

December 30, 2003

Robert L. Whritenour, Jr., Administrator
Town of Falmouth
59 Town Hall Square
Falmouth, MA 02540

RE: Conservation Commission Authorities

Mr. Whritenour:

This letter is in response to your telephone call to me on Friday, December 12 about certain comments I made during my presentation the previous night to the Falmouth Bog Committee. Specifically you asked for more information regarding the legal authorities of Conservation Commissions that I referenced during my talk. My comments were based on discussions I have had with Conservation Commission members in various towns and state officials over the years, and my own review of various Massachusetts General Laws and regulations.

I summarize my comments below and provide the regulatory reference. These are not legal opinions, and you should consult with your attorney, EOEAs Division of Conservation Services, and the Massachusetts Department of Revenue Division of Local Services for legal opinions.

I also wish to call your attention to the new information I discovered described in item 2 that directly contradicts my statement that income from the property must be deposited into the conservation fund.

1) Conservation Commission Ownership of Lands purchased with Self-Help Funds

A number of large parcels along the Coonamessett River (open space and bogs) were purchased by the Falmouth Conservation Commission with the Massachusetts "Self-Help" grant in the 1970s (maps attached). The Self-Help Program specifically provides funds to Conservation Commissions for the purchase of conservation land. As such, the Conservation Commission becomes the owner and manager of these properties. The Self-Help Grant Program was established under M.G.L. Ch. 132A, § 11 (attached), and the supporting regulations are found under 301 CMR 5.00 (attached).

Some requirements under the regulations include:

- You must develop a 5-year Open Space and Recreation Plan
- Land purchased must have public access and be open to all state residents (generally off street parking is required)
- The land must be adequately posted that it is open to the public
- Land shall be retained and used at all times for open space purposes in accordance with M.G.L. c. 132A, § 11, and St. 1977, c. 933
- The regulations included reversion and conversion provisions.

2) Income from conservation properties must be placed in a Conservation Fund, not the town's General Fund.

I presented on a slide, and stated "Any fees generated from town conservation or parkland must go to a dedicated fund (either conservation or recreation fund) as per MGL Ch. 83 §44 and a letter of opinion from DOR [Department of Revenue], Division of Local Services."

We received this information from the EOEI Division of Conservation Services, and it was consistent with our understanding of the laws relating to town conservation funds.

However, after receiving your call, we discovered that the citation was incorrect and should have read MGL Ch. 44 §63 and §53D, (Sale or other disposal of realty; disposition of proceeds, and recreation and park self-supporting service revolving funds; creation; authorized use of funds). Chapter 44 §63 states that proceeds from the sale or disposal of real estate can be placed in accounts for the "acquisition of land for park purposes or for capital improvements to park land." In 1991 legal opinion¹, the DOR Division of Local Services noted that proceeds from the sale of a conservation easement could be placed in a municipality's Conservation Fund.

In addition, Chapter 44 §53D states that a town may establish "a revolving fund which shall be kept separate and apart from all other monies by the treasurer and in which shall be deposited the receipts received in connection with the conduct of self-supporting recreation and park services." This legislation allows various park and recreation fees and incomes from concession operators to be put into a separate account to pay for various expenditures like park improvements, maintenance, etc. In a DOR newsletter, the Division of Local Services commented² "The Property Tax Bureau has previously interpreted the statute to mean that proceeds from concessions and the rental of recreational facilities could become part of the revolving fund revenue if generated in connection with self-supporting activities sponsored by the recreation department. Accordingly, these rent payments from the concession operator should be deposited in the park and recreation revolving fund and not be considered local estimated receipts."

The reference to the conservation fund is based on MGL Ch. 40 §8C³ which authorizes the establishment of local conservation funds in interest bearing accounts for the use by Conservation Commissions.

"A city or town may appropriate money in any year to a conservation fund of which the treasurer shall be the custodian. He may deposit or invest the proceeds of said fund in savings banks, trust companies incorporated under the laws of the commonwealth, and any income therefrom shall be credited to the fund. Money in said fund may be expended by said commission for any purpose authorized by this section; provided, however, that no expenditure for a taking by eminent domain shall be made unless such expenditure has been approved in accordance with this section."

However, while we believe that the EOEI Division of Conservation Service's opinion is correct that "fees" generated from town conservation land should go to the Conservation Fund, we discovered a 1995 Department of Revenue Division of Local Services legal opinion that stated that town agricultural land lease income was not the same as fee income. In their legal opinion summary they state:

95-221 (7/6/95) Receipts from Leases of Agricultural Land.
Revenues from the lease of agricultural land under the control of the conservation commission belong to the general fund under G.L. Ch 44 §53, not to the conservation fund established by G.L. Ch. 40 §8C. Nor can the

¹ DOR DLS file No. 91-602, November 22, 1991 letter to the City of Springfield legal counsel.

² Division of Local Services "CITY & TOWN" July/August 1999, page 2

³ CHAPTER 40. POWERS AND DUTIES OF CITIES AND TOWNS PURPOSES FOR WHICH TOWNS MAY APPROPRIATE MONEY Chapter 40: Section 8C Conservation commission; establishment; powers and duties.

revenues be considered proceeds from the sale of park land to be used for capital improvements for the land under G.L. Ch. 44 §63, because a lease is not a sale or disposition of real estate and agricultural land under the control of the conservation commission is not park land for purposes of the statute.

This opinion clearly contradicts my statement at the meeting and the original guidance we received from the EOE Division of Conservation Services.

3) The Conservation Commission can buy land without the approval of town meeting, but land donated to the Conservation Commission must be approved by the Board of Selectmen.

MGL Ch. 40 Section 8C states “Said commission may receive gifts, bequests or devises of personal property or interests in real property of the kinds mentioned below in the name of the city or town, subject to the approval of the city council in a city or of the selectmen in a town. It may purchase interests in such land with sums available to it.” Conservation Commission oversee a Conservation Fund which can be spent for the purpose of conservation land. Thus, a Conservation Commission could expeditiously purchase a parcel for \$1, whereas a land donation requires approval of the Board of Selectmen.

The considerable authority of the Conservation Commission in purchasing land is illustrated further by this DOR Division of Local Services legal opinion:

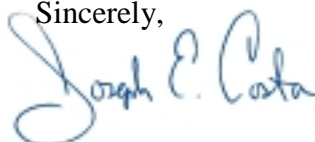
DOR Division of Local Service Opinion 95-586 (6/20/95)

Earmarking of Future State Reimbursements for Conservation Purchases to Conservation Fund.

“A provision of an appropriation for the conservation fund established under G.L. Ch. 40 §8C for land acquisitions that makes the selectmen the administrators of the fund is ineffective, because the statute vests the power to purchase such lands exclusively in the conservation commission. Therefore, the commission may spend the unexpended balance of the fund for land acquisitions without the approval of the selectmen. Any reimbursements received by the town from the commonwealth for monies it has already spent for conservation land purchases belong to the general fund if the acquisitions were funded from the conservation fund, the tax levy, free cash or other available fund”

I hope this information will be useful to you and the Conservation Commission.

Sincerely,



Joseph E. Costa, PhD
Executive Director

cc. Virginia Valiela, Chairperson, Bog Committee
Eric MacLaughlin, Chairman, Conservation Commssion

Attachments

CHAPTER 132A. STATE RECREATION AREAS OUTSIDE OF THE METROPOLITAN PARKS DISTRICT Chapter 132A: Section 11 Conservation program for cities and towns; establishment

Section 11. The secretary of environmental affairs shall establish a program to assist the cities and towns, which have established conservation commissions under section eight C of chapter forty, in acquiring lands and in planning or designing suitable public outdoor facilities as described in sections two B and two D. He may, from funds appropriated to carry out the provisions of section three, reimburse any such city or town for any money expended by it in establishing an approved project under said program in such amount as he shall determine to be equitable in consideration of anticipated benefits from such project, but in no event shall the amount of such reimbursement exceed eighty per cent of the cost of such project. No reimbursement shall be made hereunder to a city or town unless a project application is filed by such city or town with the secretary setting forth such plans and information as the secretary may require and approved by him, nor until such city or town shall have appropriated, transferred from available funds or have voted to expend from its conservation fund, under clause fifty-one of section five of chapter forty, an amount equal to the total cost of the project, nor until the project has been completed, to the satisfaction of the secretary, in accordance with said approved plans. Any reimbursement received by a city or town under this section shall be applied to the payment of indebtedness, if any, incurred in acquiring land for such conservation project.

ADMINISTRATION OF THE GOVERNMENT

TITLE VII.

CITIES, TOWNS AND DISTRICTS

CHAPTER 40. POWERS AND DUTIES OF CITIES AND TOWNS

PURPOSES FOR WHICH TOWNS MAY APPROPRIATE MONEY

Chapter 40: Section 8C Conservation commission; establishment; powers and duties

Section 8C. A city or town which accepts this section may establish a conservation commission, hereinafter called the commission, for the promotion and development of the natural resources and for the protection of watershed resources of said city or town. Such commission shall conduct researches into its local land areas and shall seek to co-ordinate the activities of unofficial bodies organized for similar purposes, and may advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which in its judgment it deems necessary for its work. Among such plans may be a conservation and passive outdoor recreation plan which shall be, as far as possible, consistent with the town master plan and with any regional plans relating to the area. The commission may, from time to time, amend such plan. Such plan shall show open areas including marsh land, swamps and other wetlands, and shall show which areas are subject to restrictions or wetland zoning provisions and any other matters which may be shown on a plat index under section thirty-three of chapter one hundred and eighty-four. Acquisitions of interests in land under this section and other municipal open lands shall be shown thereon as well as lands owned by other entities kept open through any legal requirement. Such plan shall show other areas which public necessity requires to be retained for conservation and passive recreation use. It shall keep accurate records of its meetings and actions and shall file an annual report which shall be printed in the case of towns in the annual town report. The commission may appoint a director, clerks, consultants and other employees, and may contract for materials and services within available funds insofar as the same are not supplied by other departments. The commission shall consist of not less than three nor more than seven members. In cities the members shall be appointed by the mayor, subject to the provisions of the city charter, except that in cities having or operating under a Plan D or Plan E form of city charter, said appointments shall be by the city manager, subject to the provisions of the charter; and in towns they shall be appointed by the selectmen, excepting towns having a manager form of government, in which towns appointments shall be made by the town manager, subject to the approval of the selectmen. When a commission is first established, the terms of the members shall be for one, two or three years, and so arranged that the terms of approximately one third of the members will expire each year, and their successors shall be appointed for terms of three years each. Any member of a commission so appointed may, after a public hearing, if requested, be removed for cause by the appointing authority. A vacancy occurring otherwise than by expiration of a term shall in a city or town be filled for the unexpired term in the same manner as an original appointment.

Said commission may receive gifts, bequests or devises of personal property or interests in real property of the kinds mentioned below in the name of the city or town, subject to the approval of the city council in a city or of the selectmen in a town. It may purchase interests in such land with sums available to it. If insufficient funds are available or other reasons so require, a city council or a town meeting may raise or transfer funds so that the commission may acquire in the name of the city or town by option, purchase, lease or otherwise the fee in such land or water rights, conservation restrictions, easements or other contractual rights including conveyances on conditions or with limitations or reversions, as may be necessary to acquire, maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces in land and water areas within its city or town, and it shall manage and control the same. For the purposes of this section a city or town may, upon the written request of the commission, take by eminent domain under chapter seventy-nine, the fee or any lesser interest in any land or waters located in such city or town, provided such taking has first been approved by a two-thirds vote of the city council or a two-thirds vote of an annual or special town meeting, which land and waters shall thereupon be under the jurisdiction and control of the commission. Upon a like vote, a city or town may expend monies in the fund, if any, established under the provisions of this section for the purpose of paying, in whole or in part, any damages for which such city or town may be liable by reason of any such taking. The commission may adopt rules and regulations governing the use of land and waters under its control, and prescribe penalties, not exceeding a fine of one hundred dollars, for any violation thereof. No action taken under this section shall affect the powers and duties of the state reclamation board or any mosquito control or other project operating under or authorized by chapter two hundred and fifty-two, or restrict any established public access. Lands used for farming or agriculture, as defined in section one A of chapter one hundred and twenty-eight, shall not be taken by eminent domain under the authority of this section.

A city or town may appropriate money in any year to a conservation fund of which the treasurer shall be the custodian. Prior to the adoption of any rule or regulation which seeks to further regulate matters established by section forty of chapter one hundred and thirty-one or regulations authorized thereunder relative to agricultural or aquacultural practice, the commission shall, no later than seven days prior to the commission's public hearing on the adoption of said rules and regulations, give notice of the said proposed rules and regulations to the farmland advisory board established pursuant to section forty of chapter one hundred and thirty-one. He may deposit or invest the proceeds of said fund in savings banks, trust companies incorporated under the laws of the commonwealth, banking companies incorporated under the laws of the commonwealth which are members of the Federal Deposit Insurance Corporation, or national banks, or invest it in paid up shares and accounts of and in co-operative banks or in shares of savings and loan associations or in shares of federal savings and loan associations doing business in the commonwealth, and any income therefrom shall be credited to the fund. Money in said fund may be expended by said commission for any purpose authorized by this section; provided, however, that no expenditure for a taking by eminent domain shall be made unless such expenditure has been approved in accordance with this section.

TITLE VII. CITIES, TOWNS AND DISTRICTS
CHAPTER 44. MUNICIPAL FINANCE
MISCELLANEOUS PROVISIONS

Chapter 44: Section 63 Sale or other disposal of realty; disposition of proceeds

Section 63. Whenever the proceeds of the sale or other disposal of real estate, including the taking by eminent domain by another governmental unit, but other than that acquired through tax title foreclosure, by a city, town, or district, exceed five hundred dollars, the same shall be applied to the payment of indebtedness incurred in acquiring such real estate or shall be added to the sinking fund, if any, from which said indebtedness is payable, or if no such indebtedness is outstanding may be used for any purpose or purposes for which the city, town or district is authorized to incur debt for a period of five years or more or be applied to the payment of indebtedness incurred under clause (3) of section seven, except that the proceeds of a sale in excess of five hundred dollars of any park land by a city, town, or district shall be used only by said city, town, or district for acquisition of land for park purposes or for capital improvements to park land.

TITLE VII. CITIES, TOWNS AND DISTRICTS
CHAPTER 44. MUNICIPAL FINANCE
MISCELLANEOUS PROVISIONS

Chapter 44: Section 53D Recreation and park self-supporting service revolving funds; creation; authorized use of funds; annual report; revocation of provisions

Section 53D. Notwithstanding the provisions of section fifty-three, any city or town which accepts the provisions of this section may establish in the city or town treasury a revolving fund which shall be kept separate and apart from all other monies by the treasurer and in which shall be deposited the receipts received in connection with the conduct of self-supporting recreation and park services of said city or town. The principal and interest thereon shall be expended at the direction of the authority, commission, board or official of such city or town with said responsibility without further appropriation, but only with the written approval of the mayor in cities, or city manager in Plan E cities, or the selectmen in towns, or in towns which have adopted the town manager form of government the town manager and only for the purpose of operating self-supporting recreation and park services. The city auditor or town accountant shall submit annually a report of said revolving fund to the mayor, city council, city manager, board of selectmen or town manager for their review and a copy of said report shall be submitted to the director of the bureau of accounts; provided, however, that funds in said revolving fund shall not be used for the purpose of paying any wages or salaries for full-time, as defined in the guidelines issued by the director of accounts, recreation and park employees; provided, further, that the unreserved fund balance shall not exceed ten thousand dollars at the close of each fiscal year and any such amount in excess of ten thousand dollars shall be paid into the city or town treasury as provided in section fifty-three.

A city or town which has accepted the provisions of this section may, in like manner, revoke its acceptance; provided, however, that any city or town may require by by-law or ordinance, that the provisions of this section may be subject to annual authorization by a vote of the annual town meeting or city council.