

Today's Legal Issues and Solutions Session 3G

Article 97 by Dedication, Land Trust roles in holding and stewarding (anti-merger) and CPA provisions for monitoring fees

Written for the March 24, 2018 MA Land Conservation Conference
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Article 97

Article 97 of the Articles of Amendments to the Constitution of the Commonwealth of Massachusetts (Art. 97), approved and ratified November 7, 1972, declares that we have certain rights to clean air and water, freedom from excessive noise, and to the natural, scenic, historic and esthetic qualities of our environment, and declares those and other rights to be a public purpose.¹ Lands or 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. [i.e., “supermajority”]

Article 97 is retroactive² and applies only to property interests of the Commonwealth's state and local governments³, not private property (although there can be Art. 97 easements or conservation restrictions that burden non-Art. 97 property).

Sounds fairly straightforward, but Art. 97 is incredibly complicated. A random list of issues among many that arise include: (1) if it is retroactive, then how do we know if it is Article 97 because the original acquisitions would not have referenced Article 97; (2) if acquisitions since Art. 97 don't reference Article 97, are they protected?; (3) does NOT apply to private ownership, only public (but could change); (4) recent cases have stated that a reference to Article 97 must be in the deed, but that is not the common practice nor is it correct; (5) other cases suggest that a municipality re-deed itself the property interest and reference Article 97, but that is prohibited by conveyancing and Registry of Deeds rules and practices; (6) it says lands and easements, but what about licenses, restrictions, or other lesser interests? (7) what does “shall not be used for other purposes” mean? Must it always be used for the original purpose it was acquired for, or can it be changed to another Article 97 purpose without having to get a 2/3rds vote? (8) what about a transfer when there will be no change in use?⁴ (9) what if town meeting votes to put land under Art. 97 or to acquire land for Art. 97 purposes, but nothing else references Art. 97? (10) what if town meeting or other votes include other uses, such as “for Art. 97 and other consistent uses” or “and municipal purposes”?

Prior Public Use Doctrine

To make things even more complicated, the common law doctrine of prior public use was the basis for and applies to Article 97⁵ as well as non-Art. property interests. The prior public use doctrine provides that land *already devoted to one public use* cannot be changed to an *inconsistent use* without plain and explicit legislation authorizing the change. It also requires a vote that the property is no longer needed for the use it is devoted to. *Sacco v. Dept. of Public Works*, 352 Mass. 670, 672 (1967) (quoting *Higginson v. Treasurer & School House Commrs. of Boston*, 212 Mass. 583, 591 (1912)).

For a good description of Art. 97 and the prior public use doctrine, see the June 6, 1973, opinion of then Attorney General Robert Quinn. See Rep. A.G., Pub. Doc. No. 12, at 139 (1973) (Quinn Opinion) which can be found here: <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1958&context=ealr>

Article 97 has been eroding as a result of numerous factors, including the tendency of municipalities to see protected land as being held “until they find a better use for it” or as “free land” when a new community need arises. Article 97 lands have been lost because of erroneous opinions that land is not Article 97 for reasons such as: a parking lot was put on the land so that “changed it” from Article 97 to municipal land; the land was acquired before the passage of Article 97; being under the Conservation Commission doesn’t mean it’s Article 97; there is no deed referencing Article 97 (See, *Selectmen of Hanson v. Lindsay*, 444 Mass. 502, 508-509 (2005) where the court conflated the Hanson town meeting’s requirement for a deed, as applying to all Article 97 land).

Dedication

What if the deed does not state that the land is subject to Article 97?

It has long been held that land can be “acquired” for Article 97 purposes by dedication. The recent case of *Smith v. Westfield*, 478 Mass. 49 (2017) where a City attempted to convert a playground into a school site, confirmed and reinvigorated the doctrine of dedication to Article 97 purposes:

A city or town dedicates land as a public park where there is a clear and unequivocal intent to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park. Because the municipal land at issue in this case has been dedicated as a public park, we conclude that it is protected by art. 97.⁴

...The court went on to say: We also have recognized that land may be protected by art. 97 where it was neither taken by eminent domain nor acquired for any of the purposes set forth in art. 97 provided that, after the taking or acquisition, it "was designated for those purposes in a manner sufficient to invoke the protection of art. 97." citing *Mahajan v. Department of Env'tl. Protection*, 464 Mass. 604, 615 (2013) ...

...A city or town that owns land in its proprietary capacity and uses the land for a park may also dedicate the parkland to the use of the public. "A municipality may dedicate land owned by it to a particular public purpose provided there is nothing in the terms and conditions by which it was acquired or the purposes for which it is held preventing it from doing so, . . . and upon completion of the dedication it becomes irrevocable" (citation omitted). *Lowell v. Boston*, 322 Mass. 709, 730 (1948). "The general public for whose benefit a use in the land was established by an owner obtains an interest in the land in the nature of an easement." *Id.* This court applied the public dedication doctrine in holding that, even though title to the Boston Common and the Public Garden "vested in fee simple in the town free from any trust," the city did not possess title to this parkland "free from any restriction, for it is plain that the town has dedicated the Common and the Public Garden to the use of the public as a public park." *Id.* at 729-730. "The title to the Common and the Public Garden is in the city; the beneficial use is in the public." *Id.* at 735."

Article 97 in Votes & Deeds

When votes to acquire property interests or deeds have language such as: “for conservation and other consistent purposes” “for Article 97 and municipal purposes”, it allows for other uses, so it is very hard, if not impossible, to say that the property interest was acquired solely for Article 97 purposes. Make sure that votes or deeds intending to put land under Article 97 say that, and only that.

Hierarchy of Laws & Courts - very important!

The Constitution is the supreme law of Massachusetts, followed by statutes (laws), and regulations (which have the force of law), and the common law (also known as “judge made law”, as it is constantly changing based on court decisions). Where there are conflicts, the lower hierarchy law cedes to the higher law. See http://www.ifes.org/sites/default/files/2016_ifes_hierarchy_of_laws.pdf

Courts interpret laws and apply the facts to the law. In Massachusetts, jurisdiction to make decisions regarding Article 97 primarily resides in the Supreme Judicial Court (“court of last resort”) (“SJC”); the Appeals Court, and the Trial Courts (lower courts). Lower courts are bound by the precedents of higher courts. Where Appeals Court decisions conflict with SJC decisions, the SJC’s decision is followed. Lower court cases decisions regarding Article 97 do not establish “precedent”. Do not rely on non-precedential cases except perhaps where a higher court has cited the lower court with approval.

What if a Law Allows for the Sale of Land and Doesn’t Mention Article 97?

A law does not relieve the government from complying with the Constitutional provisions of Article 97. If a law provides how the proceeds of a sale of land are to be used, that doesn’t mean the law waives the disposition requirements of Article 97. The sale and proceeds are subject to FIRST complying with Article 97.

Community Preservation Act

Can I Dedicate Land in Lieu of a Conservation Restriction (CR) on CPA land?

M.G.L. c. 44B Section 12 is very specific: (a) A real property interest that is acquired with monies from the Community Preservation Fund **shall be bound by a permanent restriction**, recorded as a separate instrument, **that meets the requirements of sections 31 to 33, inclusive, of chapter 184** limiting the use of the interest to the purpose for which it was acquired.

The Municipality wants the Conservation Commission to Hold the CR. Can they?

A municipality may not hold a CR over its own property because, besides the potential for the doctrine of merger to apply, it cannot meet Section 12 (a)’s requirement that the CR must be enforceable. The Conservation Commission is authorized to hold a CR because it has the purposes of the conservation of land or water areas, as is required by sections 31-33, but (1) the Conservation Commission has no authority to independently engage the town counsel to represent it in pursuing any violations by the town (2) the Conservation Commission has no authority to hire its own counsel or even accept pro bono representation in any matter (3) the Conservation Commission cannot sue the town or get an injunction against the town to stop violating the restriction.

Baseline, Monitoring, and Enforcement

Municipalities may appropriate monies from the CPA fund to be paid to the Grantee of the CR to hold, monitor and enforce the CR.

The CPA allows for municipalities to designate “a nonprofit organization, charitable corporation or foundation selected by the city or town with the right to enforce the restriction. The legislative body may appropriate monies from the Community Preservation Fund to pay a nonprofit organization created pursuant to chapter 180 to hold, monitor and enforce the deed restriction on the property.

(b) Real property interests acquired under this chapter shall be owned and managed by the city or town, but the legislative body may delegate management of such property to the conservation commission, the historical commission, the board of park commissioners or the housing authority, or, in the case of interests to acquire sites for future wellhead development by a water district, a water supply district or a fire district. The legislative

body may also delegate management of such property to a nonprofit organization created under chapter 180 or chapter 203.

¹ Article XCVII (Article 97) of the Amendments to the Constitution was approved and ratified on November 7, 1972. It states: "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."

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

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.

² **Opinions of the Justices**, [383 Mass. 895](#), 918 (1981), citing **Rep. A.G., Pub. Doc. No. 12**, at 141 (concluding art. 97 applies retroactively).

³ There is at least one lower court case that says, in a footnote, that Art. 97 does not apply to municipally held lands. This is incorrect.

⁴ The two-thirds vote by each branch of the general court is required to make a change in use or control or disposition of land and easements and applied to land held for park purposes. Read against the background of the "prior public use doctrine", legislation is required even when the transfer of land is between government agencies and there will be no change in use of the land. **Opinion of the Attorney General**, June 6, 1973, p. 139.

⁵ See **Rep. A.G., Pub. Doc. No. 12**, at 146 (prior public use doctrine "background against which [art. 97] was approved"). See also **Rep. A.G., Pub. Doc. No. 14**, 131 (1980) ("language of Article 97 must be read in conjunction with the judicially developed doctrine of 'prior public use' "). **Mahajan v. Dept of Env'tl. Protection**, 464 Mass. 604 (2013)