

Peconic Bay Community Preservation Fund
Advisory Opinion

Opinion # 2016-9

Opinion Requested By: Town of Southampton

Issues Presented: (1) May the Peconic Bay Region Community Preservation Fund (CPF) be utilized to purchase restrictions on agricultural lands that (a) would restrict the definition of “agricultural production” to the use of the land to grow food crops, and (b) create an affirmative duty on the land owner to use the land for agricultural production; and (2) may such additional restrictions be purchased on agricultural lands for which development rights have already been purchased?

Sections of Law: General Municipal Law, Section 247, Agriculture and Markets Law, Section 301, Town Law, Section 64-e.

A. Legal Analysis

We begin the discussion with whether towns have the legal authority to acquire such restrictions under Section 247 of the State General Municipal Law.

Section 247 defines “open areas” and “open spaces” as follows: "open space" or "open area" is any space or area characterized by (1) natural scenic beauty or, (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources. **For purposes of this section natural resources shall include but not be limited to agricultural lands defined as open lands actually used in bona fide agricultural production.**

Thus, it is clear the intent of the law is to permit agricultural lands to be acquired under Section 247. Further, such lands are to be **“actually used in bona fide agricultural production.”**

Section 247 goes on to state that the acquisition of interests in such lands is a valid public purpose and what actions may be taken under the statute to protect such lands. Subdivision 2 of Section 247 states **The acquisition of interests or rights in real property for the preservation of open spaces and areas shall constitute a public purpose for which public funds may be expended or advanced, and any county, city, town or village after due notice and a public hearing may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser**

interest, development right, easement, covenant, OR OTHER CONTRACTUAL RIGHT necessary to achieve the purposes of this chapter, to land within such municipality.

The statute broadly defines an interest in real property to include: fee or any lesser interest, development right, easement, covenant, or **other contractual right necessary to achieve the purposes of this chapter.**

An agreement creating an affirmative duty to farm and limiting the definition of agricultural production to only food crops is a “contractual right” that may be necessary to achieve the purposes of this chapter—that is to preserve lands that are for “actual use in bona fide agricultural production.”

Thus, towns can acquire these additional rights under Section 247.

The second issue, then, is whether the CPF can be a source of funds that can be utilized to acquire such contractual rights.

Section 64-e (3) of the Town Law provides in part as follows: “The purposes of the fund shall be exclusively, (a) to implement a plan for the preservation of community character as required by this section, (b) **to acquire interests or rights in real property for the preservation of community character** within the town including villages therein in accordance with such plan and in cooperation with willing sellers,”. **This language mirrors the language of Section 247 of the state General Municipal Law.**

Further Section 64-e (4) of the Town Law provides: “4. Preservation of community character shall involve one or more of the following: (b) preservation of open space, **including agricultural lands.**”

Finally, Section 64-e (8) of the Town Law provides: “8. No interests or rights in real property shall be acquired pursuant to this section until **a public hearing is held as required by section two hundred forty-seven of the general municipal law.**”

Thus, throughout Section 64-e of the Town Law creating the Peconic Bay Region Community Preservation Fund, the State Legislature intended that the CPF could be used to fund any acquisition of interests in real property that qualified as open areas or open spaces under Section 247 of the General Municipal Law.

Thus, the CPF can be used to acquire interests in real property in the form of a contractual agreement that limits the definition of agriculture to only food crops and creates an affirmative duty to farm the land.

The final part of the analysis is whether the CPF can be utilized to acquire additional restrictions by contractual agreement where the town has already acquired “development rights.”

If the situation to be analyzed was a case where a town had first purchased a conservation easement to a property and later determined it was in the public interest to purchase fee title so that the public could access the land, there is a little doubt that such a purchase would be legal using CPF funds. Certain interests in land less than fee title were purchased. It was in the public interest to purchase additional rights that the public heretofore did not possess. Such a purchase is legal utilizing CPF funds.

The proposed purchase of additional rights to farmland is no different from a legal perspective. The Town had purchased “development rights.” The decision to actually farm the land was not conveyed to the town, but was a right retained by the landowner.

The right to use the land for the full measure of agricultural production including horticultural, horse boarding, etc. was also retained by the land owner. Limiting the use of the land to the growing of food crops is a limitation that was not acquired by the town.

Thus, if there is a legitimate public interest in purchasing these additional contractual rights, the town can legally do so and utilize CPF funds to accomplish this goal. Requiring that land actually be utilized for actual bona fide agricultural production and requiring that food crops be grown is a valid public purpose promoting the agricultural industry. Such restrictions clearly promote agricultural production as envisioned by Section 247 of the State General Municipal Law and also promote the region’s sustainability by promoting the growing of food. Such purposes are consistent with the intent of protecting the open spaces in the first place including aesthetics of lands being actually farmed, as opposed to being part of an estate.

There is nothing expressly in the CPF statute that limits the right of the town to acquire additional rights where a lesser interest had previously been acquired. In fact, the intent is quite the opposite.

The legal issue is clear. From a policy perspective, the town must always analyze whether a particular purchase of these additional rights serves the public interest.

B. Conclusion

1. A town may use CPF funding to acquire contractual rights such as an affirmative duty to farm and a limitation on the types of agricultural products that may be grown to food products.

2. There is no limitation on a town acquiring additional interests in land that promote agricultural production, where the town had previously purchased a lesser interest in the property that did not include the rights to now be acquired.
3. Whether or not a particular purchase is in the public interest, is a policy determination that must be made by the towns in each individual case.