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Recent Case Law on Article 97 Limits State and Municipal Authority to Develop Property

By Patricia A. DeAngelis | May 10, 2018

Article 97 of the Articles of Amendment to the Massachusetts Constitution, approved by the Legislature and ratified by Massachusetts voters in 1972, provides that '[l]ands and easements taken or acquired' for conservation purposes 'shall not be used for other purposes or disposed of' without the approval of two thirds roll call vote of each branch of the legislature.' Article 97 is intended to be a legislative 'check' to ensure that lands acquired by state entities and municipalities for conservation purposes are not converted to other inconsistent uses.

The Massachusetts Supreme Judicial Court significantly broadened the scope of Article 97 and, thus, the constraints on the development of property by governmental entities in Massachusetts, in the case of *Smith v. City of Westfield, 478 Mass 49 (2017)*. In the Westfield case, the SJC revisited its analyses in determining whether Article 97 state constitutional protections apply to restrict development of land held by state and municipal entities "for conservation and natural resource protection purposes."[1] Prior to *City of Westfield*, Article 97's application was limited to circumstances where an instrument, recorded in the title of property (including an instrument of taking), indicated an intent by the state entity or municipality to limit the use to conservation purposes. See e.g. *Selectmen of Hanson v. Lindsay, 444 Mass. 502, 508-509 (2005)*. In *City of Westfield*, the Court departed from that strict rule and held "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."[2] In other words, the Court broadly interpreted art. 97's language of land "taken or acquired" for conversation purposes.

The Court explained that there are a variety of ways in which land may be designated as a public park sufficient to invoke art. 97 protection.[3] Land may be so designated by (1) taking by eminent domain for the purposes of conservation or recreation, (2) recordation of a deed restriction, or (3) the doctrine of prior public use.[4]

Under the "prior public use" doctrine, land may be deemed to be designated as a public park and protected by art. 97 if (1) "the intent to dedicate [the land permanently is] made manifest by the unequivocal declarations or acts of the owner" and (2) "where the dedication is accepted by the public."[5] No specific amount of time is required for such dedication to take effect—as long as the intent to permanently render the land a public park is clearly and unequivocally manifested, and the public accepts such dedication, the land becomes subject to art. 97.[6]

In *City of Westfield*, the Court applied these rules to a proposed change, by Westfield, of a public park into a new elementary school. The park was not taken by eminent domain, and no instrument was recorded that would limit its usage to conservation or public recreation. The Court considered the totality of the circumstances, but the most determinative factor was the City's acceptance of federal funding, which

[1] Westfield, 478 Mass. at 49 (citing Mass. Const. amend. art. XLIX). Art. 97 may be enforced by the Department of Environmental Protection (Mass. Const. amend. Art. XLIX) or by a civil action brought by ten or more citizens of the Commonwealth (Citizens Right to Intervene, G.L. c. 30, § 10A). The Executive Office of Energy and Environmental Affairs also has de facto enforcement powers because it will not support an art. 97 disposition unless its "no net loss" policy is satisfied. See EEA Article 97 Land Disposition Policy, available at http://www.mass.gov/eea/agencies/mepa/about-mepa/eea-policies/eea-article-97-land-disposition-policy.html (Feb. 19, 1998).

[2] Id. (citing Mahajan v. Dept. of Environmental Protection, 464 Mass. 604 (2013) at 615).

[3] Id. (citing Mahajan, 464 Mass. at 615-16).

[4] Id. (citing Mahajan, 464 Mass. at 615-16).

[5] Id. (quoting Hayden v. Stone, 112 Mass. 346, 349 (1873)).

[6] Ibid

required the City to maintain the land as a public park unless it first obtained federal approval to change its use. The Court reasoned that, it is likely that even without the federal funding, the park would have been considered to be dedicated and accepted as a public park because it "served as a public playground for more than sixty years." Thus, the Court, for the first time, considered evidence outside of the property's title in determining that Article 97 prohibited the change of use. In the first judicial decision to apply this Article 97 guidance, the Massachusetts Land Court held that property conveyed to a town "for the purposes of protection of water resources and other compatible purposes including conservation and recreation" is not protected land under Article 97, and therefore could be leased to install a solar facility. *Mirkovic v. Guercio, 2017 WL 4681972 (Mass. Land Court, Oct. 18, 2017)*.

In 1990, the Town of Shirley acquired property under a deed that provided the land was being conveyed to the Town "for purposes of protection of water resources and other compatible purposes including conservation and recreation as approved and authorized by the voters of the Town of Shirley. . . .." In 2015, the Town's Planning Board granted site plan approval and a special permit to a solar energy company for the construction and operation of a solar energy generating facility on a section of the property. The company thereafter entered into an agreement with the Town to lease the project site on the property. A group of residents of the Town appealed the Planning Board's site plan approval to the Zoning Board of Appeals (ZBA), which denied the residents' petition to reverse the Planning Board's decision. The plaintiffs then appealed to the Land Court, arguing that the Town had acquired the property for purposes protected under Article 97 and that the ZBA had exceeded its authority by authorizing the disposition of the public's rights in the property without a vote of two-thirds of both branches of the Massachusetts Legislature. The defendants countered that the phrase "other compatible purposes" did not restrict the Town's use of the property to Article 97 purposes.

The Land Court determined that, while protection of water resources was "unquestionably" an Article 97 protected purpose, the allowance in the deed for "other compatible purposes" was not within the scope of Article 97 and that the property was therefore not subject to Article 97. The Land Court reasoned that the phrase "other compatible purposes" needed to be read within the context of the Town's Water Protection District zoning bylaw, which allowed, among other things, commercial, industrial, and institutional uses, and even the handling and storage of toxic or hazardous materials, in the Water Protection District. As the bylaw allowed a broad array of uses that were compatible with the water protection purposes for which the property was acquired, and those uses did not meet the purposes of Article 97, the Land Court found that the deed language was insufficient to invoke Article 97 protections.

Takeaways:

State and municipal entities which propose to develop vacant properties or properties which have been used for any period of time for uses that could fairly be characterized as conservation or recreation, should engage in a thorough analysis of any documentation or other evidence that speaks to its intent with respect to the use of the property.

Buyers of such property should go beyond a standard title search in conducting due diligence when responding to RFPs by a municipality or state entity.

Failure to take these extra steps could result in an attempt to enjoin the sale on Article 97 grounds.

If you have any questions about this article, please contact:
Patricia A. DeAngelis at pdeangelis@murthalaw.com or 617.457.4025

Thomas M. Daniells, Chair
860.240.6078
tdaniells@murthalaw.com

Alyssa L. Aaskov
617.457.4037
aaaskov@murthalaw.com

Catherine A. Cuggino
860.240.6086
ccuggino@murthalaw.com

Patricia A. DeAngelis
617.457.4025
pdeangelis@murthalaw.com

Jodie L. Driscoll
203.772.7748
jdriscoll@murthalaw.com

Robert V. Giunta, Jr.
860.240.6033
rgiunta@murthalaw.com

Frank J. Saccomandi, III
860.240.6043
fsaccomandi@murthalaw.com

Spencer A. Stone
860.240.6079
sstone@murthalaw.com

Joseph R. Tarby, III
781.933.5505
jtarby@murthalaw.com

Keith S. Varian
203.653.5415
kvarian@murthalaw.com