



LEGAL AND OPERATIONAL ISSUES

Kathleen M. O'Donnell, Esq.

Milton, MA

Adoption

- ▶ Creation:
 - ▶ In a town, by vote of annual town meeting
 - ▶ In a city, by vote of city council or as designated by municipal charter
- ▶ Declaration of Trust
 - ▶ Drafted by attorney for the Trust
 - ▶ Terms based on by-law, ordinance or text of Town Meeting vote
 - ▶ Appoint Trustees in accordance with the terms of the Trust
 - ▶ Once created, record Declaration of Trust or Trust Certificate at Registry of Deeds - Trustees must be on record to shown authority to sign deeds, mortgages, agreements, leases, etc.

Uniform Procurement Act - c. 30B

- ▶ For general contracts - make friends with your Procurement Officer
 - ▶ Amount less than \$10,000 - select contractor using sound business practices
 - ▶ Amount higher than \$10,000 but less than \$50,000 -
 - ▶ Solicit three written bids based on a purchase description (but check your municipality for local rules)
 - ▶ Maintain a file for each contract
 - ▶ Keep record of all names and addresses of contacts and the date and amount of each bid
 - ▶ Keep copies of all bids for at least six years from the date of final payment
 - ▶ Above \$50,000 - see Section 5 of UPA - competitive sealed bidding process

Uniform Procurement Act - c. 30B, Section 16 - Real Estate

- ▶ Applies to the sale or purchase of any interest in real property, including restrictions!
- ▶ If the purchase is fully funded by CPA money, the exemption in the CPA statute (c.44B) applies - get an appraisal
- ▶ If you are using any other funding source for the purchase:
 - ▶ Advertise for proposals
 - ▶ Proposals must be opened in public
 - ▶ Purchase may qualify for a “uniqueness determination” - must advertise in the Central Register at least 30 days prior to closing

Open Meeting Law - 940 CMR 29.00-29.11

- ▶ New Revisions Effective October 6, 2017
- ▶ 29.03 - takes away all of the alternative posting options and allows the use of the municipal website. The chief executive officer of the municipality (Board of Selectmen or Mayor) must decide what alternative posting method will be used.
- ▶ 29.04 - new Trustees should be given copies of any determinations received by the Trust in the past five years so new Trustees are aware of the Trust's compliance issues.
- ▶ 29.10 - Remote participation in meetings may only be done if physical attendance at the meeting is unreasonably difficult.

Open Meeting Law continued

- ▶ 29.11 - Refines the timeline by which minutes must be approved for both open and executive session meetings - within the next three meetings or 30 days, whichever ever occurs the latest.
- ▶ Within two weeks of an appointment as Trustee, the Trustee must complete the Certificate of Receipt of OML Materials with the appointing authority, city or town clerk, or the executive director or other appropriate administrator of a state or regional body, or their designee. This Certificate states that the Trustee as received and read the OML Guide published by the Attorney General's Division of Open Government.
- ▶ BEWARE - a deliberation by a public body can be any oral or written communication, including e-mail, between or among a quorum of a public body on any public business.
- ▶ Resources: www.mass.gov/ago/openmeeting

Uniform Procurement Act - c. 30B

Section 16 - Sale

- ▶ If disposing of real estate:
 - ▶ Determine value of property or interest by usual appraisal methods
 - ▶ Establish re-use restrictions
 - ▶ If value exceeds \$35,000, must advertise in Central Register and local newspapers, postings in Town Hall, post office, library
 - ▶ Open proposals in public and disclose reasons why disposition is for less than fair market value
 - ▶ There is no “uniqueness determination” for the sale of property, only purchases

Public Records Law - c. 121 of the Acts of 2016

- ▶ What is a “Public Record” - safe to assume that everything is
- ▶ Designate Records Access Officer for the Trust
- ▶ Records Access Officer is responsible for:
 - ▶ Assistance in identifying records requested
 - ▶ Service as custodian of records and arranging for storage
 - ▶ Preparation of guidelines for people requesting access to records
 - ▶ Coordination of Trust’s response to requests for access to public records
- ▶ Trust must respond to records request within 10 business days
- ▶ Trust may charge 0.5 cents per page, and if the assembly of the records takes more than 4 hours, may charge \$25 per hour

Funding Sources

- ▶ Community Preservation Act funds - 172 cities and towns have adopted CPA
- ▶ Inclusionary Zoning Payments in lieu - to receive these payments, the Trust must be mentioned in either in the specific provision of the Zoning By-Law or in the decision issued by the ZBA or the permit issued by the Planning Board. If not provided in the Zoning By-Law, these payments go into the general funds and must be appropriated to the Trust by Town Meeting
- ▶ Sale of tax title parcels - as established in by-law adopted by municipality
- ▶ Donations and gifts

Grant Agreements I

- ▶ Types

- ▶ Grant Agreement between Community Preservation Committee and/or Board of Selectmen and the Trust
- ▶ Grant Agreements between the Trust and a Third Party

Grant Agreements with CPC

- ▶ Basic purpose - reassuring your CPC that you are using the funds for the activities authorized by Town Meeting/City council vote
- ▶ Agreement may be signed by CPC or Selectmen/Mayor - depends on local practice
- ▶ Amendment - November 7, 2016 - c. 218 of the Acts of 2016

“provided, however, that any such money received from chapter 44B shall be used exclusively for community housing and shall remain subject to all the rules, regulations and limitations of that chapter when expended by the trust, and such funds shall be accounted for separately by the trust; and provided further, that at the end of each fiscal year, the trust shall ensure that all expenditures of funds received from said chapter 44B are reported to the community preservation committee of the city or town for inclusion in the community preservation initiatives report, form CP-3, to the department of revenue;

Grant Agreements with CPC

▶ Terms

- ▶ Described the proposal submitted to the CPC and the amount of money voted
- ▶ Establishes a time limit for performance with right to extend for good cause
- ▶ Restricts use of funds for purposes authorized under c. 44B
- ▶ May establish a process for funding and a contact person
- ▶ Requires delivery of a deed restriction approved by DHCD
- ▶ Termination on disbursement of all funds and delivery of restriction or may be terminated by municipality if obligations are not met
- ▶ On termination, undisbursed funds are returned to CPC
- ▶ BEWARE - town counsel's indemnity clause

Grant Agreements with a Developer

- ▶ Same concept as agreement with CPC - establishes amount of grant, purposes, and determination that the funds are being used for creation, maintenance, and support of affordable housing
- ▶ Include any requirements that were recited in the Trust's agreement with the CPC
- ▶ Require the developer to include the Trust as a party to any affordable housing restriction imposed on the property, or Trust has its own signed and recorded
- ▶ Termination if project is not completed within and established deadline
- ▶ If terminated by inaction or default, all funds come back to the Trust

How to Make Sure that You Get What You Paid For

- ▶ Loan Agreements -
 - ▶ Similar to grant agreement or a promissory note
 - ▶ Secured by a mortgage
- ▶ Mortgages
 - ▶ Typically without payments or interest but allow for foreclosure if property is no longer used for affordable housing
- ▶ Land Disposition Agreements
 - ▶ Used for new construction projects on land owned by Trust that will be transferred or leased
- ▶ Ground Leases
 - ▶ Ownership of the land stays with the Trust; buildings are owned by the developer
- ▶ Affordable Housing Restrictions/Regulatory Agreements

Title Issues

- ▶ Declaration of Trust for AHT should be recorded at the Registry of Deeds - cannot be filed with the Land Court District until it is needed for a transfer
- ▶ Trustee's Certificate names current Trustees and states that Trust has not been altered, amended or revoked, and that the Trustees have the power to buy or sell, execute grant agreement, execute ground lease, subordinate or discharge mortgage, etc.
- ▶ Trust's Certificate that homeowner's refinance does not violate the Deed Rider and that loan is approved.

Affordable Housing Restrictions

- ▶ Required if the Trust uses CPA funds for acquisition of real property
- ▶ CPC's usually want the Trust's housing projects to be included on DHCD's Subsidized Housing Inventory - must use DHCD's approved LIP Deed Rider
- ▶ If property is owned by the Trust and is being sold to an affordable buyer - process must be approved by DHCD and Trust must comply with Uniform Procurement Act
- ▶ Remember - lender to affordable buyer must approve Deed Rider

Downpayment Assistance

- ▶ Used in concert with acquisition of Affordable Housing Restriction
- ▶ Must be approved by Buyer's mortgage lender
- ▶ Promissory Note executed by Buyer in the amount of the assistance check
 - ▶ Due and payable if the property is no longer the borrower's principal residence
 - ▶ May have sliding scale of repayments with certain amounts due if sold within five years, complete forgiveness after five years, or ten
 - ▶ Due on death of Buyer - heirs must sell within one year to an affordable buyer
- ▶ Mortgage
 - ▶ Secures Promissory Note
 - ▶ Recorded AFTER the approved first mortgage
- ▶ Risk of loss if approved first mortgagee forecloses

Questions??

- ▶ E-mail - kmodonnellesq@gmail.com
- ▶ Phone - 617-794-2794