

**DRAFT  
FOSP  
Range of Open Space Preservation Tools**

The charge of the Town Council to FOSP included the following:

7. FOSP shall develop a range of tools and approaches to preserve/protect/enhance critical parcels. These tools should be expansive and include innovative approaches that have been successfully employed nationwide, including zoning, outright land purchases, elimination of incentives for development in critical parcels, methods by which land can be purchased in private/public partnerships, and any other creative approaches other towns have taken. At the same time, all of the approaches that are considered and recommended have to avoid infringement on personal property rights.

**Zoning related tools:**

1. Restrictive zoning. This term covers types of zoning that essentially prohibit development of private property due to profound public safety concerns. Restrictive zoning can be applied without compensating the property owner for loss of value to their property because the value was never there. This type of zoning includes floodplains and wetlands, and may also apply to minimum lot sizes where septic systems will be used.

An agricultural zone could be considered in this category. This type of zoning district limits uses to agriculture and typically carries a minimum lot size of 25+ acres per lot.

Examples: RP1, RP3 Zoning in Cape Elizabeth, Agricultural Zone in Auburn

Benefits: The benefit is that the public is protected from health and safety risks if these properties are developed and the land remains in private ownership. This type of zoning has been challenged in court and found an acceptable use of the police power.

In the case of the agricultural zone, it is imperative that the zoning be clearly supported by a comprehensive plan. Provisions for an opt out may also be needed to survive a court challenge.

Limitations: Any use of restrictive zoning must be accompanied by an analysis of a potential takings claim. If a municipality deprives a private property

owner of all practical use of their property, it can be responsible for paying the landowner for the value of the land prior to the zoning, plus damages and attorneys fees.

In the case of an agricultural zone, the minimum lot size needs to be set at a large enough size to support farming. This size usually results in significantly reducing what a property owner can do with his/her land, and consequently reducing the value of the land. In these circumstances, it is politically difficult to adopt an agricultural zone.

2. Clustering. Known as Open Space Zoning in Cape Elizabeth, this is a regulation that requires that a portion of the land proposed for development be set aside as permanently protected open space. Because the amount of development otherwise allowed on the lot still occurs, or even increases, the development is “clustered” on one portion of the lot.

Examples: Open Space Zoning/RB District in Cape Elizabeth, Conservation Subdivisions

Benefits: Because the ability to develop the land is preserved, there is little threat that a takings claim will be made by the property owner. Land is preserved without incurring the cost of purchasing property from the owner. The property owner who wants to develop his/her property also has an incentive to choose this type of development [rather than a development plan that does not set aside open space] because even a slight increase in density creates profit and clustering can save infrastructure costs. Developers also use the preserved open space in their marketing of the development. Municipalities save 10+ % in delivering services to clustered developments compared to traditional developments and clustered developments typically have more amenities such as sidewalks and greenbelt trails.

Through clustering, the Cape Elizabeth Planning Board has approved new development that added 330 acres of open space to the town open space total of 1100 acres.

Limitations: It is important that the open space to be preserved meets the town’s open space goals, in particular by preserving sensitive areas such as wetlands, linking to town-wide open space, providing public access and laying out open space in a large, contiguous parcel rather than minimal value buffer strips. Clustering may also push a greater intensity of development closer to abutters. Effort should be made to make the preserved open space accessible to abutters and the general public.

3. Impact Fees. These are fees imposed on new development to pay for the cost of new services or facilities that will be needed by the development. Two U. S. Supreme Court decisions have established strict parameters for impact fees. Fees must be based on a calculation that logically ties the fee amount to the impact from the development. Fees cannot be used to fund a backlog of needs and must be returned to the developer if they are not spent within a specified time period, usually 10 years.

Example: Cape Elizabeth Open Space Impact Fee (Sec. 16-3-1(q))

Benefits: In Cape Elizabeth, the impact fee was adopted to replace an open space donation requirement in the Subdivision Ordinance that was legally vulnerable to challenge. The open space impact fee allowed the town to continue its practice of setting aside land as part of development review. The fee is “paid” with a land donation. Lately, the Planning Board has opted to assess the fee instead of a land donation where the potential land did not fit within the town’s open space goals. The impact fee structure provides for the town to maintain the amount of open space per capita regardless of the level of new development.

The current open space impact fee in Cape Elizabeth is \$4,320 dollars or 12,545 sq. ft. per lot/unit.

Limitations: Impact fees cannot be set at an amount higher than the impact from new development. They also cannot be used to increase an existing community standard. The fee is only assessed on new subdivisions.

4. Transfer of Development Rights (TDR). TDR is the movement of the right to develop one property to another property. The first (“sending”) property is subject to a permanent easement that prohibits future development and the second (“receiving”) property can develop at a higher density than otherwise allowed.

Example: Cape Elizabeth TDR provisions (Sec. 19-7-3)

Benefits: This option again allows preservation of open space without expenditure of public funds. Typically, a developer would purchase the development rights from a property owner and transfer them to another property intended for development. TDR provides a mechanism for a property owner to receive a financial return on their property without developing the property. It also encourages clustering of development

rather than spreading it out over multiple parcels, which allows the Town to save costs in delivering services.

The Comprehensive Plan includes a recommendation to establish a bonus for TDR sales from agricultural land.

88. Create a Transfer of Development Rights Agricultural Bonus that increases the number of development units transferred from farm fields by one-third.

Limitations: TDR has only been used in “superheated” real estate markets or where a TDR landbank has been established and funded. It is not likely this tool will be used more than once, given the need to have a willing seller of TDR rights and willing buyer available at the same time and able to agree on a price. TDR rights sell for less money than the property owner can receive by outright sale of the property.

#### **Acquisition Tools:**

5. Fee Ownership. This is purchase of the land from the property owner by the Town, Land Trust or other conservation entity. In order for the land to be preserved as open space, restrictions must then be placed on the deed to preclude development. From 1988 -2009, the Town of Cape Elizabeth has spent \$1,675,000 to purchase open space and another \$415,000 in contributions toward Land Trust purchases.

Example: Town Farm, Gull Crest

Benefits: Ownership provides for complete control to prevent development of the property.

Limitations: Ownership without conservation restrictions leaves the land vulnerable to development by current or future property owners. Purchase is often not an option due to lack of funding.

6. Easement. A conservation easement removes the right to develop the property, subject to the terms of the easement, and maintains ownership of the land with the property owner. Pedestrian easements allow public access to a specified location on the property, while again leaving fee ownership to the property owner.

Examples: Arlington Lane Easement, Gull Crest Fowler Rd Connector  
Pedestrian Easement

Benefits: Conservation easements can be less expensive to purchase than fee ownership of the property. Property owners may also be more willing to sell or donate a conservation easement as long as they retain ownership.

Limitations: The terms of any conservation easement should be carefully reviewed to make sure you are getting what you expect. For example, many conservation easements allow timber harvesting, which may be inconsistent with the goal of preserving a naturally vegetated area. Also, conservation easements do not convey public access unless specified in the terms.

7. Donation. Some property owners feel strongly that they do not want their land developed and donate the land to the Town or the Land Trust with conservation restrictions in the deed. Some donations are motivated by the tax benefits associated with the donation, which can vary depending on the conservation restrictions imposed.

Examples: Winnick Woods, Ferne Peddy lot

Benefits: Free land!

Limitations: The recipient of the donation may need to be flexible about how the land is conveyed in order to maximize tax benefits for the donor. The terms of the donation should also be reviewed to make sure that there are public benefits, like public access, included in the donation. Sometimes the land offered does not fit within Town open space goals and sometimes the donation results in a decrease in the tax base. The Town may also assume costs for legal fees and surveying.

8. Tax acquired. The Town assesses taxes to property owners based on the value of their property and the amount needed to provide services. Failure to pay taxes initiates a 3-year process that culminates in the town assuming ownership of property for failure to pay taxes. Property owners will sometimes choose to let the Town take for taxes property that is not buildable.

Examples: Ocean View Rd and Forest Rd lots

Benefits: Often, these lots are wetlands or otherwise severely encumbered, prohibiting development. Town ownership eliminates potential challenges by the property owner to allow the lot to be developed and

often consolidates ownership by the Town of sensitive natural areas, without the need to purchase the property.

**Limitations:** The process to assume ownership of tax acquired land is time-consuming for the Town Clerk's office and may also include legal fees. This land may not fit with the Town's open space goals, although it is often located immediately adjacent to existing neighborhoods. If the land is buildable, the town may choose to sell it and it may be developed. There is also a small reduction in taxes collected.

**Other Tools:**

9. Partnerships. The Town may pool resources with the Land Trust, a property owner, or other entity to effect land conservation.

Examples: Fort Williams Park, Robinson Woods

**Benefits:** The Town may advance open space preservation goals without shouldering the entire financial and administrative burden. In some cases, large acquisitions would be impossible without a joint effort.

**Limitations:** The needs of partners must be accommodated and reconciled with Town goals. For example, Town acquisition of Fort Williams Park from the federal government included restrictions on changes to the Parade Ground. Sometimes, a partner's goals increase costs, including but not limited to staff time and attorneys fees.

10. Grants. State and federal governments and private foundations make funding available to preserve open space. The amount of funds available fluctuates, but is usually very competitive. Almost all grant funding requires a substantial cash match from the grant recipient.

Example: Robinson Woods

**Benefits:** This can be a significant source of funding on a project by project basis. Grants can make it possible to double or triple the amount of funds available to purchase open space.

**Limitations:** Once you are successful with a grant application, is it unlikely you will obtain more funding from the same source in the near future. Grant funding also typically includes conservation requirements, some of which may be inconsistent with Town open space goals. Even with grant funding, cash matching funds are almost always required.