contract made in violation of the provisions is voidable. *See* G.L. c. 34, § 14 (“Any contract for the sale or lease or real estate executed in violation of this section shall be voidable”).

The County’s actions with regard to the County Woodlot including the sale of mineral rights and lease of land for a mining operation are fraught with a history of flawed public process, lack of transparency and questionable practices.

On behalf of the Inhabitants of Plymouth County whose interests you have a fiduciary duty represent but have failed to do so, I am willing to discuss a mutually agreeable resolution of this matter. If you are interested in a discussion, please feel free to contact me at 508-259-9154 or by email at megsheehan07@gmail.com

I look forward to your response within the next two weeks.

Very truly yours,



Margaret E. Sheehan, Esq.
For citizen group

Copies to: Attorney General Maura Healy
Inspector General's Office
Melissa Arrighi, Town Manager
Zoning Board of Appeals, Town of Plymouth
Board of Selectmen, Town of Plymouth

PLYMOUTH COUNTY RESIDENTS

1. Bill Abbott
2. Brian Harrington
3. Carlos Fragata
4. Casey Shetterly
5. Charlotte Russell
6. Claire Bennett
7. Deborah Etzel
8. Denise Stowell
9. Diana Baker Price
10. Doug Post
11. Elizabeth Hanson
12. Evelyn Strawn
13. Frank Werny
14. Jeanne Lane
15. Judith Whitehouse
16. Glorianna Davenport
17. Jay Wennermenr
18. Katie Kearney
19. Ken Stone
20. Kirsten Archinson
21. Kristopher Houle
22. Laura Troll
23. Lee Pulis
24. Lois Post
25. Love Howard
26. Marie Pelletier
27. Mark Archinson
28. Martha Sheldon
29. Pat Parker
30. Paul Williams
31. Paula Marcoux
32. Preston Woodburn
33. Rhiannon O'Donnabhain
34. Robert Dawson
35. Sharl Heller
36. Sheila Sheridan
37. Tiffany Wrin
38. Elizabeth Hester
39. Wendy Reifeiss
40. Betsy Hall
41. Bill Vickstrom
42. Cheryl Kingfischer
43. Lois Post
44. Ted Curtain
45. Kirsten Archinson