

PECONIC BAY COMMUNITY PRESERVATION FUND ADVISORY OPINIONS BUREAU

Advisory Opinion 2013-4

Opinion Requested By: Town of East Hampton

Issued November 4, 2013

**The Town of East Hampton requested an advisory opinion regarding the use of Community Preservation Funds for beach projects (acquisition; re-establishment/restoration (i.e. planting native species to restore or prevent erosion)).**

**Town Law Section 64-e(3), (4), (9)(a)**

It is clear from the provisions of Town Law cited above that Community Preservation Funds may be used to purchase a beach property. Specifically, Town Law 64-e (3) states in pertinent part, “[t]he purposes of the fund shall be exclusively... (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...” Town Law 64-e (4) defines what constitutes preservation of community character, to wit: “(a) establishment of parks, nature preserves, or recreation areas (b) preservation of open space, including agricultural lands; (c) preservation of lands of exceptional scenic value;... ((f) preservation of undeveloped beach lands or shoreline (l) preservation of public access to lands for public use including stream rights and waterways...”. The language of the statute does not limit or restrict the purchase of beach property to undeveloped beach lands but may include beach property that meets some other community preservation goal set forth in Town Law 64-e (4) i.e. recreation area, land with exceptional scenic value, public access to waterways.

With respect to expenditure of Community Preservation Funds for stewardship projects such as re-establishment or restoration of beach property the statute is less clear and a more careful analysis of the facts, be it related to original purpose of acquisition or facts/circumstances post acquisition, and application of the facts to the provisions of law are required. As set forth more fully below, the statute, Town Law 64-e, recites the purpose for which lands shall be administered and managed but sets limits and restrictions on expenditure of funds for the management and stewardship.

The language set forth in Town Law 64-e (9) states in pertinent part that “[l]ands acquired pursuant to this section shall be administered and managed in a manner which (a) allows public use and enjoyment in a manner compatible with the natural, scenic, historic and open space character of such lands; (b) preserves the native biological diversity of such lands; (c) with regard to open spaces, limits improvements to enhancing access for passive use of such lands such as nature trails, boardwalks, bicycle paths, and peripheral parking areas provided that such improvements do not degrade the ecological

value of the land or threaten essential wildlife habitat... ". Town Law 64-e (9)(a) limits the expenditure of Community Preservation Fund for management and stewardship projects, except for interests or rights in real property acquired for historic preservation purposes which are governed by Town Law 64-e 9 (b), and states the funds "shall be only expended for (1) projects which promote the protection or enhancement of the natural, scenic, and open space character for which the interests or rights in real property were acquired, or (2) accessory uses related to the purpose for which the interests or rights in real property were acquired consistent with subdivision nine of this section, or (3) restoration of acquired real property to its natural state including the demolition of existing buildings and structures.

Town Law 64-e 3(d), 9(c) and 9 (d) set additional restrictions and/or conditions on management and stewardship projects funded with Community Preservation Funds, to wit: not more than ten percent of the fund shall be utilized for the management and stewardship program, expenses related to the customary operation and maintenance of acquired interests or rights in real property shall not be permitted from the fund and any project funded pursuant to this subdivision must have a useful life of five years or more under section 11.00 of the local finance law.

The determination to use Community Preservation Funds for restoration of the property must relate to and be consistent with the initial community preservation goal or revised community preservation goal and must adhere to provisions of Town Law 64-e 3(d), 9(a)(c)(d). The purchase of beach property with a dilapidated structure for use as a public bathing beach may include use of community preservation funds for demolition of the structure. However, using CPF stewardship funds for the restoration of a dune on a property purchased for open space would likely require an environmental analysis to determine if such a plan serves to protect and/or restore the property to its natural state and does not undermine the ecological sensitivity of the land. Undoubtedly, any proposed management or stewardship plan that proposes to alter the current natural features of a particular property requires in depth analysis and careful and cautious consideration such not to thwart the initial goal of preservation.

The expenditure of community preservation funds to restore or undertake remediation due catastrophic events, particularly natural disasters, requires even greater analysis. For example, if a major coastal storm exacerbated erosion of a maritime dune on CPF- acquired beachfront land, causing longstanding or permanent ecological impacts on this rare natural feature, stewardship funds could be used to restore these natural communities to mitigate storm damage, restore site conditions, and protect the documented value of a rare ecosystem. This type of restoration differs significantly from ongoing shoreline nourishment or maintenance to enhance or sustain baseline conditions which are appropriate for other funding sources.

\*The notation above regarding revised goal contemplates that there has been a change in the preservation plan and/or condition of the subject property to warrant a revised goal, by local law or resolution as the case may be, for the subject property.