

## SJC Extends “Totality of the Circumstances” Test in Determining Whether Land is Held for Specific Municipal Purpose Prepared for the January 2024 MMA Business Meeting and Trade Show

On January 5, 2024, the Massachusetts Supreme Judicial Court issued its decision in Carroll v. Select Board of Norwell relative to land held by municipalities for specific purposes pursuant to G.L. c. 40, § 15A, and the requirements applicable to changing the use of property to a different purpose or transferring the custody of land or to a different board or commission. G.L. c. 40, § 15 A states, in relevant part, as follows:

“Whenever a board or officer *having charge of land . . . for a specific purpose* shall determine that such land is no longer needed for such purpose . . . such board or officer shall forthwith give notice of such determination to the city council... or the board of selectmen . . . . At any time after the receipt of such notice, the city council of the city by a two thirds vote of all its members, in the case of a city having a city manager, with the approval of said city manager, and in the case of other cities, with the approval of the mayor, or the town by a two thirds vote at a regular or special town meeting, may transfer the care, custody, management and control of such land to the same or another board or officer of the city or town for another specific municipal purpose” (emphasis added).

The Court considered whether certain town-owned property in Norwell (the “Property”), originally acquired by Norwell pursuant to a tax taking and later held by the Select Board pursuant to a vote of Town Meeting to make said Property “available...for affordable housing purposes”, was in fact held by the Select Board for a specific purpose. If the Property was held for a specific purpose, a later Town Meeting vote authorizing and directing the Select Board to transfer the Property to the Conservation Commission for conservation purposes could not be effective unless and until the Select Board determined that the Property was no longer needed for affordable housing purposes.

The Norwell Court stated that a “totality of the circumstances” test must be used to determine if a municipality holds property for a specific purpose. The Court relied on the following facts to conclude that the Property was held specifically for affordable housing purposes:

- A unanimous 2004 Town Meeting vote to authorize the Select Board to make the Property “available for affordable housing purposes”
- A subsequent Town Meeting vote to adopt an affordable housing trust bylaw
- Actions and expenditure of funds to hire consultants for site assessments to determine the best type of affordable housing to be developed, to delineate wetlands, and to conduct a feasibility study for stormwater and wastewater at the Property

- A 2019 update to the Town’s Housing Production Plan, stating that the Property was “in the planning or predevelopment phases” and was “designated for developing affordable housing”
- A 2021 Select Board/Affordable Housing Trust meeting to discuss the development of affordable housing on the Property and recommendation to request proposals from developers for such development

Such actions demonstrated to the Court the Town’s continued intent to hold the Property for the specific purpose of affordable housing. Since the Select Board did not vote that the Property was no longer needed for affordable housing purposes, a vote of Town Meeting to transfer the Property to the Conservation Commission for conservation purposes was of no effect.

In so holding, the Court examined the common law doctrine of prior public use – meaning that land dedicated to one public purpose could not be diverted to another, inconsistent public use absent a vote of the legislative body – which is codified in Article 97 of the Amendment to the Massachusetts Constitution. The Court stated that G.L. c. 40, § 15A embodies “the same legal principles” of the prior public doctrine and, accordingly, the same “totality of the circumstances” test that was laid out in Smith v. Westfield, 478 Mass. 49 (2017), was extended to the analysis under this statute. In expanding the use of the totality of the circumstances test, which had previously been used to determine if certain property is held by a municipality for purposes protected under Article 97, to determine if property is held for a specific municipal purpose under G.L. c. 40, § 15A, the Court affirmed that property can be held for a specific purpose pursuant to G.L. c. 40, § 15A even if there is no deed restriction on record. Instead, the intent to use property for a specific purpose can be properly demonstrated through the totality of the actions of the municipality if such actions demonstrate an unequivocal intent to hold or dedicate the land for a specific purpose.

As the town meeting season is approaching, and as also applicable to city council actions, the Norwell case is instructive in reviewing proposed articles or orders to convey or transfer municipal-owned property to a third party, transfer custody of property to a different board, or change the use of property to a different purpose. Municipalities must review the deeds/legislative votes taken when the property was originally acquired, or, if property was originally acquired for general municipal purposes, review later legislative votes to see if the property was transferred or dedicated to a specific purpose, and also assess the actions taken by the board having custody of the property to determine – using a totality of the circumstances analysis – if land was and continues to be held for a specific purpose. If land is held for a specific purpose, the board or officer having custody of the property must declare that said board or officer no longer requires that property be held for that purpose. The vote of the custodial board may be taken before or after the legislative vote to transfer or change custody of the property. Harris v. Wayland, 392 Mass. 237, 243 (1984).

Please contact your KP Law Attorney with any specific questions relative to the impact of this holding on transfers of land in your municipality from one board or commission to another or from one purpose to another.

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