Massachusetts Land Trust Coalition
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Legal Advisories

Permanent Deed Restrictions Under the Community Preservation Act and the Cape Cod Land Bank

Attorney Advisory Panel of the Mass Land Trust Coalition

Section 13(a) of the Community Preservation Act provides that: "A real property interest that is purchased with monies from the Community Preservation Fund shall be bound by a permanent deed restriction that meets the requirements of Chapter 184, limiting the use of the interest to the purpose for which it was acquired." This language raises certain issues of interpretation and implementation, which are discussed below (many of these issues are also relevant to the Cape Cod Land Bank).

The statutory requirement would only appear to be met by a restriction recorded in the chain of title that is held by an entity other than the property owner.

If a municipality acquires property in a transaction with an intention from the beginning to impose a conservation restriction on the property (in other words, as part of an integrated plan for dealing with the property), then the imposition of the CR should not be considered a "disposition" of an interest in the property within the meaning of Article 97. (This assumes that the acquisition of property at one time and the later, completely independent imposition of a CR would be a "disposition" under Article 97, even though it is not obvious why this result particularly advances the purposes of Article 97.)

If a municipality acquires property under the CPA statute, it is required to impose a restriction on the property as a matter of law and thus the imposition of the restriction should be considered part of an integrated plan for dealing with the property. Therefore, the imposition of the restriction should not be considered a "disposition" of an interest in the property within the meaning of Article 97.

It is probably the better practice for the municipality to vote to impose the restriction at the same time that it votes to acquire the property. However, even if the municipality votes to acquire the property first, and then votes to impose the restriction later, the municipality should be treated as having agreed to the obligation to impose a restriction at the time of the first vote, because that is the express requirement of the CPA statute. In other words, whether or not the first vote explicitly included the restriction, there can be no argument that a restriction was not part of the plan. It must be part of the plan when a municipality acquires property under the CPA statute. If the formal municipal vote does not identify the holder of the restriction, the signature of the selectmen or other applicable municipal official on the final restriction would be sufficient to designate the appropriate holder. EOEA might well ask the municipality to include a certification of some kind (in or with the restriction) that the holder of the restriction is an entity entitled to be the holder within the provisions of the CPA statute.

For the same reasons, although it may be the better practice for the municipality to actually impose the restriction immediately after it acquires the property, the municipality should still be considered to have imposed the restriction as part of an integrated plan as long as it does so within a reasonable time after the property acquisition. In the common law, the courts have left themselves considerable latitude in deciding whether a contractual obligation that is to be performed "within a reasonable period of time" has been timely completed. In this case, EOEA may find it helpful to create guidelines that help set expectations ("all conservation restrictions are to be submitted to the Secretary for approval within no more than six months of property acquisition, except for good cause shown").

In certain circumstances, it may be possible for a restriction which does not have the benefit of Section 32 to be a permanent restriction (there are certain narrow exceptions to the 30 year limit of Chapter 184, section 23 contained within that provision). If a restriction so qualifies, it could be permanent without the Secretary's approval. Nonetheless, the imposition of such a restriction would still have to be part of an integrated plan to avoid Article 97 "disposition" issues.

Joel Lerner has stated that as long as a restriction is recorded after the recording of the deed of acquisition (even if immediately after), the unrestricted value of the property is used for funding determinations in the Self-Help program. The procedure described above therefore does not interfere with Self-Help or similar funding.

The question has been raised as to whether the imposition of the restriction required by the CPA statute may mean that a party seeking a charitable contribution in connection with a (bargain) sale of property to a municipality pursuant to the CPA statute may not be able to use the unrestricted value of the property in calculating the tax benefit. Although there is no authority on the subject, the better view appears to be that since the seller did not bargain for or require the imposition of the restriction, it should not affect the tax valuation.

It has been suggested that if the holder of the restriction has not contributed financially to the acquisition of the property, then the "proceeds" clause of the restriction should provide that the property owner receives all of the proceeds of an extinguishment or taking and the holder of the restriction receives none of such proceeds. This is certainly legally permitted if the property owner and the holder of the restriction are willing to agree to it.

It would be useful for EOEA to provide some guidelines for cities and towns that cover the foregoing issues (and perhaps other related issues that will likely come up).