

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the left and right sides of the slide, framing the central white area where the text is placed.

# Protecting Open Space Under Article 97

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# FIRST - Is the Land Already Protected by Article 97?

- ▶ Read the Deed! - Beware of deeds or takings that allow too many uses
- ▶ Check the title - is there a recorded restriction?
- ▶ Read the Acceptance and Town Meeting/City Council vote recorded with the Deed or Order of Taking

# Deed to Municipality - CRITICAL

- ▶ Grantee in the Deed to the City or Town should read:

to the Town of Fenwick acting by and through its Board of Selectmen and to be held under the care and custody of the Conservation Commission for open space and recreation purposes pursuant to G.L. c. 40 Section 8C

# Community Preservation Act (G.L. c. 44B)

## Restrictions Required Under Section 12

- ▶ Any real property interest acquired by a municipality with CPA money must be protected by a permanent restriction meeting the requirements of G.L. c. 184 Sections 31 to 33
- ▶ Management of the property may be delegated to a particular board or commission or to a not-for-profit organization
- ▶ The municipality may appropriate money from CPA funds to pay a non-profit to monitor and enforce the deed restriction

# Sample Warrant Article

- ▶ “to authorize the Board of Selectmen to acquire by purchase, gift or eminent domain for open space purposes pursuant to G.L. c. 44B on such terms and conditions as the Board of Selectmen deem appropriate and to accept the deed to the Town of a fee simple interest in and to a parcel of land containing 25 acres more or less located at 234 Old Fenwick Road shown on Assessors Map 52 as Parcel 12, further that said parcel of land shall be held under the care, custody and control of the Conservation Commission and to enter into all agreements and execute any and all instruments as may be necessary on behalf of the Town to effect said purchase; and as funding therefor to appropriate from the Community Preservation Fund estimated annual revenues, fund balance or reserves the sum of \$250,000; and further to authorize the Board of Selectmen to grant a conservation restriction on said property pursuant to G.L. c. 44B §12 and G. L. c. 184 §§31-33; or to take any other action relative thereto.”

# What if the Deed doesn't read the "right way"?

► Examples of Deeds Gone Wrong:

1. Grant to the inhabitants of Fenwick - Not Article 97

a grant without a statement of custody is deemed to be general municipal land under the control of the Board of Selectmen or Mayor/City Council

Cure:

- a. Town Meeting Vote to transfer custody to ConCom - need 2/3rds
- b. Record Town Clerk's Affidavit with certified copy of Town Meeting vote (G.L. c. 183 §5B Affidavit in assistance of title)

## Mistakes.....

2. Grant to Town of Fenwick for conservation purposes -  
No Vote, No acceptance - Not owned by the Town!

Cure:

Record Acceptance by Conservation Commission with reference back to recorded Deed

3. Grant to Inhabitants of the Town of Fenwick under the authority and control of the Town of Fenwick Conservation Commission  
Sloppy but it works as ConCom can't hold land for any purpose other than conservation

4. Grant to the Town of Fenwick. Said property to be managed and controlled by the Conservation Commission. It is understood and agreed that the Town may use the premises for purposes other than conservation.

Second sentence defeats Article 97 unless you can show dedication to conservation purposes - see Mirkovic et al v. Shirley ZBA (Land Ct. Misc 16-000054 Oct. 18, 2017)

# Dedication - if all else fails

- ▶ See Smith v. Westfield
- ▶ No recorded Deed to City for open space/recreation
- ▶ No recorded restriction
  - ▶ BUT If your parcel is
- ▶ Bought with CPA money but you didn't get the restriction yet
- ▶ Shown on municipal plans as open space
- ▶ Signs on the property designating the park
- ▶ Walking trails installed and maintained by the ConCom and/or "Friends"
- ▶ Accepted grant funds from a state or federal program
- ▶ Donor established restrictions and rights in the deed of gift - charitable trust?



# Final Point - Get the Deed Right!

Town Counsels are not usually real estate lawyers

Real estate lawyers don't usually do land transfers to towns

When you are asked to sign the Acceptance - **READ THE DEED FIRST!**