

# PROTECTED OPEN SPACE - LEAVING LEGAL FOOTPRINTS

## *The Problem*

### **Town-owned conservation land and parkland may not be legally protected open space.**

Open Spaces across the Commonwealth may not be as protected from development as we thought. A recent ruling by the Massachusetts Supreme Judicial Court (June 2005 *Town of Hanson v. Lindsay*) found that land acquired for conservation purposes as stipulated in the Town Meeting Vote, but *not* subsequently reflected in the deed, can be “disposed”, (in this case it was sold), without going through a stringent public review process. In this particular case, the town meeting vote required that the deed reflect the conservation designation and when the deed did not have the conservation language, the court found that it was not conservation land, and not subject to Article 97.

## *Legally Protected Open Spaces*

### **Some Background**

Citizens of Massachusetts have a state constitutional *right to a clean environment* as first established under an amendment adopted in 1918. Subsequently, Article 97 of the Articles of Amendment to the Massachusetts Constitution provides that “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.” “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.” These public lands include both state-owned lands and municipal lands acquired for conservation or recreation purposes.

### **Article 97**

#### **Philosophy of Article 97 – 1973 Opinion of Attorney General Quinn:**

- Public has the right to clean air, water, freedom from excessive noise, natural, scenic, historic, esthetic qualities of their environment. (“The fulfillment of these rights is uniquely carried out by parkland acquisition.”)
- Land Protection: “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... in harmony with their conservation.”

The Quinn opinion broadly defines lands acquired for Article 97 purposes, asserts a wide definition of “natural resources” protected, gives examples of both conservation and recreation lands that are protected, and applies this protection to lands acquired both before and after the effective date of Article 97. “[W]hile small greens remaining as the result of constructing public highways may be excluded, it is suggested that parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify.”

### **Removing Land from Legal Protection under Article 97**

#### **EOEA Article 97 Disposition Policy - No Net Loss**

The policy of EOEA and its agencies is to protect, preserve and enhance all open space areas covered by Article 97 of the Articles of Amendment to the Constitution of the Commonwealth of Massachusetts. The goal of this policy is to ensure no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions (*i.e.*, municipalities and counties.) Exceptional circumstances must exist for EOEA and its agencies to support an Article 97 disposition. Determination of “exceptional circumstances” includes a finding that all options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist, including the evaluation of other sites for the proposed activity.

### EOEA's Disposition Process – Purposefully Onerous

- 1) Municipal conservation commission must vote that the land is surplus to its needs
- 2) Municipal park commission must vote the same if it is parkland in question
- 3) Town Meeting or City Council must also vote to remove the land from protected status
- 4) Municipality must file an Environmental Notification Form with EOEA's MEPA Unit
- 5) The disposition request must pass by a two-thirds vote of the Massachusetts Legislature and be signed by the Governor.

Finally, if the property was either acquired or developed with grant assistance from EOEA's Division of Conservation Services (DCS) (*i.e.*, Self-Help, Urban Self-Help or Land and Water Conservation Fund), the converted land must be replaced with land of equal monetary value and recreational or conservation utility. While conversions do occur, the process is purposefully onerous in an attempt to protect these conservation and recreation lands in perpetuity.

### ***A Solution – Research and Re-record***

#### **Research Acquisition History and Deed**

Research the acquisition history and deeds for all municipal conservation and parkland and identify those parcels that have affirmative Town Meeting Votes or City Council Orders stipulating that the land is for either conservation or recreation use, and deeds echoing that particular purpose for acquisition. You may discover some surprises as the research uncovers which lands have the most protection as "open space." The deed may stipulate that the land is to be managed by the conservation commission or park commission, or that it was donated to the town with deed restrictions, or for park or conservation purposes. If the property was acquired or developed with DCS grant assistance, the grant agreement should have been recorded as an adjunct to the deed. The authorizing Town Meeting Vote or City Council Order may also be recorded as an adjunct to the deed (*i.e.*, request that the Register of Deeds or Land Court clerk make a marginal reference on the deed or title).

Consider the following:

- Some publicly owned lands can be sold or developed easily (with local legislative approval) either to private parties or for other public purposes. For example, school playgrounds and ballfields are often not protected parklands.
- Some deed restrictions may only last for a period of years (typically, 30 years) and not in perpetuity.

#### **The Fix - Record a Confirmatory Deed**

If you discover that the Town Meeting Vote or City Council Order authorizing the acquisition of a conservation property or park property stated that the land to be acquired was for either conservation or recreation use, but the accompanying deed does not reflect that intent, fix it by recording a corrective deed. Again, it may also be prudent to record the authorizing Town Meeting Vote or City Council Order as an adjunct to the deed.

#### Sample for Conservation Land

"...hereby grants to the TOWN OF \_\_\_\_\_, a Massachusetts municipal corporation, through its Conservation Commission for administration, control, and maintenance under the provisions of M.G.L., Chapter 40, §8C, as amended, with \_\_\_\_\_ covenants the land as bounded and described as follows:..."

#### Sample for Parkland

"...hereby grants to the TOWN OF \_\_\_\_\_, a Massachusetts municipal corporation, through its Park Commission (department) for administration, control, and maintenance under the provisions of M.G.L., Chapter 45, §3, as amended, with \_\_\_\_\_ covenants the land as bounded and described as follows:"