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TO: Michael Herbert, Town Manager
FR: Lisa L. Mead, Town Counsel
RE: Mindess School and Use of CPA funds for ball field and dug out
DA: April 7, 2021

Reference is made to the above captioned matter. In that connection, you have requested that I provide an opinion as to whether, when the School Department through the Ashland Fields Management Group accepted funds over a period of time in 2013 and 2014 for improvements to the Mindess School baseball field from the Community Preservation Committee, did the acceptance and use of the funds convert the baseball field to a protected Article 97 status. The short answer is no.

The Facts: In 2013 and 2014 the Town Meeting appropriated, in Article 16 and Article 12 respectively, $213,025 to the Ashland Fields Management Group for work on various projects around Town. Of that amount approximately $30,000 was spent to make improvements to the Mindess School baseball field and to build dugouts.

This year, the Mindess School Building Committee is doing a construction project and a parking lot is replacing the ball fields and the ball field will be moved and improved – essentially to the other side of the property.

The Law: G. L. c. 44B section 12 only requires a restriction be put in place where the town acquires an interest in real estate. The Community Preservation Act does not include requirements for restrictions for use of CPA funds to recreational improvements, absent an acquisition of interest in real estate. Further, the Department of Revenue agrees and does not have specific guidance on this situation – that is where CPA funds are used for recreational improvements and later the improvements are discontinued or changed. Indeed, since the school is replacing the field with its own funds, not CPA funds, such that the use will remain on the site, I have been advised by the Department of Revenue that such a situation would comply with the intent of the CPA – ensuring the use of the CPA funds as originally appropriated continues for the same purpose.

Further, Article 97 of the Amendments to the Massachusetts Constitution ("Article 97") was approved by the Legislature and ratified by the voters in 1972 and provides that "[l]ands and easements **taken or acquired**" for conservation purposes "shall not be used for other purposes or otherwise disposed of" without the approval of a two-thirds roll call vote of each branch of the Legislature. Article 97 is retroactive. See *Opinions of the Justices,* 383 Mass. 895, 918, 424 N.E.2d 1092 (1981), citing Rep. A.G., Pub. Doc. No. 12, at 141.

The application of Article 97 has been parsed out in recent years, most notably in *Board of Selectmen of Hanson v. Lindsay*, 444 Mass. 502 (2005), *Mahajan v. Department of Environmental Protection*, 464 Mass. 604 (2013), and *Smith v. Westfield*, 478 Mass. 49 (2017).

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Essentially, the main issue courts have addressed is how to determine whether land has been sufficiently **taken or acquired for such purposes**, thus receiving Article 97 protection.

In 2005 in *Board of Selectmen of Hanson v. Lindsay*, 444 Mass. 502 (2005), the Supreme Judicial Court determined whether a town meeting vote authorizing the acquisition of property for open space and conservation purposes, was sufficient to protect the property under Article 97. In that case, the town originally acquired the locus by tax title taking in 1957, and a deed was subsequently recorded. Importantly, this original acquisition by the Town was not for a specific purpose, but instead the land was held as general corporate property. Then, in 1971, the Town voted "to accept for conservation purposes" a deed to the locus. However, no further action was taken in connection with the vote.

In *Hanson*, the court reasoned that since the town took no further action after the 1971 vote, and no deed was prepared for and accepted by the town, the town never became specifically designated for conservation purposes. All the vote did was "merely expressed the town's interest in dedicating the locus to conservation purposes. The vote did not formally impose such a restriction on the land, but is expressly anticipated the execution of a deed for that purpose." *Id.* at 508. The court concluded that the vote alone did not accomplish the task of taking or acquiring the property and "had no legal effect on the locus" and "to conclude that this could be accomplished solely by vote, without recordation of any instrument, would eviscerate the purposes of our recording acts." *Id.*

In 2013, the Supreme Judicial Court again considered the application of Article 97 in *Mahajan v. Department of Environmental Protection*, 464 Mass. 604 (2013). There, the Court found that land taken by the Boston Redevelopment Authority, while the purpose of the land acquisition did serve some objectives parallel to those articulated in Article 97, the land was not taken for the purposes of Article 97 and therefore was not protected.

In 2017, the Court again revisited Article 97 in *Smith v. Westfield*, 478 Mass. 49 (2017). This time, the Court concluded that recorded, written dedication is not the only way to impose Article 97 protection on land. Instead, the Court found that Article 97 applies to land not originally acquired for an Article 97 purpose where the municipality demonstrates a "clear and unequivocal intent to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park".

In the *Westfield* case, the Court revisited its decisions and reasoning from *Hanson* and *Mahajan*, distinguishing them. The Court found that in *Hanson*, the town intended to designate land for conservation purposes by executing a deed with a conservation restriction but never did, so it was true, as they said in *Mahajan*, that "the town had to deed the land to itself for conservation purposes—or record an equivalent restriction on the deed—in order for art. 97 to apply to subsequent dispositions or use for other purposes."

Importantly, the *Westfield* case continued— "[b]ut this should not be understood to mean that, in all circumstances, the only way that land not taken or acquired for an art. 97 purpose may become protected by art. 97 is through a recorded deed restriction." *Id.* at 401. The Court then went on to determine that "there are various ways to manifest a clear and unequivocal intent" to dedicate land sufficient to invoke Article 97 beyond the recoding of a deed or conservation restriction.

Here, two essential elements are important to point out. First, no land was taken or acquired by the Town for conservation purposes. The Community Preservation Funds that were used were recreational funds a sub set of the Open Space funds. These funds were clearly requested and used for the creation and improvement of ball fields on previously owned school property. Second, because the Community Preservation Act does not require a restriction where an interest in land is not acquired, no restriction, implied or actual, would attach to the land. There

is no Town Meeting declaration that these funds were for such purposes nor is there any declaration whatsoever by any body of the Town that the funds were to be used for such purposes. Therefore, there is no basis upon which one could reasonably conclude that there was ever a clear and unequivocal intent of the Town to dedicate this ballfield and dugout as protected open space to be covered under Article 97.