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## **Appendix A Non Regulatory Land Protection Tools**

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## **Non Regulatory Land Protection Tools**

Following is a descriptive list of non-regulatory tools that may be used to protect land from development. To determine which protection technique is best suited to each targeted parcel, the following set of needs and circumstances should be evaluated:

### **Needs and Circumstances**

1. Needs of the community
  - Is the parcel desirable for access and active use, or resource protection and passive use?
  - Are acquisition funds available (cash donations, town appropriation, outside grants?)
  - Is the parcel needed immediately or in the future?
2. Needs of the landowner
  - Are income tax or property tax advantages, or cash most important for landowner's financial situation?
  - Is continued privacy an issue?
  - Is the landowner sympathetic to public protection?
- 3) Size and value of parcel
  - Is the parcel large enough to protect what needs protection or serve as a linkage?
  - Is the entire parcel needed or only a portion?
- 4) Development pressures
  - Will the parcel likely be available later if not acquired now?
  - Is the real estate market likely to push prices beyond reach or is market declining for the foreseeable future?
  - Can the Town relieve land development pressure through advantageous tax policy?
- 5) Maintenance
  - Can the community manage the property better than current landowner, given expected levels and types of use?
  - Does the Town have the money and expertise to manage the parcel?

## **Non Regulatory Land Protection Tools**

Fee acquisition (conveying full title to land) by:

1. Donation: to the Town or Barnstable Land Trust

The landowner gives the entire interest in a property (fee simple title) to the Town or charitable conservation organization, such as the Barnstable Land Trust. The donor is relieved of future property taxes because ownership is relinquished. The donor may receive income tax deductions amounting to the appraised fair market value of the land.

The landowner may impose use restrictions on the deed, such as prohibiting motor vehicles, though these limitations may reduce the value of the gift. The landowner may also donate parts of the property in different years or donate undivided interests in the entire property over successive years, in order to maximize income tax benefits.

Land donations are the easiest, quickest and, obviously, cheapest land acquisition methods for the community. A title exam and hazardous waste survey should be conducted prior to conveyance. Deeds specifying conservation use should read, "to be managed under the authority of MGL Chapter 40, section 8C," to ensure the land cannot be devoted to other municipal use. Land donations are subject to Town Meeting approval, or Town Council approval if accepted by the Conservation Commission. Gifts of land to the Barnstable Land Trust do not require municipal approval.

## 2. Purchase: friendly sale, eminent domain, bargain sale, installment sale

If funds are available, and the landowner cannot or will not donate the parcel, the Town may wish to purchase the fee simple title to the land. The length of time necessary to complete the transaction depends on negotiations, title research, appraisals and Town Meeting scheduling. If bonds are to be issued, the Town Meeting must approve the purchase by a two-thirds majority and a simple majority of a town-wide election is needed to exempt the bonds from the tax levy limit (Proposition 2 1/2.)

The Town has the right to take a key property for public use by eminent domain, if a negotiated price cannot be reached. Even if the Town bases compensation on an accurate appraisal, landowners often feel aggrieved and sue for additional damage awards. Juries typically side with the landowner. Because takings automatically clear away title defects, friendly negotiated sales are often written as eminent domain takings in the Town Meeting article.

Land purchases can also be structured in installments or at bargain prices to satisfy a landowner's tax needs. A bargain sale is one at a price below fair market value by at least 20 per cent. The difference between appraised value and the sale price qualifies as a tax-deductible gift, which can offset the landowner's capital gains tax on the sale.

Open space purchases by the town can receive approximately 50% in reimbursement from the state Self Help and Urban Self Help Programs (M.G.L. c. 132A, s. 11). Towns across the state annually compete for what has amounted to a total of (in recent years) \$8 million. Property acquired with assistance from these state programs must be kept and used at all times for open space purposes. Self Help lands cannot be disposed of or converted to other uses without approval of town meeting, the state legislature and the governor. Even then, converted property must be replaced by the town with land of at least equal fair market value and of reasonably equivalent usefulness.

### 3. Bequest

Property can be given for public use after the landowner's death if his or her will specifies such a disposition. This technique allows the landowner full use and enjoyment of the land during his or her lifetime, while removing the asset from estate tax obligations at the time of death. There are no income tax or property tax savings using this approach and the community gets no immediate use of the property. There is also no assurance that the will won't be altered before death.

### 4. Tax title transfer

Tax title properties are parcels acquired by a municipality through foreclosure owing to non-payment of property taxes (G.L.C. 60.) People may neglect to pay the minor amount of taxes due on their "worthless" wetland parcels and lose their land through foreclosure by the Town. Land values today are generally high enough to dissuade owners from risking the loss of their land through tax default. In the past, though, many properties were acquired by towns through this method.

Once acquired by the community, tax title lands are general purpose municipal lands, usually under the control of the Town Manager. They can be kept, sold by Town Meeting, or transferred to another town agency for a specific use. The Conservation Commission, for example, could request wetlands and parcels with special resource value. Barnstable and Wellfleet are two Cape towns which have regularly transferred these types of parcels to their Conservation Commissions in the past.

### 5. Reverter clause

Lands can be transferred to one entity with the stipulation that if the grantee fails to honor the grantor's intent, the title will automatically transfer to a third party who will uphold the grantor's intent. An example of this technique was used in the 1960s when the Thacher/Perera family transferred over 200 acres for use by the Boy Scouts' Camp Greenough in Yarmouthport. The deed requires that title transfer to the Yarmouth Conservation Commission if the Scouts discontinue use of the land for scouting/camping.

## Less-than fee protection (conveying partial rights to property)

### 1. Trail Access and other Use Easements

Many landowners are familiar with positive easements, such as for drainage, driveways or utilities. Easements may also be constructed to link open space parcels or to create viewsheds. Unfortunately, most landowners fear the loss of privacy and liability concerns sometimes associated with public use. If privacy loss is significant and fair market value is reduced, the Town should lower the tax assessment on the affected parcel accordingly.

Massachusetts General Law (c. 21, s. 17C) protects landowners from liability if they allow public access without charging admission, so liability fears are probably exaggerated.

The Cape Cod Pathways Project, sponsored by Barnstable County, encourages landowners to participate in the creation of a linked system of walking trails throughout the Cape. This network would rely on land donations, easements, licenses and purchases. The Town of Barnstable Proposed Cape Cod Pathways Trail Plan was completed in 2003. Its implementation is likely to require the use of access easements over some privately owned parcels.

The Department of Environmental Management's (DEM) Sea Path program, which would grant public strolling rights below the high tide line (currently, public trust rights in this intertidal zone are limited to fishing, fowling and navigation), is relevant to privately owned parcels on both the north and south sides of Town.

## 2. Conservation Restrictions (G.L. 184 s. 31-33)

Conservation restrictions, also called conservation easements, are voluntary, yet binding legal agreements between a landowner and the Town or conservation organization, such as the Barnstable Land Trust. The landowner is offered powerful incentives through estate tax and federal income tax deductions and property tax relief, to keep parcels in an undeveloped state. The owner keeps control over the land, while the holder of the restriction promises to enforce the terms of protection. The state Secretary of Environmental Affairs and the Town Council must approve each restriction based on the land's environmental significance or other public benefit.

## 3. Lease

The Town could lease private land for open space needs, such as for a community garden. Leases are effective in their flexibility and "trial-run" aspects. A landowner who is reassured by the community's responsible management of the leased land may be more willing to cooperate later on a more permanent arrangement, such as a donation in fee or conservation restriction. Leases are recorded in the Registry of Deeds and remain in force until their expiration date, even if the land's title is conveyed. Land leased for public use is typically relieved of property tax obligation. No income or estate tax deduction can be claimed due to the temporary nature of the lease.

## 4. Remainder interest/reserved life estate

A landowner can give or sell land to a town while retaining the right to live on or use the property for the rest of his or her life. The landowner keeps a "reserved life estate" while transferring the remainder interest to the Town. The landowner receives a charitable deduction for the value of the land minus the value of the life estate (based on IRS actuarial tables) and minus any depreciation. The landowner typically must still pay property taxes and maintenance costs.

Reserved life estates are typically used by elderly landowners who still need their home, but not their land. Benefits to the community include immediate access to the property and knowledge that, eventually, full control will result.

#### 5. Option/Rights of first refusal

An option is a right, but not an obligation, to purchase a property at an agreed upon price at a specific time. Options allow a town or land trust the time needed to raise funds for a parcel it knows it wants to acquire. Options are particularly useful in times of development pressure and rising realty markets because they lock in a price and take the land off the market. The Town pays a nominal price for the option itself to indicate genuine intent, and records the option. Landowners derive no tax incentives from this technique, but many landowners would prefer to sell their property for conservation than for development.

Rights of first refusal similarly can buy time for the town to assemble acquisition funds, but are less certain than options. These agreements set neither a purchase price nor an execution date. The town cannot determine when the owner will decide to sell the land - now, later or never - but it gives the public the right to determine the land's fate if and when that time comes. No tax incentives accrue to the landowner from these agreements; civic cooperation may be the only motivation.

#### 6. Tax-deferral programs: MGL 61, 61A, 61B (see Section 5 for further discussion)

Working forests, farms and private recreation lands often receive preferential tax treatment under the current use assessment programs (respectively, under MGL c.61, 61A, 61B.) For an in depth discussion of these land protection options, see Section 5.

#### 7. Differential Assessment Programs (Special Act 797 of 1979)

Private retention of open land could be stimulated by Special Act 797 of 1979, which provides the Town with an option to tax open or vacant land at a rate up to 15 percent less than residentially-developed land. It is based on the premise that developed land requires more municipal services and should generate more taxes than open land. The advantage to this program is that it applies indiscriminately throughout the town; everyone gets a tax break for keeping land undeveloped whether they want it or not. The drawback is that the open space rate reduction of 15 percent is much smaller than the discount offered by other techniques, such as conservation restrictions. In 1990, five Massachusetts communities (Bedford, Concord, Norton, Nantucket and Somerset) used this classification program. It is an equitable conservation option that need not cost the town a penny. The town's total tax revenue remains the same; more of the burden is simply shifted onto developed properties.