



Buyer not bound by land-use restrictions

Massport bans had lapsed

By Eric T. Berkman

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A property owner was not bound by land-use restrictions barring residential construction on two parcels that the Massachusetts Port Authority had divested more than 30 years earlier, a Land Court judge has ruled.

Massport had imposed the restrictions to forestall potential injury or noise claims by future occupants related to the agency's operation of the nearby Logan International Airport.

The agency argued that the restrictions were part of a "deed of the Commonwealth" and were intended for conservation purposes, and were thus exempt from the statutory 30-year time limit on use restrictions.

But Judge Keith C. Long disagreed.

"[Massport] argues that it falls within [the statutory] definition of the Commonwealth ... and asserts that it acts as 'an arm of the state' in carrying out its official functions," wrote Long, granting summary judgment for the landowner. "It is an interesting argument, but not a convincing one."

Additionally, Long said, "not just any building restriction is a conservation restriction. ... [Massport's] restrictions may prevent the increase of population density ... but that is not conservation within the meaning of the statute."

The 14-page decision is *Massachusetts Port Authority v. Basile*, Lawyers Weekly No. 14-044-09.

Important clarifications

Richard C. Lynds of Boston, who represented the buyer of the property, said the decision is a victory for the community in that it now can look to develop, for residential purposes, what otherwise would remain vacant lots.

From a legal standpoint, Lynds said the decision clarifies some important questions.

"First, when restrictions are imposed by a governmental agency that would appear at first blush to be a 'conservation restriction,' this decision requires us to take a closer look at the type of restriction that's actually being imposed," he said.

The case also clarifies that - at least with respect to land-use restrictions - Massport is not the equivalent of the commonwealth and thus does not enjoy the same exemptions, he said.

"And I'm not certain that the decision simply just affects parcels that may have involved Massport restrictions," he said. "It may also apply to restrictions by other governmental entities, like the city of Boston."

Charles N. LeRay a land-use attorney at Brennan, Dain, LeRay, Wiest, Torpy & Garner in Boston, said the "real takeaway [from the decision] is that perpetual restrictions on land are disfavored, and if you want to do it, you've got to do it very carefully."

LeRay, who is co-chairman of the Real Estate Bar Association's Land Use and Zoning Committee, also suggested that a better, albeit imperfect, solution for Massport may have been to reserve an easement on the parcels giving itself the right to remove any kind of structure that did not fit a particular purpose.

"An easement would be permanent until Massport either relinquished it or a court at some point decided, in the context of a suit by a future landowner, that it no longer served its purpose," he explained.

The lawyer for Massport, Martin R. Healy, of Goodwin Procter in Boston, could not be reached for comment prior to deadline.

Residential restriction

Massport, the plaintiff in the case, owned two parcels in East Boston that it had acquired for future expansion of Logan Airport.

In 1977, after conducting a master planning process of its operations, the agency determined that it no longer needed the properties and decided to divest them.

It sold the two parcels, at a price apparently below market value, to two separate parties.

According to an internal 1977 memorandum, Massport sought to protect itself from any potential injury or liability claims (such as claims for noise damages) by future owners or occupants of the property as a result of airport operations.

Thus, when Massport conveyed the parcels, it placed development restrictions on the deeds prohibiting owners from building anything that might constitute a dwelling. Specifically, the deeds prohibited construction of anything other than one- to two-car garages, small accessory structures not fit for habitation and - if attached to dwelling houses on adjoining parcels - porches, steps, terraces or bay windows.

The deeds also stated at the time that the restrictions were permanently binding on the purchasers and any successors-at-interest.

At no time, however, were the development restrictions approved by the secretary of Energy and Environmental Affairs. Nor did the restrictions or any reference to them appear on the deeds when defendant Paul Basile purchased the parcels.

Basile bought the land in 2007 and expressed an intention to develop the parcels, maintaining that Massport's restrictions on the property had expired pursuant to G.L.c. 184, §23, which places a 30-year time limit on such restrictions.

In response, Massport filed suit in Land Court seeking a declaration that G.L.c. 184, §32 exempted the restrictions from the time limit and were thus still in force.

Both parties filed for summary judgment.

Without exception

Massport asserted that G.L.c.184, §32 exempted its restrictions from the 30-year time limit because they were part of a "gift" made for a "public purpose."

But Long was unconvinced.

First, Massport's conveyances of the parcels were not gifts because the agency sold them to private citizens for adequate consideration, said the judge.

Additionally, Long said, Massport made the conveyances not to serve a public purpose, but for its own benefit.

"The parcels were land Massport no longer needed," the judge stated.

Meanwhile, though the restrictions might have the effect of increasing off-street parking, fewer and smaller buildings and less lot coverage, "these were clearly incidental benefits since the restrictions required none of them," said the judge.

Long also rejected Massport's contention that the restrictions were contained in a "deed of the Commonwealth" and thus fell within the time-limit exemptions.

Massport maintained that, when divesting the property, it was acting in the capacity of the commonwealth according to the definition laid out in G.L.c. 184, §23, because it was acting as an "arm of the state" in carrying out its functions.

Additionally, Massport argued, the functions it carries out today are governmental in nature and were carried out by the commonwealth when §23 was enacted in 1887, long before Massport was created.

But Long emphasized that the notion of an independent authority such as Massport - which operates outside the normal checks and balances of the traditional branches of government but with independent power to acquire, hold, divest and borrow - is a modern concept not contemplated in 1887.

The judge also observed that the Legislature amended §23 in the years since Massport's creation without ever changing the statute's reference to the commonwealth. Instead, the Legislature cross-referenced a new provision specifically addressing restrictions imposed by "governmental bodies," distinguishing entities such as Massport from the commonwealth itself, he said.

Finally, Long found that the restrictions were not exempt under §32 as "conservation restrictions."

The judge noted that G.L.c. 184, §31, the provision that defines "conservation restrictions," states that the goal of that statute is to retain land or water areas in their "natural, scenic or open condition."

Massport's development restrictions - which would allow garages, accessory structures and additions to adjacent dwellings without limitations on structure size or lot coverage - did not fall within such goals, Long said.

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