

**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.

Recommendation: The FOSP Committee recommends that the use of restrictive zoning as a tool not be expanded. Specifically, the existing Resource Protection Districts work well to protect wildlife habitats but an agricultural zone should not be created.

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 more accessible to abutters and the general public.

Recommendation: The FOSP Committee recommends that the current regulations promoting clustering be retained. More work should be done to investigate the potential for increasing the amount of open space that is preserved while maintaining the density allowed that makes this a desirable option for property owners. More emphasis should also be put on preserving contiguous open space and connectors and less on open space as buffer strips.

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 \$6,729 dollars or 14,767 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.

Recommendation: The FOSP Committee recommends that the Town retain the current open space impact fee structure.

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.

Recommendation: The FOSP Committee recommends that the town retain the current TDR regulations.

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

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.

Recommendation: The FOSP Committee recommends that Fee Ownership purchases continue.

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. Easements are typically permanent, but can also be for limited duration.

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. The benefit to the land is that the landowner retains ownership. Limited term easements may be easier to obtain from a property owner who does not want to make a permanent commitment.

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. Limited term easements protect property for a specific period, after which a new easement will need to be obtained in order to preserve the open space.

Recommendation: The FOSP Committee recommends that easement donations and purchases continue.

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: Land donation allows for expansion of open space without incurring purchase costs.

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. For example, the Town received the donation of Winnick Woods over a 3 year period to maximize the tax benefits to 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.

Recommendation: The FOSP Committee recommends continued donation of land for public open space.

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.

Recommendation: The FOSP Committee recommends that tax acquired land continue to be evaluated for public open space designation.

9. Buy/Restrict/Sell. When a property is available for sale, it can be purchased by the Town. The open space value of the property can be removed from the property and then the property can be resold. A more specific example would be purchasing a lot adjacent to public open space, adding a pedestrian easement to a section of the lot to create an access point to the adjacent public open space, and then selling the lot with the easement on the property.

Example: Scarborough Beach

Benefits: This approach can dramatically reduce the costs of acquisition by reselling the land and still advance open space goals.

Limitations: There is a risk that the property will not sell for the anticipated value once the easement is in place. There are also the typical costs of real estate transfers that will likely not be recouped by the resale.

Recommendation: The FOSP Committee recommends that this tool be used at appropriate opportunities.

Other Tools:

10. 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.

Recommendation: The FOSP Committee recommends that partnerships continue to be established to preserve open space.

11. 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. Most 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: 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.

Recommendation: The FOSP Committee recommends that grants be sought at appropriate opportunities.

12. Reduced Taxation. There are tax programs available that allow property owners of open space to reduce their tax burden. These may include assessing property at current use value instead of highest and best use, enrollment in state open space, tree growth or agriculture programs, or establishment of deed restrictions on property.

Example: State of Maine's Open Space, Tree Growth and Agriculture Tax Programs

Benefits: All of these tax programs work to reduce the base value of property upon which taxes are assessed based on a standard tax rate. Once the property value is reduced, subsequent taxes are automatically lower without further action by the property owner.

Limitations: Because these programs focus on the value of the land, taxes will still increase as the tax rate increases. The equal application of tax rates across different land uses is restricted by state constitution so there is no legal means to adopt a different tax rate for open space. Most of these options also require the land owner to agree to temporary or permanent limitations on the use of their property.

Recommendation: The FOSP Committee recommends that open space property owners be provided with information regarding these programs.