



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

June 5, 2015

Thomas E. Hefner, Esquire
Town Solicitor
Town of Cumberland
45 Broad Street
Cumberland, Rhode Island 02864

Re: Request for Legal Opinion, Chapter 39 of Title 34

Dear Mr. Hefner:

Your letter dated May 18, 2015, addressed to Attorney General Peter F. Kilmartin, has been forwarded for a response. You seek an Advisory Opinion and relate the following pertinent facts.

According to your May 18, 2015 Request for an Advisory Opinion (hereafter “Request”), “the Town of Cumberland finds itself in a legal conflict with certain interests which are seeking to prevent the Town from selecting a site to build a much needed ‘public safety complex’ (and possibly in the future a new town hall and senior center) on land centrally located in the Town and purchased in 1968 and 1972.” You relate that Chapter 39 of Title 34 – entitled “Conservation and Preservation Restrictions on Real Property” – is being relied upon to prevent the Town of Cumberland from moving forward with the proposed development in G.L. 34-39-3.” Your Request continues that “[i]t is the position of the Town that [Chapter 39 of Title 34] is not applicable to the Town land which is at the center of this controversy.”

According to your Request, the “entire parcel of some 525 acres was purchased by the Town in 1968 and 1972” and the “land proposed to be used is to be not more than twenty (20) acres on the northernmost portion above all hiking trails and fronting on Diamond Hill Road across from the post office and near several commercial properties.” You continue that:

“[t]he Town realizes that any restrictive covenants that existed at the time of its purchase of all 525 acres needs to be addressed and the Town, if it was seeking to develop this property admits that the jurisdiction of the Attorney General would be proper pursuant to G.L. 34-39-3 and 34-39-5 as the Town took all three (3) parcels by deeds. (Emphasis in original). However, that is not the case here as the interests seeking to prevent the Town from proceeding are basing their argument on a conservation

easement and restrictive covenants placed on the 525 acres on November 8, 2004 in Book 1236 at page 298 * * * by the Town itself after its purchase of the land. The land is also governed by a management plan which can be amended from time to time. It is the Town's position that the Management Plan as well as the self imposed easement and restrictive covenants can be amended and/or revoked with Town Council approval just as they were created." (Emphasis added).

Later, your Request avers that:

"the Town's real argument is that none of the provisions in Chapter 34-39 giving rise to the involvement of the Department [of] Attorney [General] apply to the present scenario. It is quite clear that jurisdiction requires that any 'conservation restriction' or 'preservation restriction' must meet the definitions set forth in G.L. 34-39-2(a) and (b). The key language in both subsections references '...in any deed, will or other instrument executed by or on behalf of the owner of the area or in any order of taking...'. The General Assembly, therefore, only intended this chapter to protect any covenants imposed by the prior owner to a new owner (in this case the Town) when conveyed by deed or will or taken by eminent domain or other taking." (Emphasis added).

Respectfully, your Request identifies no specific legal question to be answered by this Department, but taken in its totality, we surmise that you seek this Department's opinion that Chapter 39 of Title 34 is not applicable to this situation and that "the self imposed easement and restrictive covenants can be amended and/or revoked with Town Council approval just as they were created."

Before delving into your Request, we address a threshold issue: whether this Department should render an Advisory Opinion to the Town of Cumberland. Respectfully, Chapter 39 of Title 34 provides no authority for this Department to render an Advisory Opinion to the Town and typically it has been this Department's position that it will not render advisory opinions to cities or towns. Indeed, it is this Department's role to:

"act as the legal adviser of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof, of all commissioners appointed by the general assembly, of all the general officers of the state, and of the director of administration, in all matters pertaining to their official duties, and shall institute and prosecute, whenever necessary, all suits and proceedings which they may be authorized to commence, and shall appear for and defend the above-named individual legislators, boards, divisions, departments, commissions, commissioners, and officers, in all suits and proceedings which may be brought against them in their official capacity." R.I. Gen. Laws § 42-9-6.

Nothing within the above-quoted provision provides that this Department acts as legal counsel – or provides legal advice – to cities or towns.

Notwithstanding the plain language set forth above, in this case, a strict application of our general practice ignores the purpose and the text set forth in Chapter 39 of Title 34. The purpose of the “Conservation and Preservation Restrictions on Real Property” (Chapter 39) has been articulated:

“to grant a special legal status to conservation restrictions and preservation restrictions so that landowners wishing to protect and preserve real property may do so without uncertainty as to the legal effect and enforceability of those restrictions. This chapter is further intended to provide the people of Rhode Island with the continued diversity of history and landscape that is unique to this state without great expenditures of public funds.” R.I. Gen. Laws § 34-39-1.

Most importantly for the present analysis, R.I. Gen. Laws § 34-39-3(d) provides that “[t]he attorney general, pursuant to his or her inherent authority, may bring an action in the superior court to enforce the public interest in such restriction.” (Emphasis added). Based upon the foregoing, if this Department were to decline to provide an Advisory Opinion, such a decision would leave the Town and what you describe as the present “legal conflict” in an uncertain posture whereby this Department would decline to respond to the Request – presumably sought by the Town in an effort to comply with Rhode Island law – yet if this Department later determined the circumstances warranted, the Attorney General could bring a lawsuit against the Town for failing to comply with Chapter 39 of Title 34. Such a wait-to-be-sued scenario does not best serve the public interest in light of the Attorney General’s inherent authority to enforce and protect the public interest in this arena. See id. We proceed to the merits of your Request.

Regarding the substance of your Request, you relate that the Town is presently embroiled in a “legal conflict” concerning a portion of the 525 acre parcel. It is significant – and it does not appear to be disputed – that on November 8, 2004, the Town was the owner in fee simple of this 525 acre parcel and that on November 8, 2004, the Town placed (and recorded) on the 525 acre parcel a “Conservation Easement and Restrictive Covenants.” Although we attach the “Conservation Easement and Restrictive Covenants” as Exhibit A, for the immediate purposes it suffices that the “Conservation Easement and Restrictive Covenants” provides, inter alia, that:

- “the Town is the owner in fee simple of certain real property containing approximately 525 acres of land * * * (hereinafter referred to as the ‘Premises’);”
- “the Premises is presently comprised of open, natural, ecological, archeological and historic land in addition to existing buildings of great historical significance which are used for municipal purposes;”

- “the Town recognizes the value and special character of the Premises and acknowledges a purpose to conserve the values of the Premises, and to conserve and protect the historic buildings on the [P]remises as well as the natural beauty of the property and to prevent its use or development for any purpose or in any manner that would conflict with the present use of the Premises, in its current, natural, scenic and historic condition;” and
- “the Town as owner of the Premises intends to preserve and protect the said historic conservation values of the Premises in perpetuity.”

In consideration of the above covenants and restrictions, the “Conservation Easement and Restrictive Covenants” further indicates that “the Town hereby voluntarily establishes a Conservation Easement And Restrictive Covenants in perpetuity over the Premises, of the nature and character, and to the extent hereinafter set forth.” The “Conservation Easement and Restrictive Covenants” also provides, in pertinent part, that the purpose of the:

“Conservation Easement And Restrictive Covenants [is] to assure that the Premises will be retained forever in its open, natural, scenic, historic, ecological, or educational condition and to prevent any use of the Premises that will significantly impair or interfere with the conservation values of the Premises. The Town intends that this Conservation Easement will confine the use of the Premises to the uses as are consistent with the purpose of this Conservation Easement and the Conservation Management Plan developed by the Town[.]”

Having reviewed, *inter alia*, your Request, the “Conservation Easement and Restrictive Covenants,” Chapter 39 of Title 34, and our independent research, it does not appear that you contest that the 525 acres at issue are encumbered by a “Conservation Easement and Restrictive Covenants,” which the Town imposed upon Town-owned land in November 2004. Rather than contest the existence of the “Conservation Easement and Restrictive Covenants,” it appears to be the Town’s position that Chapter 39 of Title 34 is simply not applicable to the 525 acres at issue. Specifically, you relate, “[i]t is the town’s position that the Management Plan as well as the self-imposed easement and restrictive covenants can be amended and/or revoked with Town Council approval just as they were created.” Although, respectfully, you reference no legal authority for the above-quoted conclusion, your Request elucidates that:

“the Town’s real argument is that none of the provisions in Chapter 34-39 giving rise to the involvement of the Department [of Attorney General] apply to the present scenario. It is quite clear that jurisdiction requires that any ‘conservation restriction’ or ‘preservation restriction’ must meet the definitions set forth in G.L. 34-39-2(a) and (b). The key language in both subsections references ‘...in any deed, will or other instrument executed by or on behalf of the owner of the area or in any order of taking . . .’. The General Assembly, therefore, only intended this chapter to protect any

covenants imposed by the prior owner to a new owner (in this case the Town) when conveyed by deed or will or taken by eminent domain or other taking.” (Emphasis added).

Rhode Island General Laws § 34-39-2(a) provides that a “conservation restriction” means:

“a right to prohibit or require a limitation upon or an obligation to perform acts on or which respect to or uses of a land or water area, whether stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of the owner of the area or in any order of taking, which right, limitation, or obligation is appropriate to retain or maintain the land or water area, or is appropriate to provide the public the benefit of the unique features of the land or water area, including improvements thereon predominantly in its natural, scenic, or open condition, or in agricultural, farming, open space, wildlife, or forest use, or in other use of condition consistent with the protection of environmental quality.” (Emphasis added).

When construing statutes, it is well settled that when “the language of a statute is clear and unambiguous, [the court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Such v. State, 950 A.2d 1150, 1156 (R.I. 2008). Here, although the Town submits that the General Assembly “only intended this chapter to protect any covenants imposed by the prior owner to a new owner,” the plain language set forth in R.I. Gen. Laws § 34-39-2(a) provides no support for this conclusion. Instead, as the above emphasized language reveals, the plain language defines a “conservation restriction” as, inter alia, a limitation concerning land memorialized in the form of a restriction or easement “in any deed, will, or other instrument executed by or on behalf of the owner of the area.” (Emphasis added). In brief, R.I. Gen. Laws § 34-39-2(a) provides no language requiring the restriction or easement be “imposed by the prior owner to a new owner,” but rather merely requires that the easement or restriction be “executed by or on behalf of the owner of the area.” This requirement was easily satisfied when the Town imposed and recorded the “Conservation Easement and Restrictive Covenants” upon property that it owned in November 2004.

But for your argument that the General Assembly intended Chapter 39 of Title 34 to apply only to easements or restrictions “imposed by the prior owner to a new owner,” it does not appear that you contest that the other requirements set forth in R.I. Gen. Laws § 34-39-2(a) have been satisfied. In this respect, we must reference the “Conservation Easement and Restrictive Covenants” and observe that this document:

- is entitled “Conservation Easement and Restrictive Covenants;”

- indicates that “This Conservation Easement and Restrictive Covenants” is established this 8th day of November, 2004, by Town of Cumberland, Rhode Island (hereinafter referred to as ‘the Town’);
- relates that “in consideration of the above covenants and restrictions contained herein the Town hereby voluntarily establishes a Conservation Easement And Restrictive Covenants in perpetuity over the Premise;”
- provides that “[i]t is the purpose of this Conservation Easement And Restrictive Covenants to assure that the Premises will be retained forever in its open, natural, scenic, historic, ecological, or educational condition and to prevent any use of the Premises that will significantly impair or interfere with the conservation values of the Premises;” and
- concludes that “[t]his Conservation Easement shall be and is deemed to be a conservation restriction under the laws of the State of Rhode Island only, and shall be construed and given effect in accordance with the laws of the State of Rhode Island and not otherwise.” (Emphases added).

Based upon the foregoing, and frankly other provisions within the “Conservation Easement and Restrictive Covenants,” there is no doubt that in November 2004 the Town intended to (and did) impose a conservation easement/restriction upon the 525 acre parcel. Even your Request acknowledges that a “conservation easement and restrictive covenants [was] placed on the 525 acres on November 8, 2004 in Book 1236 at page 298 [] by the Town itself after its purchase of the land” and that the instant issue concerns a “self imposed easement and restrictive covenants.”

Rather than arguing that a conservation easement/restriction was not imposed, the Town submits that because the conservation easement/restriction was “self imposed” any limitation or restriction “can be amended and/or revoked with Town Council approval just as they were created.” The Town cites no legal authority for this proposition and our legal research soundly rejects this position.

The Rhode Island Supreme Court has observed that “it [has] long been judicially settled in this state that a municipality lacks inherent power to divest itself of property once actually devoted to a public use, and may not do so without the specific authorization of the Legislature.” Valley View Tenant’s Association v. Doorley, 312 A.2d 209, 210 (R.I. 1973). While some may view a conservation easement/restriction as an impenetrable restriction, Rhode Island General Laws § 34-39-5 (entitled “Release of Restriction”) identifies the circumstances when a conservation easement/restriction may be released or amended. Although we find it beyond the scope of your Request to identify/examine these situations, it suffices for purposes of this Advisory Opinion that none of these situations concern a governmental entity, such as the Town, “amend[ing] and/or

revoke[ing a self-imposed easement/restriction] with Town Council approval just as they were created.”¹

Even though the Town cites no authority for its argument that a “self imposed easement and restrictive covenants can be amended and/or revoked with Town Council approval just as they were created,” assuming without argument that the Town could reference some doctrine of property law to support this claim, Rhode Island law is clear that any such authority would be insufficient in circumstances, such as this one, where a conservation easement/restriction is at issue. In this respect, the Rhode Island Superior Court has recognized that “[c]onservation easements * * * are afforded special treatment under Rhode Island statutory law” and that Chapter 39 of Title 34 “states that no conservation easement will be unenforceable against an owner of land on account of any doctrine of property law which might cause the termination of the restriction.” Rhode Island Resource Recovery Corp. v. Brien, PB 10-5195, 2012 R.I. Super. Lexis 113 (Silverstein, J.). In other words, even if the Town could muster an argument that the instant conservation easement/restriction was unenforceable, such an argument would fail unless consistent with Chapter 39 of Title 34. See generally R.I. Gen. Laws § 34-39-3(a) (“No conservation restriction held by any governmental body * * * shall be unenforceable against any owner of the restricted land or structure on account of lack of privity of estate or contract, or lack of benefit to particular land, or on account of the benefit being assignable or being assigned to any other governmental body or to any entity with like purposes, or on account of any other doctrine of property law which might cause the termination of the restriction such as, but not limited to, the doctrine of merger and tax delinquency.”)(emphases added).

¹ A conservation easement/restriction “held by cities and towns may be released in the same manner as land held by cities and towns may be sold under § 45-2-5.” R.I. Gen. Laws § 34-39-5(a). Rhode Island General Laws § 45-2-5 provides:

“[i]n addition to the powers previously granted by charter or the public laws of the state with respect to the purchase and sale of land, the city council of any city and the town council of any town, if it sees fit so to do, is hereby authorized, from time to time, to sell, lease, convey, or use for any other public or municipal purpose or purposes, or for any purpose whatsoever, any lands or properties owned by the city or town, which have been purchased, acquired, used, or dedicated in any manner for municipal or other public purposes, whenever, in the opinion of the city council or town council, the lands or properties have become unsuitable or have ceased to be used for those purposes.”

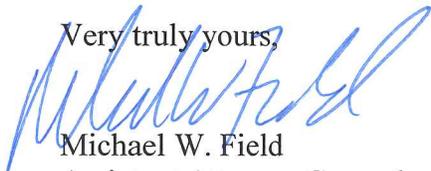
We do not view the Town’s assertion that the conservation easement/restriction at issue in this case “can be amended and/or revoked with Town Council approval just as they were created” as complying with the authority referenced in this footnote and the Town makes no argument to this effect.

In summary, there is no disagreement that the 525 acre parcel is encumbered by a conservation easement/restriction, and as such, this conservation easement/restriction may only be released in accordance with Chapter 39 of Title 34. See Rhode Island Resource Recovery, 2012 R.I. Super. Lexis 113 (“§ 34-39-3 precludes a finding that a conservation easement is unenforceable under such doctrines of property law that could terminate the easement, including but not limited to, the merger doctrine”). To be sure, Chapter 39 of Title 34 does provide the Town with some avenues to release or amend a conservation easement/restriction, see R.I. Gen. Laws § 34-39-5, but for the reasons already stated the assertion that “the self imposed easement and restrictive covenants can be amended and/or revoked with Town Council approval just as they were created” is not an available avenue. In closing, the Town’s arguments can be succinctly rejected by referencing Justice Silverstein’s words: “a conservation easement expressly may not be terminated without prior approval of a court.” See Rhode Island Resource Recovery, 2012 R.I. Super. Lexis 113. For these reasons, we conclude that Chapter 39 of Title 34 applies to the 525 acre parcel and that the Town may not terminate the conservation easement/restriction in a manner that is inconsistent with Chapter 39 of Title 34.

This advisory opinion is based upon the specific facts as you related. If the facts should differ in any respect, it may affect this Department’s interpretation and ultimate opinion. This advisory opinion does not abrogate any rights under which the Department of the Attorney General is vested. This opinion does not address the Town’s responsibilities under any other state law, rule, regulation, or ordinance, nor does it shield the Town from a complaint filed in the Superior Court by a citizen or entity.

We hope that this advisory opinion is of assistance to the Town.

Very truly yours,



Michael W. Field
Assistant Attorney General



Gregory S. Schultz
Special Assistant Attorney General