

Municipal Property Acquisitions and Dispositions: **Permanent Land Use Restrictions**

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August
2019

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PRESENTATION OUTLINE

- *Property Acquisitions: Creating, Administering, and Enforcing Restrictions Under M.G.L. Chapter 184*
 - Conservation Restrictions
 - Agricultural Preservation Restrictions
- *Property Dispositions and Changes of Use: Restrictions Commonly Affecting Municipally Owned Conservation Land*
 - Article 97
 - Land and Water Conservation Fund Grant Conditions
 - Charitable Public Trusts



30 years

Perpetuity



M.G.L. c.184, §23

M.G.L. c.184, §32

Ch. 184, §31 Restrictions

Conservation



Agricultural

Conservation Restriction

Forbid or limit

- Locating structures and utilities,
- Dumping material as landfill, or dumping unsightly or offensive materials,
- Removal or destruction of vegetation,
- Excavation, dredging or removal of mineral in such manner as to affect the surface,
- Surface use **except for** agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition,
- Acts detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or
- Acts detrimental to land or water areas.



Agricultural Preservation Restriction



Forbid or limit

- Locating buildings except for agricultural purposes or for dwellings used for family living by the land owner, his/her immediate family, or employees;
- Excavation, dredging or removal of mineral substance in a manner as to adversely affect the land's overall future agricultural potential; and
- Acts detrimental to retention of the land for agricultural use.



Adoption





Chapter Land

Is there land we
want conserved?





HELD BY CITY OR TOWN

- ✓ Grantor
- ✓ Grantee
Municipality/Agency
- ✓ Sec. EEOEA

HELD BY CHARITABLE CORPORATION OR TRUST

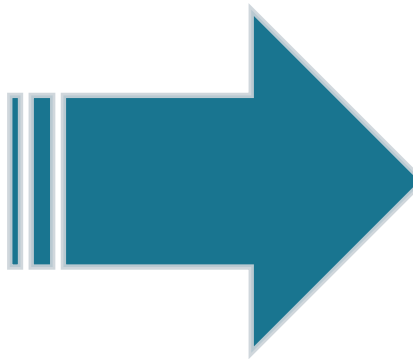
- ✓ Grantor
- ✓ Grantee
- ✓ Mayor/City Manager &
City Council;
Select Board
- ✓ Sec. EEOEA



1

GOALS

- Conservation values
- Permitted uses and non-permitted uses.
- Helpful to check MassGIS/OLIVER and local planning documents



2

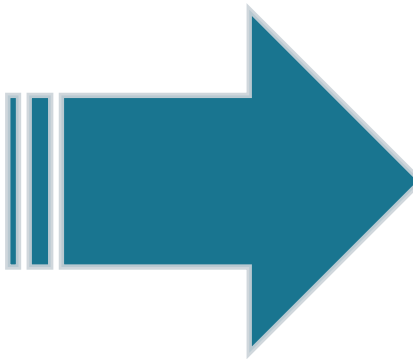
BASELINE DOCUMENTATION

- Photographs
- Narrative description of property
- Maps

3

DRAFT CR

- EOEEA's model
- Key provisions: allowed uses, prohibited uses, access, enforcement, dissolution of CR, and amendment of CR
- Building envelopes
- Agricultural Uses



4

APPLICATION TO DCR

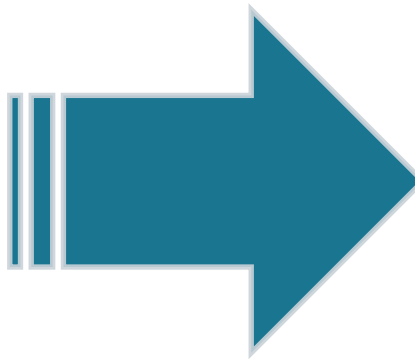
- Meets and bounds/Survey Plan
- Map showing CR and abutting CR land
- Grantor's Deed
- Maps showing conservation values
- Other permits/approvals



5

FINAL APPROVAL

- Collect required signatures
- Send CR to Secretary of Energy and Environmental Affairs.



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RECORDING

Record the restriction.



HELD BY CITY OR TOWN

- ✓ Grantor
- ✓ Grantee
Municipality/Agency
- ✓ Commissioner of
Food and Agriculture

HELD BY CHARITABLE CORPORATION OR TRUST

- ✓ Grantor
- ✓ Grantee
- ✓ Mayor/City Manager &
City Council;
Select Board
- ✓ Commissioner of
Food and Agriculture



Requirements

- At least 5 acres
- Actively devoted to agriculture for two years
- Produce at least \$500 in gross sales per year for the first 5 acres plus \$5 for each additional acre or \$0.50 per each additional acre of woodland and/or wetland



Other Criteria Considered

- Suitability and productivity of land based on soil classification, physical features, and location.
- The degree of threat to the continuation of agriculture on the land due to circumstances such as owner's death, retirement, financial positions, development pressure, or insecurity due to rental agreements.
- The size or composition of the land that determines if it is economically viable for agricultural purposes, and the likelihood that it will remain in agriculture in the future.



M.G.L. c.128, §1A:

- Does not explicitly exclude marijuana and hemp from definition of agriculture



M.G.L. c.40A, §3:

- Excludes marijuana from Dover protections



M.G.L. c.61A, §2:

- Ambiguous as to whether cultivation of marijuana or hemp would qualify for protections



Monitoring



Walk the land



Engage the community



Educate new owners



CPA Funds to assist land trusts



Enforcement

Meet with
Landowner

Permit
Violations

Court
Action



Court Action

“The restriction may be enforced by injunction or other proceeding, and shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. If the court in any judicial enforcement proceeding ... finds there has been a violation of the restriction ... then, in addition to any other relief ordered, the petitioner bringing the action or proceeding may be awarded reasonable attorneys' fees and costs incurred in the action proceeding.”

M.G.L. c.184, §32



Court Action

Wellesley Conservation Council, Inc. v. Robert Pereira
35 Mass. L. Rptr. 113 (Norfolk Superior Ct., June 12, 2018)

- *M.G.L. c.184, §32* – Conservation statute
 - No additional damages awarded
- *M.G.L. c.242, §7* – Willful trespass to trees, etc.
 - No damages awarded



- Only in exceptional circumstances
- Consistent with the purposes of this Conservation Restriction
- Not affect its perpetual duration
- Approval from appropriate state authority
- Article 97



RESTRICTIONS OFTEN ENCOUNTERED IN DISPOSITIONS AND CHANGES OF USE OF CONSERVATION LAND

- Article 97
- Land and Water Conservation Fund grant restrictions
- Public charitable trusts



Prior Public Use Doctrine

“The rule that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law.”

Robbins v. Department of Public Works,
355 Mass. 328, 330 (1969)

M.G.L. c. 40, §15A

1951: Legislature delegated authority to municipalities to change use of municipally owned land acquired for a specific purpose (**other than land acquired for park purposes**)

- Board or officer having charge of land gives notice to city council or board of selectmen that land is no longer needed for original purpose
- City: Two-thirds vote of city council, plus approval of mayor or city manager
- Town: Two-thirds vote of town meeting

Article 97*

1972: MA Constitution amended by Article 97

- Strengthened public use doctrine for conservation land by requiring 2/3 vote of Legislature (not just majority)
- Expanded protection of such land by also requiring 2/3 vote of Legislature for disposition (even if use unchanged)

(*actually Article 49 of the Amendments to the Massachusetts Constitution as amended by Article 97)

Article 97

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.

* * * *

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.

Is the
property
protected by
Article 97?

“taken or acquired for such purposes”

Smith v. City of Westfield, 478 Mass. 49 (2017)

- “Under our common law, land is dedicated to the public as a public park when the landowner’s intent to do so is clear and unequivocal, and when the public accepts such use by actually using the land as a public park.”
- “There are various ways to manifest a clear and unequivocal intent. ... The recording of a deed or a conservation restriction is one way of manifesting such intent but it is not the only way.”
- “[W]e consider the **totality of the circumstances...**”

Is the
property
protected by
Article 97?

“taken or acquired for such purposes”

Possible Evidence of Designation for Article 97 Purposes:

- Language in the deed or order of taking
- Context of acquisition (e.g., pursuant to an urban renewal plan)
- Recording of a conservation restriction
- Vote of city council or town meeting
- Custody given to conservation commission, parks department, etc.
- Actual use of the land

Keep in mind:
Article 97
applies
retroactively!

Does the
contemplated
action trigger
Article 97?

**“used for other purposes
or otherwise disposed of”**

*Opinion of the Attorney General,
June 6, 1973
 (“Quinn Opinion”)*

- A **change of use to a purpose inconsistent with Article 97** triggers the requirements of Article 97, even if there is no change in ownership of the property
- Refer to “prior public use” case law to determine what constitutes a change in use

YES

Does the contemplated action trigger Article 97?

“used for other purposes or **otherwise disposed of**”

Quinn Opinion, cont’d

“**Dispositions**” are **transfers of legal or physical control**

- Between government agencies
- Between political subdivisions
- Between levels of government
- From public to private

Such transfers include:

- Outright conveyances
- Takings by eminent domain
- Leases (whether short-term or long-term)
- Granting or taking of easements

YES

Does the contemplated action trigger Article 97?

“used for other purposes or **otherwise disposed of**”

Opinion of the Attorney General, May 16, 1980

- Permits granted by DEM to landowners surrounding Otis Reservoir are not interests in land and do not trigger Article 97

Mahajan v. DEP, 464 Mass. 604 (2013)

- A license is not the disposition of a property interest triggering Article 97
- Also, Chapter 91 license granted to landowner does not transfer control of property from landowner and thus does not trigger Art. 97

NO

Things to Know

- **MA EEA Article 97 Land Disposition Policy**
 - Municipal approval
 - Unanimous Conservation Commission vote
 - Unanimous Park Commission vote if parkland
 - Two-thirds Town Meeting or City Council vote
 - “No net loss”
 - Violation makes municipality ineligible for EEA grants
- **MEPA filing**
 - Required for:
 - Conversion of Article 97 land to non-Article 97 purpose
 - Some conversions of active agricultural land to non-ag use
 - Release of preservation restriction
 - IF transaction involves state agency action or funding or is part of a project requiring state permits
 - See 301 CMR 11.01(2) & 11.03(1)(b)

Special Acts

SENATE DOCKET, NO. 2500 FILED ON: 7/18/2019
SENATE No. 2300

The Commonwealth of Massachusetts

PRESENTED BY:

Patrick M. O'Connor

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act authorizing the town of Scituate to use certain land for general municipal purposes without Article 97 restrictions on such use.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Patrick M. O'Connor</i>	<i>Plymouth and Norfolk</i>
<i>Joan Meschino</i>	<i>3rd Plymouth</i>
<i>Patrick Joseph Kearney</i>	<i>4th Plymouth</i>

Chapter 17. AN ACT AUTHORIZING THE CITY OF GARDNER TO CONVEY CERTAIN PARK LAND.

Be it enacted, etc., as follows:

SECTION 1. The city of Gardner, acting through its mayor and city council, may convey a certain parcel of land acquired for use as a public common to the Greater Gardner Community Development Corporation. The parcel is more particularly described in an order of taking dated June 17, 1997 recorded in the Worcester county registry of deeds in book 18985 at page 149 and shown in plan book 740, plan 73 also recorded in said registry.

SECTION 2. The conveyance of the parcel of land in section 1 shall be subject to the following terms and conditions:

(1) The premises shall be restricted to the development of not more than 4 dwelling units of which 100 per cent shall be subject to an affordable housing restriction acceptable to the mayor;

(2) The dwelling units shall be sold or leased by the Greater Gardner Community Development Corporation to individuals who: reside in the city of Gardner; have parents or siblings who reside in the city of Gardner; or work in the city of Gardner; and

(3) As a condition of the conveyance, the city of Gardner shall transfer a parcel of land under the care, custody, management and control of the board of selectmen and dedi-

Land & Water Conservation Fund

Land and Water Conservation Fund Act of 1965, Section 6(f)(3):

“No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than outdoor public recreation use.”

(currently codified at 54 U.S.C. §200305(f)(3))



Open Space and Recreation Plan Update
Fitchburg, Massachusetts



2014-2021





Things to Know

- Boundary of land affected by LWCF Section 6(f)(3) restriction should be depicted in grant documents
- This area cannot be converted from outdoor recreation use, no matter how little grant money was received or how long ago it was, without adhering to regulatory requirements for conversion (36 CFR §59.3)
- MA EEA Division of Conservation Services has LWCF grant records; LWCF information may also be recorded

“Property conveyed to a governmental body ... for particular purposes may be subject to an enforceable general public obligation or trust to use the property for those purposes.”

Cohen v. City of Lynn, 33 Mass.App. Ct. 271, 275 (1992) (quoting *Nickols v. Commissioners of Middlesex County*, 341 Mass. 13, 18 (1960))



Key words in deed or will: land shall be used for specified purpose “forever” or “in perpetuity” (with no right of reversion)

Things to Know

- Can be enforced by the AG or ten taxpayers under M.G.L. c.214, §3(10)
- Can't be voided by Legislature
 - *Opinion of the Justices to the Senate*, 369 Mass. 979, 983 (1975)
- Municipality can petition court to modify trust under the doctrine of *cy pres* by filing a petition under M.G.L. c.214, §10B (on grounds that purpose has become impossible or impractical to fulfill)

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