

## **VII. Regulatory Agricultural Planning Tools**

### ***A. Agriculture Protection Zoning***

The act of zoning was established in the 1920s as a means of designating specific uses to areas of land based on its characteristics, location, and accessibility. Agriculture Protection Zoning (APZ) is a form of very large lot zoning applied in areas in which a town or county has determined that agriculture is the preferred land use. Lands zoned for agricultural land use are typically those with prime soils, an historic record of farming, and where farming is the desired use (AFT 1997). Protecting agricultural lands through zoning was first pioneered in the mid-1970s by counties in Pennsylvania, California and Washington to protect important farmland from the threat of development. A 1995 study by the American Farmland Trust reported that about 700 local governments in 24 states had enacted some form of Agricultural Protection Zoning.

There is a wide range of development densities permitted in agriculture protection zones. In western states, densities can be as low as one house per 640 acres. Agricultural zoning in eastern states features smaller parcel sizes. For example, in Baltimore County, Maryland, one dwelling per 50 acres is the allowed density in the Resource Conservation District. In some Pennsylvania counties and townships the permitted density of non-farm dwellings ranges 20 – 25 acres. Harrison Township in Ohio has 20-acre minimum lot sizes.

In some areas, the term agricultural zoning is used where one house/acre or one house/two acres is permitted. (As will be described below, the town of Falmouth has such zoning designations.) The American Farmland Trust points out (AFT 1998) that although such zoning does permit farming, the function of this kind of zoning is more to reduce the density of development as such small parcels limit the amount of farm activity that can take place.

Agricultural Protection Zoning is a very important component of a community's plan to retain agriculture. Because zoning ordinances are subject to change, zoning cannot be relied upon as the only method to protect farms. As discussed later in this section, Massachusetts, including Cape Cod, has not utilized agriculture zoning in any reasonable way to protect agriculture, in contrast to many other parts of the country where agricultural zoning is common.

### ***B. Massachusetts Zoning Act***

The Commonwealth of Massachusetts acknowledges the necessity for agriculture in the state Zoning Act, MGL Chapter 40A: Section 3. This section of the zoning act provides a conditional exemption for agriculture by providing that zoning ordinances and bylaws may not unreasonably prohibit or regulate land that has a primary purpose of commercial agriculture. Prior to August of 2010, the exemption was limited to land located within districts zoned for agriculture and to land of five acres in area or more. The Zoning Act was amended in August 2010 by adding an additional category of agricultural uses protected by that statute of any parcel of 2 acres or more that generates annual revenues from the sale of products of \$1,000 or more per acre. Thus, there are now three categories that exempt agricultural land from local zoning:

1. Parcels of land of any size devoted primarily to commercial agriculture within districts zoned for agriculture. There is no minimum revenue requirement.
2. Parcels of land of five acres or more devoted primarily to commercial agriculture within any zoning district. There is no minimum revenue requirement.
3. Parcels of land of 2 acres or more if the sale of products from the agricultural use generates \$1,000 per acre or more of gross sales.

The amended text of the Zoning Act appears in bold below.

“No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products, . . . , 25 per cent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, or at least 25 per cent of such products for sale, based on either gross annual sales or annual volume, have been produced by the owner or lessee of the land on which the facility is located and at least an additional 50 per cent of such products for sale, based upon either gross annual sales or annual volume, have been produced in Massachusetts on land other than that on which the facility is located, used for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, whether by the owner or lessee of the land on which the facility is located or by another, except that all such activities may be limited to parcels of 5 acres or more **or to parcels 2 acres or more if the sale of products produced from the agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture use on the parcel annually generates at least \$1,000 per acre based on gross sales dollars** in area not zoned for agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as 1 parcel. . . . For the purposes of this section, the term “agriculture” shall be as defined in section 1A of chapter 128, and the term horticulture shall include the growing and keeping of nursery stock and the sale thereof. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.”

### Agriculture Protection Zoning and the State Zoning Act

As described above, Agriculture Protection Zoning (APZ) is a form of very large lot zoning applied in areas in which a town has determined that agriculture is the preferred land use. Despite the language in the Massachusetts State Zoning Act that clearly supports agriculture as an important land use, Massachusetts does not have legislation that directly enables Agricultural Protection Zoning (APZ). By contrast, other states expressly authorize localities to use agricultural zoning.

Because the state Zoning Act is silent on this issue, it may be permitted under the Home Rule Amendment, but case law has not in general supported large lot zoning. In fact, all across Massachusetts, there are only a very few places—including Edgartown and a few towns in the Cape Cod National Seashore—where even 3-acre zoning has been permitted by the Commonwealth absent demonstration of an overriding public interest. Typical lot sizes in Massachusetts’ towns range ½ to perhaps two acres.

It would appear that in Massachusetts, the only method that has been available to protect agricultural lands—or any other resource land for that matter—has been through acquisition of the land, through conservation or agricultural restrictions, or through state incentive programs. However, recent low-density zoning bylaws that passed in Shutesbury, Brewster, New Salem and Wendell may suggest that such large lot or low-density zoning may now be allowed. This important breakthrough is discussed in the next section.

### ***C. Zoning to Protect Natural Resources***

#### Cluster/Open Space Residential Design Zoning

For many years, cluster zoning has been promoted as an alternative to a traditional grid subdivision layout.

Clustering development on smaller lots is more economical for the developer and more beneficial to the environment as it results in a larger portion of the parcel remaining as open space. A variant of cluster zoning is Open Space Residential Design (OSRD) wherein attention focuses on natural resource protection and there is no minimum lot size. All Cape Cod towns now have some form of cluster or OSRD bylaw, but they are not widely or consistently used and typically only protect narrow fingers of land rather than larger areas. Skeptics claim these bylaws are of little use as the Cape is almost fully developed. Nevertheless, there may be opportunities for some agriculture in cluster or OSRD areas.

In the past many believed that clustered developments were less marketable than traditional grid subdivisions. However, recent studies indicate that proximity to views of open space more than compensates for the smaller lots found in cluster developments (Lacy).

### Natural Resource Protection Zoning

A few Massachusetts towns have modified the concept of OSRD by considering development densities rather than lot sizes. Known as Natural Resource Protection Zoning (NRPZ), this kind of zoning can protect agricultural lands as well as drinking water supplies, sensitive watersheds, and critical habitats. The highest priority in a NRPZ bylaw is resource protection; as a result, both development potential and the pattern of subdivision are altered.

The town of Shutesbury was the first to adopt NRPZ in order to protect the town's forestry resources in 2008. The town of Brewster followed in 2009 when it passed a zoning bylaw to create a NRPZ district to protect the public water supply and water quality in Pleasant Bay. New Salem and Wendell have recently adopted NRPZ bylaws and Harwich has a draft NRPZ bylaw.

These bylaws first set aside those parts of the parcel that contain the resources the bylaw seeks to protect—forestry in the case of Shutesbury and water in the case of Brewster—and then cluster development on the remaining land. All four bylaws require 65 – 80% of the parcel to be set aside.

Unlike traditional cluster bylaws that allow cluster development by special permit only, the NRPZ bylaw makes clustering “by right” and requires a special permit for a conventional grid subdivision. The number of dwelling units is calculated using a density formula instead of the typical large-lot subdivision layout. Both Shutesbury and Brewster have two different districts covered by the NRPZ. Depending on the district, densities are three or five acres per unit, but this density is averaged over the entire district so individual house lots are much smaller. Lot sizes and road frontage requirements are flexible (i.e. there are no minimums) and shared driveways are encouraged to limit paved surfaces.

Development Density can be increased in an NRPZ subdivision through an incentives system. Brewster's incentive system is linked to the purpose of the district, the protection of water resources. In the Brewster NRPZ district extra units are allowed if additional water resource protection measures, such as connecting all the houses to an advanced wastewater treatment system, utilizing low impact development concepts to reduce stormwater runoff, and other techniques are put in place.

### ***D. Cape Cod Commission Regional Policy Plan***

The 2009 update to the Cape Cod Regional Policy Plan added some new language to the land use goal (LU3.3): “to preserve and enhance rural land uses, including agriculture, that are environmentally compatible with the Cape's natural resources in order to maintain opportunities to enjoy the traditional occupations, economic diversity, and scenic resources associated with rural lands,” was amended to end with the phrase “and to support activities that achieve greater food independence for Cape Cod.”

The update did not strengthen the minimum performance standards associated with this goal. These remain:

Land Use 3.1. New development adjacent to rural landscapes and those lands in active agricultural production shall maintain or provide a thickly vegetated buffer of sufficient width to prevent conflicts between the development and existing uses.

Land Use 3.2 Development unrelated to agricultural operations shall be designed so as to avoid or minimize development on lands capable of sustained agricultural production as evidenced by soils, recent agricultural use, and/or surrounding agricultural use.

In the section on Cape Cod Commission actions to implement goals, the RPP indicates the Commission will work with other parties to “encourage and support continued and expanded agricultural use of land on Cape Cod, where environmentally appropriate.” A second action the Commission says it will undertake is an investigation of the use of Districts of Critical Planning Concern, Transfer of Development Rights and conservation restrictions in order to protect significant soils and working agricultural landscapes.

Recommended town actions to reach this goal include: exploration of expanding agricultural activities on municipal lands where appropriate; adoption of cluster bylaws allowable by right and agricultural zoning; direction of additional growth away from identified Resource Protection Areas; and adoption of Right-To Farm bylaws.

Agriculture is also addressed in the Open Space section of the updated RPP. The Open Space Protection and Recreation Goal (OS1): is “To preserve and enhance the availability of open space that provides wildlife habitat and recreational opportunities, and protects the region’s natural resources and character, Barnstable County shall strive to protect remaining developable land.” The minimum performance standard OS1.3 includes a paragraph on farmland protection: “In the design of developments, and in the consideration of on-site or off-site open space, agricultural soils and agricultural uses shall be protected. In suitable locations and where conflicts with sensitive habitats and/or state law do not arise, conservation restrictions may reserve the right to farm.”

Finally agriculture is addressed in the Heritage Preservation and Community Character: Historic, Cultural, and Archaeological Resources section of the RPP. In the planning section, a Cape Cod Commission action that is listed is “to inventory the region’s distinctive cultural landscapes, including historic agricultural lands, and ...make recommendations to preserve these significant resources through land protection, preservation or conservation restrictions, educational efforts to increase public awareness, and other means.” Minimum performance standard HPCC1.2: Cultural Landscapes states “the distinguishing original features of an historic or cultural landscape shall be preserved. New development adjacent to or within historic or cultural landscapes shall be located to retain the distinctive qualities of such landscapes and shall be designed to maintain the general scale and character-defining features of such landscapes. In particular, historic agricultural lands and other working agricultural lands shall be retained to prevent further loss of these dwindling resources that speak to the Cape’s agricultural past.”

### ***E. Right-to-Farm Bylaw***

A Right-to-Farm bylaw is a general, as opposed to zoning bylaw, which is designed to underscore the importance of farming to a town. Such a bylaw acknowledges that farming, and its associated sights, sounds and odors is a legal, accepted and desirable use of land that is of value for cultural and economic reasons. For towns that have Agricultural Commissions, there is a dispute resolution process. It is strongly recommended that Agricultural Commissions be adopted before enacting a Right-to-Farm bylaw, as such a commission can help tailor the bylaw and educate the public about the need for such a provision.

## ***F. Local Zoning and Agriculture***

### **Permitted and Prohibited Agricultural Uses in Zoning Bylaws**

As described earlier in this document, the state zoning act exempts agriculture from zoning restrictions on lots that are five acres or greater in size or on lots of two acres or more with annual revenues of \$1,000 or more per acre. Zoning regulations in Cape towns address several different aspects of agriculture, including minimum lot sizes, districts in which agriculture is allowed or not, stables, raising of livestock and farm stands.

The town of Falmouth is the only town that has zoned agricultural districts where agriculture, horticulture, and floriculture are permitted uses along with single-family homes, and other community services. The three agriculturally zoned districts have lot size minimums of 40,000, 60,000 and 80,000 square feet. These districts were designated in 1973 and were based on the historical record of cropland in these areas.

In most towns the raising of crops is allowed by right in most or all zoning districts on parcels less than five acres. A few towns require a special permit for lots smaller than five acres. Most towns on Cape Cod require a special permit for raising of livestock, sometimes with different requirements for swine, fur-bearing animals and poultry. Several towns restrict the raising of livestock to certain zoning districts.

Regulations for permitting farm stands include specifications concerning allowable uses in different zoning districts, the size of the parcel, and percent of goods produced on the land on which the farm stand is located. In some towns, farm stands are a permitted use in all but a few zoning districts. Some towns allow farms stands by special permit if the parcel is less than five acres. Some towns require that a percentage or all of the product sold is grown on the adjacent land.

### **Provisions for Agriculture in Other Parts of the Zoning Bylaw**

All Cape towns now have cluster bylaws. Most of these explicitly include agriculture as a permitted use in the open space portion of the parcel.

Most Cape towns also have provisions for agriculture in areas of low flood damage potential where structures are not permitted and where agriculture land use is otherwise permitted and does not obstruct flood flow.

### **Examples of Agricultural Zoning in Other Parts of Massachusetts**

The town of Chilmark has established Agricultural Zoned Residential Districts where farming is a permitted use in the area.

The town of Plymouth has established Traditional Rural Village development areas, which consist of different historical mixed uses in which agriculture is included.

Amherst created the Farmland Conservation Overlay District, which is an innovative zoning tool requiring that any development within the district be clustered, thereby preserving the most important agricultural soils for farming.

The town of Hadley has a Farmland Preservation Bylaw that created a farmland preservation district as a sending zone under the Transfer of Development Rights program. The bylaw allows increased density of commercial or industrial development when land in the sending zone is permanently protected.

Hatfield, Massachusetts has a TDR program where all agricultural, outlying residential or rural residential zoning districts are eligible sending areas. Developers pay to permanently protect land in those zones in exchange for increased building density.