

September 16, 2019

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BY ELECTRONIC TRANSMISSION
AND FIRST CLASS MAIL

Ms. Melissa Malone
Town Administrator
Natick Town Hall
2nd Floor
13 East Central Street
Natick, MA 01760

Re: Camp Mary Bunker – Article 97

Dear Ms. Malone:

You requested an opinion regarding whether, prior to the vote taken under Article 17 of the 2019 Spring Annual Town Meeting (the “2019 Vote”), Camp Mary Bunker (the “Camp”) was subject to Article 97 of the Articles of Amendment to the Massachusetts Constitution (“Article 97”), and, accordingly, special legislation was required for the installation of a sidewalk on the Camp property in connection with the North Main Street (Route 27) improvement project. In my opinion, the Camp was not subject to Article 97 until the 2019 Vote expressly dedicated the Camp to Article 97, and the construction of a sidewalk at the Camp property is permissible.

Camp Mary Bunker was purchased pursuant to a vote taken under Article 27 of the 1983 Spring Annual Town Meeting, which did not specify the purpose for which the Camp was acquired. The care, custody and maintenance of the Camp was, and continues to be, with the Board of Selectmen. The Camp was conveyed to the Town by a Quitclaim Deed from the Patriot’s Trail Girl Scout Council, Inc., dated July 26, 1984, recorded with the Middlesex South Registry of Deeds in Book 15706, Page 22, subject to an Agreement, dated January 24, 1984, recorded with the Registry of Deeds in Book 15706, Page 26. While the Agreement states that the Camp shall remain in a permanent natural, open, and park-like state, this language, alone, is not dispositive of whether the Camp is subject to Article 97. As discussed below, a number of other factors must be considered to make this determination. In this case, these factors support a finding that Article 97 did not apply to the property prior to the 2019 Vote.

Article 97

Article 97, approved on November 7, 1972, states in relevant part 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; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air

Ms. Melissa Malone
Town Administrator
September 16, 2019
Page 2

and other natural resources is hereby declared to be a public purpose.” Article 97 further provides: “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” (emphasis added). As quoted above, Article 97 applies to land originally acquired (by purchase, taking, or gift) by a municipality or other governmental body for a purpose protected under Article 97, such as park, conservation, open space, and/or water supply protection (which I refer to as “an Article 97 Purpose”), and prohibits the municipality or other body from disposing of such land or interests in such land (such as leases, easements, and restrictions) and from changing the use of Article 97 land to a different purpose without, in each instance, a two-thirds roll call vote of each house of the state Legislature, in addition to other approvals.

In Mahajan v. Department of Environmental Protection, 464 Mass. 604 (2013), the Supreme Judicial Court held that, for land to be protected under Article 97, the primary purpose for which the land was acquired must be a purpose that serves “the stated goals of art. 97” - that is, an Article 97 Purpose. Id. at 615. Thus, if land is originally taken or acquired for multiple purposes, some of which are protected by Article 97 and some that are not protected under Article 97, such land would not be subject to Article 97. See also Mirkovic v. Guercio, 2017 WL 4681972 (Land Court 2017).

Note that Article 97 can also apply to land that was not originally acquired or taken by the Town for an Article 97 Purpose. In Hanson v. Lindsay, 444 Mass. 502 (2005), a case involving unique facts, the Court indicated that if land owned by a municipality is bound by a permanent deed restriction or conservation restriction, limiting the use of the land to an Article 97 Purpose, such land could be deemed to be subject to Article 97. In addition, in Mahajan v. Department of Environmental Protection, 464 Mass. 604 (2013), the Supreme Judicial Court held that Article 97 could apply to property not originally acquired or taken for an Article 97 Purpose if such property, “subsequent to the taking [is]...designated for those purposes in a manner sufficient to invoke the protection of art. 97.” Id. at 615 (emphasis added).

In Smith v. City of Westfield, 478 Mass. 49 (2017), the Supreme Judicial Court addressed what it means to “designate” or dedicate property to Article 97. At issue was whether Article 97 applied to a parcel of land that, though originally acquired by the City of Westfield by tax title foreclosure, was used as a public park for several decades. The Court held that if, based on a review of the totality of the circumstances, the property owner expresses a “clear and unequivocal intent to dedicate the land permanently”... for an Article 97 Purpose “...and where the public accepts such use by actually using the land...” for that Article 97 Purpose, the land may be deemed to be protected by Article 97 (emphasis added). While recording a permanent deed restriction may be evidence of such intent, the Court indicated it was not the only means of protecting land under Article 97. In Westfield, there was no conservation or deed restriction on record.

Ms. Melissa Malone
Town Administrator
September 16, 2019
Page 3

In Westfield, the Court considered whether the following actions taken by the City demonstrated such clear and unequivocal intent: (i) the property was used as a public park and playground by the public for more than sixty years, (ii) the City Council voted to transfer the “full charge and control of the property to the playground commission,” (iii) the City transferred funds to the playground commission to improve the playground, (iv) the City passed an ordinance, formally naming the property as a playground, and (v) the City accepted federal funds under the Land and Water Conservation Fund Act of 1965 (the “Act”) to rehabilitate the property. To obtain such funds, the City entered into a grant agreement in which it agreed to develop an outdoor recreation plan and comply with the provisions of the Act. The Act states that land developed using funds under the Act cannot be converted “to other than public outdoor recreation uses without the approval of the United States Secretary of the Interior.” Id. at 52. The Court concluded that the property in Westfield was subject to Article 97, stating that while it had reviewed the totality of the circumstances (discussed above), “the determinative factor here was the acceptance by the city of Federal conservation funds under the act to rehabilitate the playground with the statutory proviso that, by doing so, the city surrendered all ability to convert the playground to a use other than public outdoor recreation without the approval of the Secretary.” Id. at 64.

Under the case law as it stands today, to determine if Article 97 applies to any particular parcel of land, one must examine if the Town originally acquired the land for an Article 97 Purpose. Often, the deed or order of taking by which the Town acquired the land in question will state the purpose of the acquisition. It is also important to review the Town Meeting vote that authorized the acquisition of the land to determine if it refers to an Article 97 Purpose. If land was not originally acquired for an Article 97 Purpose, we need to examine whether the Town clearly and unequivocally expressed its intention to protect the land permanently under Article 97. Such an examination requires an investigation of various actions, including a review of Town Meeting votes since the original acquisition of the land, the purposes for which the land has been used, and whether there are any restrictions on the use of the land, among other factors. As stated in Westfield, the determination of whether property is subject to Article 97 must be gleaned from the “totality of the circumstances.”

Camp Mary Bunker

In my opinion, the Camp Mary Bunker was not dedicated to Article 97 purposes prior to the 2019 Vote. There is no statement, in the original acquisition vote, that it was acquired for Article 97 purposes. The property is under the care, custody and control of the Board of Selectmen – which is not the board or commission ordinarily charged with the care of Article 97 property. Moreover, there are several uses expressly permitted at the Camp which are not consistent with Article 97, e.g., buildings or other development, including a sanitary facility, a storage facility for outdoor program equipment or firewood storage, a small indoor activity center for camp programs, a rustic, open-roofed pavilion and a caretaker’s facility or home. See Agreement, Article III, Section B.

Ms. Melissa Malone
Town Administrator
September 16, 2019
Page 4

There is no evidence, as in Westfield, that the Town passed a by-law formally naming the Camp as a park, or that the Town accepted funds from the federal government or the state. Indeed, the determinative factor in Westfield is not present here. There is no evidence of funding that required the Town to subject the property to the provisions of Article 97.

In my opinion, the most compelling factor against the application of Article 97 to the property is that the Division of Conservation and Services (DCR), when this issue was raised in the early months of 2019, did not take the position that the Camp had already been dedicated to Article 97. DCR, in my experience, is vigilant in protecting Article 97 properties from any change in use, however *de minimis* or non-intrusive. DCR requested that the Town dedicate the property to Article 97 purposes going forward, and expressly sanctioned the installation of the sidewalk. Had DCR believed the Camp was already subject to Article 97, it would not have condoned the Town action. Instead DCR would have advised that the property was, in its estimation, already subject to Article 97, and any dedication vote would have been redundant as the land was already protected.

Conclusion

It is not the case that all property owned by a municipality that is in a natural and protected state is subject to Article 97. In order to determine if Article 97 applies, an assessment must be made that the property has been dedicated to Article 97, which analysis requires a review of a totality of the circumstances. The facts surrounding the Camp Mary Bunker did not, prior to the 2019 Vote, satisfy the standards set forth in the case law, and, in particular, the Westfield decision, where far more indicia of dedication were present. Accordingly, in my opinion, Camp Mary Bunker was not subject to Article 97 prior to the 2019 Vote, and the installation of the sidewalk in connection with the North Main Street improvements project is permissible.

Please do not hesitate to contact me with any questions.

Very truly yours,



Katharine Lord Klein

KLK/jsh