

# MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION  
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## MEMORANDUM

To: Princeton Mayor and Council

From: Trishka W. Cecil, Esq.  
Princeton Attorney



Date: March 19, 2015

Re: 31-33 Lytle Street

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In anticipation of this evening's neighborhood meeting regarding the town's proposal to acquire 31-33 Lytle Street for the expansion of the adjacent Mary Moss playground, I have been asked to prepare a memorandum outlining the town's options should it acquire the property using monies from Princeton's open space trust fund, as currently proposed.

The operative statute here is *P.L. 1997, c. 24 (N.J.S.A. 40:12-15.1 et seq.)*, which is the statute that authorizes counties and municipalities to levy an open space tax and establish county and municipal open space trust funds.<sup>1</sup> The levy must be approved by referendum, and the referendum question must specify the purpose(s) to which the monies will be put. The monies raised through the tax must be kept in a dedicated trust fund.<sup>2</sup>

The statute authorizes the open space trust fund monies to be used for any or all of the following purposes, depending on what the electorate has approved by referendum:

- ▶ Acquisition of lands for recreation and conservation purposes
- ▶ Development (for recreation and conservation purposes) of lands acquired for recreation and conservation purposes
- ▶ Maintenance of lands acquired for recreation and conservation purposes
- ▶ Acquisition of farmland for farmland preservation purposes

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<sup>1</sup>The Municipal Land Use Law does not apply to here. The MLUL governs a municipality's ability to identify, evaluate, designate, and regulate historic resources within its borders. This is separate and distinct from a municipality's use of monies levied pursuant to an open space tax, and accompanying limitations on the municipality's use of property acquired with those monies.

<sup>2</sup>*N.J.S.A. 40:12-15.7.*

# MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION  
COUNSELLORS AT LAW

Princeton Mayor and Council  
March 19, 2015  
Page 2

- ▶ Historic preservation of historic properties, structures, facilities, sites, areas, or objects, and the acquisition of such properties, structures, facilities, sites, areas, or objects for historic preservation purposes
- ▶ Payment of debt service on indebtedness issued or incurred by a county or municipality for the purposes set forth above, with the exception of maintenance purposes described in the third item above
- ▶ Blue Acres projects.<sup>3</sup>

In Princeton's case, the referendum that was approved was for all of the above statutory purposes (except, I believe, Blue Acres projects, although I would need to confirm this).

It is evident that Princeton can use its open space funds to acquire the property for the currently-proposed expansion of the Mary Moss playground. The question has arisen, however, as to whether those funds could be used instead to acquire the property with the house for historic preservation purposes, then sell it or use it for affordable housing.

With respect specifically to the use of open space funds for historic preservation, it is important to begin with the definitions set forth in the statute. The term “historic preservation” carries a specific meaning for purposes of open space trust monies: the statute defines the term as “the performance of any work relating to the stabilization, repair, rehabilitation, renovation, restoration, improvement, protection, or preservation of an historic property, structure, facility, site, area, or object.”<sup>4</sup>

The term “historic property, structure, facility, site, area, or object” also has a specific meaning under the statute. It is defined as “any property, structure, facility, site, area, or object *approved for inclusion*, or which *meets the criteria for inclusion*, in the New Jersey Register of Historic Places pursuant to P.L. 1970, c. 268 (C. 13:1B-15.128 *et seq.*)”<sup>5</sup>

In other words, in order to use money from the open space trust fund for historic preservation, the property, structure, facility, site, area or object to be acquired and/or preserved must either be

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<sup>3</sup>*N.J.S.A.* 40:12-15.7a(1)(a) - (g).

<sup>4</sup>*N.J.S.A.* 40:12-15.1.

<sup>5</sup>*Id.* (emphasis added).

# MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION  
COUNSELLORS AT LAW

Princeton Mayor and Council  
March 19, 2015  
Page 3

listed on the New Jersey Register of Historic Places, or be eligible to be listed on the New Jersey Register of Historic Places.<sup>6</sup>

Assuming the property is eligible and can therefore be acquired for historic preservation using trust fund monies, the question then becomes how the property may be used once acquired. The statute provides that the monies in the municipal trust fund “shall be used exclusively for the purposes authorized by the voters of the municipality[,]” and lands acquired with municipal trust fund monies “shall be held in trust and shall be used exclusively for the purposes authorized under [the statute].” Although there are a number of cases that address what this means in the context of property acquired for recreation and open space, I could not locate any case law or other information on what this means with respect to property acquired for historic preservation. It is clear to me that Princeton could not acquire the property with open space funds for historic preservation, and then simply sell it without any limitations on its future use. What is not clear is whether Princeton could acquire the property, restore the house, then sell it (*e.g.* to the highest bidder, or to a non-profit for affordable housing purposes) subject to a historic preservation easement that would require the ongoing protection and preservation of the house’s historic features. There is conflicting language in the statute, and in the absence of any case law on the subject, at best it is a gray area.

The bottom line is that if the town acquires the property using open space trust fund monies as presently proposed, then it will be limited to using the property for one or more of the purposes listed in the statute. If that purpose is historic preservation, the town will first need to know whether the property is eligible for listing on the New Jersey Register of Historic Places. Lastly, assuming it is eligible for listing and the town acquires it for historic preservation, it is unclear whether the town could then sell the property or use it for affordable housing.

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<sup>6</sup>The property is not currently on either the New Jersey Register or the National Register. It is my understanding that on August 9, 1994, Deputy State Historic Preservation Officer Nancy Zerbo issued a letter indicating that in her opinion, John Street was eligible for inclusion on the New Jersey Register of Historic Places. This determination appears to have been made in the context of a Community Development Block Grant for a road reconstruction project involving John Street. I do not know what effect this determination has on whether 31-33 Lytle Street itself is eligible for listing on the NJ Register. Ms. Zerbo also issued a letter on February 22, 1990 indicating that in her opinion, “the John-Witherspoon Neighborhood in Princeton Borough is eligible for listing in the National Register of Historic Places.” This was part of a letter providing comments regarding a number of different projects in Mercer County.

# MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION  
COUNSELLORS AT LAW

Princeton Mayor and Council  
March 19, 2015  
Page 4

As always, please contact me at (609) 436-1211 or [trishka@mgplaw.com](mailto:trishka@mgplaw.com) with any questions or for additional information.

cc: Marc Dashield  
Linda S. McDermott