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PECONIC BAY COMMUNITY PRESERVATION FUND
ADVISORY OPINIONS BUREAU

Advisory Opinion 2013-5

Opinion Requested By: Town of Shelter Island
Issued December 12, 2013

Town Law Section 64-e (3), (6), (7) and (10)
Town Law Section 261-a
State Constitution Article VIII, Section 1

Development rights in real property acquired under the Community Preservation Program may be used for affordable housing or other public benefit, provided: (1) the reservation of the development rights to a bank or reserve for purposes of utilizing them on other property(ies) within the Township was disclosed prior to or at the time of the acquisition of the "donor" property; (2) the Town has a properly established Development Rights program which complies with the requirements of Town Law 261-a; (3) the Town transfers rights in compliance with its Development Rights Program; and (4) the Town receives adequate consideration, in the form of payment and/or benefits to the community, for the transfer of the development credit(s), and any monetary proceeds from the sale of the development rights shall be deposited in the Community Preservation Fund. (5) Lands from which development rights are to be transferred from shall be preserved in perpetuity by a permanent conservation easement or similar instrument.

The Town of Shelter Island has requested an advisory opinion regarding whether the Town may utilize development rights or credits from properties acquired with Community Preservation funds for purposes of providing affordable housing or other use which provides a public benefit within the Town.

For the purposes of this opinion, affordable housing shall mean housing provided as rental property or by way of long term lease or fee simple ownership, which is rented, leased or sold in a manner which complies with the standards established by the municipality for such purposes and which is consistent with the Municipality's Comprehensive Plan. A "public benefit" is a use which in

the determination of the Town Board improves the health, safety and welfare of members of the community.

Town Law, Section 64-e (3) (c) states that one purpose of the CPF is "to establish a bank pursuant to a transfer of development rights program consistent with section two hundred sixty-one-a of this chapter". Town Law 64-e(6) provides for a Town to include the transfer of development rights as part of its community preservation project plan. Town Law 64-e(7) requires a town within the Peconic Bay Region to "study and consider establishing a transfer of development rights program to protect community character" and requires any such program to comply with the requirements of Town Law 261-a.

Town Law, Section 261-a defines development rights as "rights permitted to a lot, parcel or area of land under a zoning ordinance or local law respecting permissible use, area, density..." and the transfer of development rights as "... the process by which development rights are transferred from one lot, parcel, or area of land in any sending district to another lot, parcel or area of land in one or more receiving districts." Section 261-a further provides standards for the establishment of development rights sending and receiving districts and required processes, which shall consist of a comprehensive study and analysis of potential sending and receiving site, and the potential impacts associated with the same [see statute for full text and requirements].

Town Law 64-e (10) prohibits rights or interests in real property acquired with monies from the CPF fund from being sold, leased, exchanged or otherwise disposed of without express authority of an act of the legislature, but provides that such restrictions "shall not apply to the sale of development rights by a town acquired pursuant to this section, where said sale is made by a central bank created by a town, pursuant to section two hundred sixty-one-a of this Chapter [Town Law] provided, however (a) that the lands from which said development rights were acquired shall remain preserved in perpetuity by a permanent conservation easement or other instrument that similarly preserves the community character referenced in subdivision four of this section, and (b) the proceeds from such sale shall be deposited in the community preservation fund."

The acquisition of a fee title interest in property with CPF funds for a proper purpose stated in Town Law 64-e would meet the requirements of 64-e (10(a) for preservation in perpetuity, as would lesser interests if encumbered with appropriate conservation easements or covenants. 64-e(10)(b) requires only that the proceeds from such sale be deposited in the Community Preservation Fund. Nothing in the CPF law itself requires that the compensation for such development rights be at "fair market value".

Article VIII, Section 1 provides that "no county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking..." Thus, any conveyance of property such as development rights to a private entity for less than fair market value would violate this constitutional provision.

In addition, it is well established that a municipality has a fiduciary duty to secure the best price in its judgment, or the most beneficial terms in the public interest, when it conveys an interest in real property, requiring the municipality to obtain fair market value (FMV) for the property in the event of a sale, or benefits in the public interest of a value that the municipality determines equates to fair market value.

For instance, the municipality may determine that fostering the development of additional affordable housing units in the community is valuable consideration sufficient to justify the transfer of development rights to create those units. It may determine that other uses, as well, are of worthwhile benefit to the community, and may, it appears, determine to utilize development rights in furtherance of other worthy projects, provided that the requirements of 261-a are met. It is important that the municipality perform an analysis, and justify its conclusion that the value of the benefits received meets or exceeds the fair market value of the interests conveyed. Town Law 64-e does not specifically restrict the use of development rights to affordable housing. Regardless of the purpose, the total value of the benefits received by the municipality for the transfer of development rights, or the value of the benefits plus any monetary payments, should equate to no less than the fair market value of the rights conveyed.

We determine that the term "proceeds" as used in Town Law 64-e (10) (b) means monetary consideration. To the extent that compensation to the municipality for such development rights consists in whole or part of monetary compensation, that compensation must be deposited in the Community Preservation Fund, in keeping with Section 64-e(10) (b) of the Town Law.

Accordingly, it is our opinion that real property acquired with Community Preservation Funds can be a source of development rights which can be utilized for affordable housing development, or other projects or uses deemed appropriate and beneficial by the municipality, provided the Town can show that it has complied with the conditions outlined in this opinion. As mentioned hereinbefore, the statute does not specifically restrict the use of development rights acquired for affordable housing or any other specific purpose, and therefore, it would seem that such development credits may be utilized in the manner deemed most appropriate to the Town, provided the Town has a properly authorized and Section 261-a compliant plan in place and the transfer for such use is consistent with the requirements of the Town's plan.