

Overcoming Impediments to Smart Growth on Cape Cod



Prepared by Ridley and Associates for The Association to Preserve Cape Cod, Inc.

Overcoming Impediments to Smart Growth on Cape Cod

The Association to Preserve Cape Cod is the region's leading nonprofit environmental organization, working for the adoption of laws, policies and programs that protect and enhance Cape Cod's natural resources and quality of life.

A central focus of our efforts is to direct growth to our existing town centers and villages and away from critical natural resource areas. Promotion of compact village centers and protection of natural resource areas is also a primary goal of the Cape Cod Business Roundtable, a group of about 25 civic leaders who meet regularly to address regional issues.

During the past several years APCC and the Roundtable have worked collaboratively to advocate for revitalization of town centers and protection of natural resources. Over the course of our work, we determined that although towns' local comprehensive plans call for compact development and protection of natural resources, the provisions of towns' bylaws often preclude this pattern of land use. As we advocated for bringing zoning bylaws into alliance with local comprehensive plans, we discovered that the public was concerned about density and additional height in villages and that there were multiple impediments to changing zoning bylaws in general.

This publication and its companion, "A Guide to Town Center Revitalization" provide information, insight and guidance for towns and concerned citizens who seek to establish a pattern of development that results in vibrant town centers and protection of natural resources areas. The "Guide to Town Center Revitalization" is largely based on our experiences in several towns on Cape Cod where we have worked with partners to effect zoning changes to promote village revitalization. "Overcoming Impediments to Smart Growth on Cape Cod" is the result of an analysis of the problems related to reforming zoning bylaws.

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Executive Summary

Cape Cod's scenic natural beauty is fundamental to the region's economic strengths as a resort destination, second home market and home for low impact, knowledge-based businesses whose owners locate here to enjoy the quality of life. In order to keep Cape Cod's economy strong and our communities vibrant, we need to protect our scenic and natural resource areas and direct new growth to revitalized town centers. Local and regional efforts to protect open space and promote vibrant downtowns have achieved some significant successes. However, overall progress in enacting zoning to revitalize town centers and protect open space has been limited despite the fact that many Local Comprehensive Plans include these dual planning objectives.

To understand why needed zoning reform has not occurred on Cape Cod, this paper examines three kinds of impediments: (1) those built into the state zoning act; (2) those related to the use of local and regional land use tools; and (3) common arguments in the public discourse about zoning and land use that make it difficult to build broad popular support for zoning reform. In reviewing these types of impediments to reform several clear themes emerge:

- State zoning reform is essential if towns are to be able to manage growth, and this legislative reform is long overdue;
- Lenient treatment of non-conformities enables incremental development in a manner that may vary substantially from community planning goals;
- Open space protection will require greater creativity and flexibility in the use of local and regional regulatory tools; and
- The public is naturally cautious about zoning change, but communications tools and strategies are available to towns to engage citizens and property owners and build support for zoning reform.

This paper also includes the following recommendations for communities to strengthen their ability to manage growth.

Prompt resolution to state zoning act reform (Section II)

State zoning reform should grant immediate relief from the most onerous elements of current law and not condition such relief on the development and certification of a plan. Proposed provisions that should apply statewide upon enactment of reform legislation include:

- Ability to reduce or eliminate ANR lots;
- An alternative and less permissive zoning freeze system;
- Authorization to impose impact fees;
- Option to apply a simple majority vote to amend or adopt zoning;
- Ability to restrict the maximum interior floor area of residences; and
- Ability to establish low densities in resource-sensitive areas.

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Modify local bylaws to clarify and strengthen treatment of non-conformities (Section III)

Alteration of non-conformities is an on-going challenge that undermines local planning objectives. Among towns surveyed, most requests for alteration of non-conformities are granted. Towns have the ability to tighten treatment of non-conformities and should do so by adding the following provisions to their bylaws:

- Include a statement of intent that creates a policy context for treatment of non-conforming uses and structures;
- Separate or clarify differences in treatment of non-conforming uses and structures;
- Provide criteria to determine what does and what does not constitute an intensification of an existing non-conformity;
- Make all alterations to non-conforming structures and uses that expand a non-conformity subject to special permit review;
- Provide quantitative or qualitative criteria for determinations of what is not substantially more detrimental; and
- Employ time limitations as a special permit condition for alteration of non-conforming uses to enable the community to revisit the appropriateness of the use for the location.

Use local and regional land use tools to protect open space (Section IV)

Funds for open space acquisition are growing scarcer and there is broad understanding that acquisition is a necessary but insufficient strategy to ensure that open space protection keeps pace with development on Cape Cod. Greater reliance on

regional and local land use planning and regulation is needed to augment land acquisition to protect open space. Other steps towns should consider include:

- Make more frequent use of powerful planning tools such as the (1) District of Critical Planning Concern that provides a time-out from development while planning takes place or (2) designation of Resource Protection Areas that allow towns to petition for changes in thresholds for Cape Cod Commission review;
- Maintain a current Comprehensive Open Space Plan and Natural Resources Inventory to guide policy development and regulatory decision making;
- Create Natural Resources Protection Districts in which low-density zoning and clustered development safeguard resources;
- Revise cluster or Open Space Residential Development bylaws to include more recent innovations such as:
 - (1) Making cluster mandatory for subdivisions of a threshold size,
 - (2) Eliminating the special permit requirement and making it cluster development “by right,”
 - (3) Reducing required minimum lot sizes,
 - (4) Encouraging cluster of redeveloped properties,
 - (5) Basing density on acreage rather than a conventional grid yield,
 - (6) Allowing flexibility in lot sizes and,
 - (7) Using site features to design the layout of lots, roadways and driveways.

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- Promote use of TDR on a local or regional basis. Each town should evaluate how TDR could work as part of the Local Comprehensive Plan (LCP) process. As a first step, towns should determine objectives that could be met through TDR and identify sending and receiving areas. Financial and technical assistance may be needed to enable towns to undertake real estate market assessments necessary to develop allocation formulas.

Promote public education regarding the role of downzoning in community planning. (Section V)

The ability of communities to enact meaningful zoning changes is hampered by public attitudes toward zoning changes that would reduce development potential in certain areas. Resistance is rooted in a perception that downzoning is somehow unfair to property owners and may even be illegal, perceptions nurtured by the public's tendency to avoid the perceived risk associated with change. Strategies for towns to consider include:

- Develop a training module for planning boards and other local officials and citizens that explores the origins of zoning powers, applicable case law, and the arguments for and against zoning reform and property rights.
- Follow steps outlined in the *Cape Cod Guide to Town Center Revitalization* when developing zoning proposals.
 - Step 1: Identify a community vision for the planning area, and design an interactive and inclusive planning process;
 - Step 2: Understand the status of current regulations and the build-out they support and assess market conditions and opportunities;

Step 3: Visualize a desired level of growth potential through photo-realistic visualizations and identify the zoning changes and density offsets needed to achieve the desired pattern of growth;

Step 4: Create tools and incentives such as bylaws, design guidelines, and infrastructure plans; and

Step 5: Foster public and private involvement throughout implementation of the zoning and incentives.

I. Introduction

Background and Purpose

Cape Cod's scenic natural beauty is fundamental to the region's economic strengths as a resort destination, second home market and home for low impact, knowledge-based businesses whose owners locate here to enjoy the quality of life. In order to keep Cape Cod's economy strong and our communities vibrant, we need to protect our scenic and natural resource areas and direct new growth to revitalized town centers. Local and regional efforts to protect open space and promote vibrant downtowns have achieved some significant successes. However, overall progress in enacting zoning to revitalize town centers and protect open space has been limited despite the fact that many Local Comprehensive Plans include these dual planning objectives.

This paper seeks to explain why zoning reform has not occurred on Cape Cod and what towns can do to build support for zoning reform. This paper devotes significant attention to the use of zoning tools to protect open space and natural resource areas. A companion publication of the Association to Preserve Cape Cod entitled, *Cape Cod Guide to Town Center Revitalization*, addresses the key elements of compact town center development.

Zoning in Cape Cod Towns

Most zoning bylaws on Cape Cod were adopted thirty to fifty years ago and were amended intermittently over the ensuing decades. Unquestionably, the community objectives around which local zoning bylaws were originally crafted have changed

dramatically during these decades, as has our understanding of the close relationship between land use and the condition of our natural resources.

There are many signs that zoning is not solving many problems—and may in fact be contributing to problems. For example:

- Long stretches of land abutting regional roadways were zoned for broad commercial purposes to promote economic development. These vast areas of commercial sprawl now contribute to traffic congestion, loss of community character, and the abandonment of traditional town centers;
- In many towns, land zoned for commercial and industrial uses overlaps water recharge areas, threatening public drinking water supplies and sensitive marine embayments;
- One-acre residential zoning designed for ample separation between private drinking wells and on-site septic systems has resulted in residential sprawl leading to fragmentation or loss of wildlife habitat, automobile dependency, and higher costs for infrastructure, including efficient wastewater treatment.

To reverse course, many towns now seek to adopt so-called smart growth regulations and policies, which call for clustering a mix of commercial and residential development in compact town centers, while promoting open space protection and less dense development in outlying areas. In fact, the certified Local Comprehensive Plans (LCPs) in the majority of Cape Cod towns call for such land use patterns. This approach recognizes that solutions to some of the most costly and complex problems facing Cape Cod communities—curtailing sprawl, protecting

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natural resources, and meeting needs for wastewater treatment, economically diverse housing and enhanced transit service—can best be addressed within a vibrant, compact, mixed use development pattern characteristic of a town center. Ironically, town centers surrounded by farms and open space were the dominant land use pattern on Cape Cod before most zoning was enacted.

Yet, despite the prevalence of LCPs that call for compact town centers surrounded by less dense development, most local zoning bylaws have not changed to mandate such a growth pattern. In a growth management survey conducted in 2004 by the Cape Cod Business Roundtable (BRT)¹, only three towns indicated that local zoning bylaws had been modified to be consistent with the LCPs. The majority of towns reported that most commercial development still occurs outside of town centers or in commercial strip patterns or large lots.

More recently, local efforts to promote vibrant downtowns have had some success. The Dennisport Village Center bylaw and Hyannis Growth Incentive Zone (GIZ) are notable examples and other efforts are underway. However, it is clear that the pace of zoning reform is not fast enough to prevent further loss or degradation of vital natural resources and community character.

¹Cape Cod Business Roundtable et al. Facing the Future: A New Look at Growth Management on Cape Cod, Summary Report of the Cape Cod Growth Management Audit. November 2004.

When local comprehensive plans clearly support smart growth, why is it so difficult to change zoning?

Many factors account for the differences between local plans and zoning. For one, LCPs define land use objectives in general terms that are broadly palatable while reaching community consensus on the specific zoning changes needed to implement LCP objectives is much more difficult. Another contributing factor is that some towns on Cape Cod do not have the planning resources to develop detailed zoning proposals and then shepherd them through a lengthy community process. Other factors contributing to the slow pace of zoning reform may be attributed to state laws governing zoning, as well as how towns use the growth management tools available to them.

This paper focuses on three reasons why zoning reform is lagging on Cape Cod:

- (1) Barriers to smart growth zoning built into the state zoning act;
- (2) Infrequent use of reform-oriented tools and provisions allowed by state law or the Cape Cod Commission Act; and
- (3) Public attitudes—including extreme views on property rights, fear of development of any kind and resistance to change—which, when coupled with the complex and technical nature of zoning, make it difficult to build broad popular support for zoning reform.

This paper then identifies regulatory and policy changes that could facilitate zoning reform to help Cape Cod communities manage growth.

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This paper does not address all growth management challenges built into state and local laws, notably Chapter 40B §20-23. This law enables residential developers to bypass local zoning and health regulations if 25% of the residential units created meet affordability standards. Projects permitted under Chapter 40B have created 40% of the affordable housing units on Cape Cod.² As development sites grow scarcer and include more environmentally sensitive areas, some view Chapter 40B as a way for developers to bypass important local protections and propose projects in locations or at densities that undermine other important community planning objectives. This paper does not examine issues associated with Chapter 40B other than to suggest that communities identify and zone areas to accommodate areas denser residential development in a manner consistent with broader growth management goals.

Organization of the Report

Section II looks at provisions within the state zoning act that arguably are more favorable to property owners than the zoning statutes in other states, and that do not incorporate adequate incentives or requirements for communities to implement smart growth policies. This section also overviews the status of state zoning reform initiatives and what potential changes could mean for Cape Cod towns.

Sections III and IV examine local zoning reform measures that are within local control yet are infrequently used. Section III focuses on elements of local bylaws that inadequately regulate nonconformities. Section IV looks at local and regional planning and zoning tools that could be used more frequently and effectively to protect natural resources lands, including agricultural land.

Section V explores how public attitudes toward zoning changes—in particular downzoning—often hamper local efforts to enact meaningful zoning changes and steps towns can take to build public awareness of and support for needed zoning change.

² Cape Cod Commission. Comprehensive Permit (Chapter 40B) Units in Barnstable County by Town, September 2008. Cape Cod Commission Reporter, Vol. 19, Number 1. January 15, 2009.

II. Reform of State Zoning Act: Chapter 40A

Introduction to Key Problem Areas

Like communities across the state, towns on Cape Cod struggle with provisions of the state zoning act that undermine the ability to implement smart growth zoning. This section reviews the problems with the state act as currently written, and the status and implications of statewide zoning reform efforts.

Laws governing zoning in Massachusetts³ have a long legislative history dating back to the 1920s, and many aspects of the laws have not changed appreciably since the 1930's.⁴ There is widespread agreement that several aspects of Massachusetts'

³Massachusetts' cities and towns are granted powers to create and enforce zoning pursuant to Amendment 89 to the Massachusetts State Constitution (the "Home Rule Amendment"). Chapters 40A and 41 of the Massachusetts General Laws impose various requirements and limitations on the zoning power that constrain local authority to regulate land use. Chapter 41 also establishes and defines the subdivision control process and defines the powers and responsibilities of planning boards. In addition to the statutes themselves, there is voluminous case law that interprets the state statutes. Among other requirements, Chapter 40A provides that Massachusetts' cities and towns can adopt or amend local zoning bylaws only by a two-thirds vote of a municipality's legislative body (Council or Town Meeting.) Once locally adopted, Town zoning bylaws must obtain approval by the Massachusetts Attorney General for compliance with procedural requirements and facial compliance with clearly established rules of the federal and state constitutions and state statutory and case law.

⁴Mark Bobrowski. *Handbook of Massachusetts land use and planning law: zoning, subdivision control, and non-zoning alternatives*. New York. Aspen Law & Business, c2002.

laws governing zoning are outdated and out-of-step with regional and national trends.⁵ Notably, Massachusetts zoning laws include provisions that favor the interests of property owners over community interests when compared to zoning laws in other states, and do not incorporate comparable incentives or requirements for communities to implement smart growth policies.⁶ Areas of the state Zoning Act, Chapter 40A, in need of reform include the following:

- Massachusetts does not require that a town's local zoning be consistent with an approved master plan. As noted above, most Cape towns have adopted Local Comprehensive Plans that reflect smart growth practices but have not enacted zoning bylaws that are consistent with the local plan.
- Massachusetts' law incorporates extensive vested rights protections that make it difficult for towns to enforce new zoning. While a proposed new zoning law is undergoing public review, property owners can file a subdivision plan that freezes rights granted by pre-existing zoning and be exempted from subsequently adopted zoning provisions. The zoning freeze provision, commonly referred to as "grandfathering" or vested rights, deters towns from seeking to change zoning because town officials fear that advertisements of proposed new regulations will cause a flood of plans to be filed in order to vest rights under the very zoning the town wishes to change.

⁵ Massachusetts Zoning Reform Working Group. "Massachusetts Land Use Reform Act (at a glance.))" November 24, 2004.

⁶ Joel S. Russell. "Massachusetts Land Use Laws—Time for a Change." *Land Use Law and Zoning Digest*. January 2002.

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- Massachusetts law exempts the creation of lots with the minimum road frontage required by zoning from requirements for subdivision approval, even though the creation of such Approval Not Required (ANR) lots could result in the same intensity of planning impacts as any other subdivision.
- Massachusetts law requires municipalities to obtain a super majority (2/3 vote) of the legislative body to adopt or change zoning. This requirement makes the process of changing zoning more difficult than if a simple majority vote were required, as is the case in other states.⁷

The effects of these provisions are far reaching in how they limit the ability of a community to control development. Procedurally, the lack of a state mandate requiring towns to achieve consistency between local plans and zoning removes any sense of urgency for the town to amend zoning. The super majority vote required to amend or adopt zoning makes the hurdle that much higher for any zoning reform measures that may be proposed.

The zoning freeze and ANR provisions pose even greater hurdles to growth management as they allow development to continue in a manner that does not conform to a town's planning objectives. By definition, a zoning freeze allows a property owner to build under previous zoning rules.⁸

⁷ Massachusetts Zoning Reform Working Group. "Massachusetts Land Use Reform Act (at a glance.)" November 24, 2004.

⁸ The zoning freeze provision leads to the creation of non-conforming lots, or lots that do not conform to current zoning rules. Other provisions of Chapter

Equally vexing, the ANR provision allows a property owner to subdivide lots with minimum road frontage without going through the same level of scrutiny required of a developer creating a new access road for a subdivision. Designing the layout of lots simply to gain frontage for ANR status frequently results in a design that does not preserve open space, facilitate wastewater treatment, control stormwater and flooding, limit curb cuts on major roadways, and minimize visual intrusions.

Status of Efforts to Reform the State Zoning Act

Despite widespread agreement that reform is needed, legislation to address the inadequacies of the Massachusetts Zoning Act has not been passed. The Massachusetts Land Use Reform Act was proposed in 2004 to address many of the shortcomings of the state zoning laws, but failed to garner support in the legislature. The subsequent Community Planning Act II (CPS II) incorporated many aspects of the Land Use Reform Act but also failed to secure widespread legislative support thus far, due largely to resistance from the building industry.

In 2007, Governor Deval Patrick created a Zoning Task Force to help break the stalemate in efforts to reform state zoning. In 2009, the task force drafted and filed the Land Use Partnership Act, which offers zoning-based incentives for housing production and economic development.

40A regulate alteration of non-conforming structures and uses, which are structures and uses that do not conform to current zoning rules. These are discussed in the next section.

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Cape Cod towns and the region as a whole would benefit from the recommendations of the Zoning Reform Working Group, a coalition of local and state officials, planners, land use attorneys, environmental organizations and housing advocacy groups. The Working Group is the body that drafted the Community Planning Act legislation. It has been actively involved in zoning reform discussions for several years and has conducted extensive study of zoning laws across the country. Based on its deliberations, the Working Group has proposed comprehensive reforms that would place Massachusetts' zoning laws in the mainstream compared to other states. It has consistently advocated that any new zoning reform law must apply to every municipality, rather than utilize the incentives approach of the Land Use Partnership Act.

It is unclear when state zoning reform will be achieved and what it ultimately will contain. At the date of this publication, both the Community Planning Act and the Land Use Partnership Act are under consideration by the state legislature.

While reform efforts continue on the state level, there are more immediate steps towns can take to increase the extent and effectiveness of zoning reform. These steps involve the treatment of alterations to non-conforming uses and structures,⁹ more frequent use of open space zoning techniques, and strategies to build public support for needed zoning reform. These are addressed in the following sections of this document.

⁹ Non-conforming lots are not treated in this section because they are largely created through the zoning freeze provisions of State law Ch 40A §6, which is addressed in the previous section.

III. Regulating Non-Conformities

Introduction

In the previous section we noted that the zoning freeze provision in state zoning laws (MGL 40A §6) allows for the creation of lots that do not conform to current local zoning. The creation of non-conforming lots through use of this provision is outside the control of local zoning. However, MGL 40A §6 allows towns somewhat more latitude in regulating non-conforming uses and structures, which are created when an existing land use or building dimension becomes out of compliance with new zoning rules. State law does protect the creation of a pre-existing non-conforming use or structure, but it gives towns the ability to regulate any changes or alterations to the use or structure that may be proposed.

Regulating the alteration of non-conforming uses and structures is a significant planning issue on Cape Cod. Table 1 summarizes special permit activity for alteration of non-conformities in FY08 in select Cape Cod towns. As Table 1 shows, some towns granted more than 80% of special permit applications for alteration of non-conformities.

This section looks at how non-conforming uses and structures are created, what their implications are, and what towns can do to enhance their ability to manage the attendant impacts when non-conforming uses or structures are altered.

Table 1. Special Permits for Alteration of Non-conformities, FY08, Sample Towns

Town	Special Permit Applications	Special Permits Granted	% Granted	Withdrawn, Denied, Continued
Barnstable	20	11	55	9
Falmouth	46	42	91	4
Mashpee	13	13	100	0
Orleans	14	9	64	5
Truro	6	5	83	1
Wellfleet	35	32	91	3
Yarmouth	35	25	71	10
Sample Total	169	137	81	32

Source: Respective Town Building Department or Zoning Board of Appeals

How Non-conformities Come into Being

Non-conformities result when new zoning changes pre-existing allowances for lots, uses or dimensional standards. Any lot, structure or use that does not conform to the new zoning rules becomes non-conforming.¹⁰

¹⁰ State law c.40A §6 sets forth standards for when a lot, structure or use is considered pre-existing non-conforming and, therefore, subject to rights and protections contained in the law.

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The term non-conforming can apply to lots, uses and structures. As noted above, non-conforming lots are created and protected by the zoning freeze provisions of the state statute discussed in the previous section.¹¹ This section focuses on steps towns can take to strengthen the section of their bylaws that regulates the alteration of non-conforming uses and structures.

Use non-conformities (non-conforming uses) exist when a pre-existing use is no longer allowed within the zoning district in which it is located. Dimensional non-conformities (non-conforming structures) are created when pre-existing structures no longer meet applicable dimensional standards, such as building height, setbacks or lot coverage. There are many combinations of non-conformities, such as a conforming use in a non-conforming structure or a non-conforming use in a conforming structure.

Many local bylaws combine treatment of non-conforming uses and structures in a single section, which can be confusing when attempting to discern the intent and rules of the bylaw with respect to one or the other.¹² In addition, although treatment of non-conforming uses and structures is differentiated in MGL 40A §6, the language is inherently confusing and has resulted in much litigation over its meaning.

¹¹ Some towns may have freeze provisions that are more lenient than provided by state law, as was discovered in Chatham. Cape-wide, however, the number of lots that could benefit from such provisions is likely to be minimal.

¹² Bobrowski

Practical Effects of Non-conformities

By definition non-conforming uses and structures do not conform to current zoning and therefore may conflict with the type or intensity of land use that is desired by the town in a particular area. It is important to distinguish between non-conformities that arise out of the state zoning act, for which a community has little or no control, and alterations that create or increase non-conformities, which may be addressed by changes in local bylaws.¹³ An example of the former would be a wholesale business or automobile dealership that is a pre-existing non-conforming use in a district identified for mixed-use revitalization. This type of business may not rely on or contribute to foot traffic in the district and may be less desirable than a shop, office or other business that generates foot traffic. Often this type of incompatible pre-existing use occupies a central location in the district, displacing the potential for a use that would contribute more to the mixed-use character of the area. Although this type of use may be incompatible with housing or other village style businesses, because it existed prior to the zoning change it is protected by the state zoning act. Towns have more latitude in regulating alterations of structures that either create or increase non-conformities through changes in local bylaws. Examples of these types of alterations may include:

- Enlargement of a non-conforming building to extend a pre-existing non-conforming use in a town center where the use is not desired. This example is similar to one listed above except that in seeking to expand the structure to

¹³ Joel Russell, review comment

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accommodate the expanded use, the incompatible nature of the use in the district may be intensified and accompanied by additional traffic or visual impacts.

- Enlargement of small single-family homes on small lots in densely developed neighborhoods. The expansion of non-conforming residential structures and the teardown of existing residential structures and their replacement with larger structures are by far the most common type of non-conformity problem brought to a Zoning Board of Appeals. Alterations of this type can block views, dwarf surrounding homes, encroach on resources, and alter neighborhood character.

Individually, either of the above examples may be a modest change, but over time cumulative alterations can change neighborhood character, exacerbate traffic congestion and parking problems, or encroach on natural resources.

Not all alternations to non-conforming structures are undesirable. Many towns adopt liberal treatment of non-conformities to compensate for underlying zoning that contains overly rigid standards that make desirable flexibility unachievable.¹⁴ An example might be the expansion of a building that has overly large front and side yard setbacks but is located in a town center. Although enlarging the building to place it closer to other buildings or to the street may increase or create a non-conformity, it also may enhance the pedestrian orientation of the

¹⁴ Joel Russell, review comment

area and thus may be desirable in the town center. While this example seems to suggest the need to amend zoning to match planning objectives, the inherent difficulty of changing zoning often renders use of non-conformities as a more manageable way to achieve desired flexibility.

Of greater concern are alterations to non-conforming structures that allow the expansion of buildings that undermine planning objectives. This is most often seen in tightly developed residential neighborhoods where additions and teardowns alter neighborhood character and result in other impacts. As the data in Table 1 demonstrate, most applications for special permits to alter non-conforming structures are granted. The rest of this section examines why these applications are granted, and what measures are available to help towns deal more proactively with non-conformities.

Protection Under State Law - Alterations and Expansions

Among the reasons why alterations of non-conformities continue to flourish is that current state law is lenient toward some types of non-conformities, and where the law is not clearly lenient, it is difficult to interpret. The section of state law that deals with the treatment of non-conformities, Ch. 40A §6, is arguably unclear and ambiguous in several respects.¹⁵ As a result, many of the rules and standards governing the treatment of non-conformities in Massachusetts have evolved through case law as local decisions are appealed and adjudicated.

¹⁵ Daley & Witten; Bobrowski

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The general philosophy implicit in state law is that non-conformities should generally be allowed to continue as they previously existed,¹⁶ but any alteration or change, particularly if it expands or extends the non-conformity, should be very carefully monitored and conditioned.¹⁷ Massachusetts allows towns to determine that any non-conforming structure or use that is abandoned for two or more years loses its legally non-conforming status.¹⁸ However, a case can be made that towns should be more lenient toward non-conforming structures than uses, since it is relatively easier to replace a non-conforming use with a conforming use than it is to tear down and replace a non-conforming structure with a conforming structure.¹⁹

¹⁶ Some states and municipalities in other parts of the country have implemented provisions for amortization of non-conformities, which essentially require that a non-conforming use or structure be eliminated within a specified time frame. While there is no provision for amortization in Massachusetts law, the law does allow towns to determine that any non-conforming structure or use that is abandoned for two or more years loses its legal non-conforming status.

¹⁷ Daley & Witten

¹⁸ All Cape Cod towns have abandonment provisions in their bylaws, but they vary in some respects. Most towns only address abandonment of uses, and are silent on the abandonment of structures (Chatham, Eastham, Falmouth, Harwich, Provincetown, Sandwich, Truro, Wellfleet, and Yarmouth.) Six towns also set forth that non-conforming structures that are abandoned may not be re-built or re-established unless conforming to then current zoning. Barnstable is the only town that allows three years until abandonment is determined, whereas all other towns apply the minimum two years set forth in state law.

¹⁹ Joel Russell, review comment

Despite the leniency built into state law, the collection of case law suggests that towns have a more latitude in controlling non-conformities than they currently use. In *Blasco v Board of Appeals of Winchendon*, the Appeals Court determined that the minimum tolerance towns are required to afford non-conforming uses and structures is to allow them to continue to exist. Towns do have the ability to prohibit alterations or extensions on non-conforming uses or structures unless the structure is a single or two-family home. A local bylaw must specifically authorize alteration or extension of any non-conformity, and where a bylaw is silent on the matter of alteration or extension it may not be construed as granting consent.²⁰

Although state law allows towns to prohibit alterations to non-conforming uses and structures (except single or two-family houses), all towns in Massachusetts allow alteration of non-conforming structures or uses to some degree under some circumstances.²¹ Why, when given the option of prohibiting expansion of non-conforming structures and uses, do towns continue to allow them?

The primary rationale may rest with the different legal requirements associated with the granting of a special permit versus a variance. If towns prohibited the alteration of non-conforming structures or uses, an applicant would be eligible to

²⁰ Bobrowski, pp. 184, 186

²¹ Wellfleet limits alterations to structures other than single or two-family homes only to campgrounds, mobile home parks, cottages and cottage colonies.

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petition the Board of Appeals for a variance from that zoning provision. Although variances are virtually never legally permissible, they are routinely granted by Zoning Boards of Appeals. Once granted, a variance allows the change or alteration to be considered conforming, allowing it to remain in perpetuity. By contrast, a special permit can set forth conditions the applicant has to meet to proceed with the alteration. In addition, the special permit does not change the non-conforming status of the use or structure, such that it would still be subject to the abandonment clause noted above as well as other conditions of the permit.

Findings Required for Granting a Special Permit

According to MGL 40A §6, a town may issue a special permit to allow alteration of non-conformities only after finding that the alteration (1) does not intensify the non-conforming nature of the use or structure or create any new non-conformities (in other words, the alteration complies with current zoning); and (2) is not substantially more detrimental to the neighborhood than the existing non-conforming structure or use. While together these requirements sound like a stiff test, there is a lack of clear guidance on how to apply the standards. Several town bylaws on Cape Cod approach the two-part test as an either-or proposition: the alteration complies with the current zoning and does not intensify the non-conformity, and is therefore allowed as of right, or the alteration does not comply with current zoning and requires a special permit based on a finding that the alteration is not substantially more detrimental. Because the test for determining what is not substantially more detrimental is so

subjective, towns frequently issue the special permits that allow for alterations. The following is a list of steps towns can take to insert more specificity into the application of the standard of not substantially more detrimental and thereby strengthen local regulation of non-conformities and, in particular, the alteration of non-conforming structures.

Local Steps to Strengthen Treatment of Non-Conformities

In a study prepared for the Cape Cod Commission, Daley & Witten recommended steps towns could take to strengthen the regulation of non-conforming uses and structures.²²

These and other possible measures are listed below:

- Include a statement of purpose in the bylaw. Towns should include a policy statement of intent in the zoning bylaw concerning non-conformities and how they are treated. This provides local decision makers with a policy context in which to apply or interpret the provisions of the bylaw;
- Separate out treatment of non-conforming uses and non-conforming structures in the bylaw. Some Cape Cod towns combine treatment of non-conforming uses and structures in the bylaw, making interpretation of the bylaw's intent with respect to each type of non-conformity more difficult.
- Clearly define what constitutes an alteration. The determination of whether an alteration complies with current zoning and does not intensify or create new non-conformities often is the responsibility of the building

²² Daley & Witten

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inspector, although the building inspector's decision is subject to review by the Board of Appeals. Bylaws of some Cape Cod towns include criteria describing what would or would not constitute intensification of a non-conformity.

- Include standards for determining what is “not substantially more detrimental.” Arguably the most challenging aspect of regulating non-conformities is applying the standard of “not substantially more detrimental.” Review of special permit applications indicates this standard is applied on a case-by-case basis, although the impacts of several alterations in a neighborhood may be cumulative. Because the courts have ruled that the usual special permit granting criteria may not be appropriate for determining each case,²³ towns should include quantitative or qualitative standards in the bylaw to provide the permit granting authority with more specific guidance in deciding whether a proposal meets this test.

In reviewing bylaws for treatment of non-conformities on Cape Cod it appears that not all towns avail themselves of these approaches. Some examples of Cape Cod towns that have strengthened or clarified their treatment of non-conformities include:

- Dennis' bylaw includes language in the section on non-conformities that conveys the planning principles guiding the town's treatment of non-conformities;

- Chatham, Dennis, Harwich and Wellfleet bylaws include some qualitative standards for determining when an alteration to a single- or two-family structure is substantially more detrimental;
- Dennis and Harwich bylaws provide some explicit standards for determining when an alteration to a single- and two-family structure is substantially more detrimental;
- Dennis, Eastham and Falmouth bylaws provide implicit standards for determining when an alteration to a structure other than a single- or two-family home is substantially more detrimental (no town bylaws provide explicit standards); and
- Barnstable, Eastham, Falmouth, Chatham, Brewster and Bourne bylaws provide some degree of implicit standards for determining when a change in use is substantially more detrimental.

²³ Bobrowski on page 188 cites the case of *Murray v. Board of Appeals of Barnstable*, 22 Mass App. Ct. 473, 476-481 (1986).

IV. Strategies to Protect Open Space and Agricultural Lands

Introduction

Cape Cod's sense of place is defined by its natural landscapes and the views they afford of sweeping coastlines, sandy dunes, wooded preserves, freshwater ponds and coastal bays. These diverse open spaces also serve important ecological functions, such as providing habitat for a wide range of wildlife, and filtering pollutants from groundwater and run-off before they enter drinking water supplies and sensitive coastal embayments. Loss of the environmental benefits of natural lands would not only lead to degraded natural resources, but also an increased financial burden to towns to provide pollution control infrastructure.

Cape Cod's natural landscapes are prime attractions for tourists who, spending more than \$1 billion annually, account for the Cape and Islands' largest industry cluster.²⁴ Farmland is equally important for sustaining Cape Cod's agricultural heritage, and also contributes to the regional economy. Cape Cod's farms sold nearly \$17.7 million in agricultural products in 2007 and paid out

\$4 million in wages to more than 575 workers.²⁵ Nationally there is growing awareness of the health and environmental benefits of local food sources, which is fueling a renewed interest in local agriculture. Six towns on Cape Cod now have agricultural commissions actively seeking to expand agricultural activities.²⁶

Despite its many important economic and natural resource values, open space and agricultural lands on Cape Cod are disappearing. As of 2005, 42% of the landmass on Cape Cod was developed and only 29% was protected open space. Roughly 16% of the remaining undeveloped landmass on Cape Cod is unprotected, raising concerns that much of this remaining land ultimately will be developed.²⁷

Protecting scarce remaining open lands is an increasingly important planning objective for Cape Cod towns. Acquisition is perhaps the most effective and permanent means of protecting open space. Cape Cod has an impressive land protection and acquisition infrastructure in the form of private conservation trusts and municipal open space committees. Fueled by \$145 million in Land Bank funds, Cape Cod towns leveraged the purchase of 4,450 acres of land between 1999 and 2007.²⁸ Local

²⁵ Commonwealth of Massachusetts, Department of Agricultural Resources. Barnstable County Ag Facts. www.mass.gov/agr/facts/barnstable.html.

²⁶ Laurie Higgins. "Fueling the Future of Cape Farms" *Cape Cod Times*. March 19, 2008.

²⁷ Heather McElroy. 13% is wetlands.

²⁸ The Compact of Cape Cod Conservation Trusts. *The Cape Cod Land Bank Program: A Golden Age for Open Space Protection, 1999-2007*. August 2008.

²⁴ Clyde W. Barrow. "Cape Cod and the Islands: More than a Resort Economy," Massachusetts Benchmarks Quarterly. Summer 2001.

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land trusts also play a significant role in preserving land by raising money for parcel acquisitions, and by encouraging landowners to avail themselves of the tax advantages of land donations or voluntary conservation restrictions. The state contributes toward open space acquisitions through funds generated by the Environmental Bond Bill and administered through the Land Acquisition for Natural Diversity (LAND) grant program (formerly the Self-Help grant program). With many prime open space targets achieved, many towns are now exploring the acquisition of tax title properties as a means of protecting land from future development.

As successful as these measures have been, there is broad acceptance that acquisition alone is an insufficient strategy for ensuring protection of natural resource areas. By 2007 most towns had fully leveraged 20 years worth of Land Bank funds. Towns with funds remaining voted to merge Land Bank funds with adoption of the Community Preservation Act, which requires funds to be distributed among three community uses: open space, historic preservation and affordable housing.²⁹ The economic crisis that began in 2008 may ultimately moderate Cape Cod's high property sales values, making each acquisition dollar go farther, but those dollars will likely be harder to come by during tight economic times as both public and private open space funders retrench. Individual towns and the Cape as a region need complementary and comprehensive strategies to protect the inherent values of open spaces.

²⁹ The Compact of Cape Cod Conservation Trusts. *The Cape Cod Land Bank Program: A Golden Age for Open Space Protection, 1999-2007*. August 2008.

State Law Limitations on Large Lot and Low Density Zoning

Greater use of regional and local land use planning and regulation is needed to augment land acquisition to protect open space. Although towns have sought to use regulation to protect open space by requiring larger lot sizes and implementing other forms of lower density, state zoning law and its interpretation through the courts have in the past imposed limitations on the extent to which these approaches can be applied to protect open space and farmland.

The state zoning act and case law have restricted the use of large lot zoning as a means of protecting farmland or other open space on the basis that such zoning has no legitimate public purpose and discourages the development of needed housing. Courts have upheld large lot zoning only in cases where it can be demonstrated that a large lot size is necessary for protecting public health and welfare, and have not been supportive when the purpose has been primarily to preserve open space or habitat.³⁰

³⁰ Bobrowski notes that the Town of Edgartown was able to uphold a three-acre minimum lot size in one half of the town because of the need to protect the ecology of a coastal great pond. Although the town had also argued that the lot size would protect open space, conserve property values and protect resources, the court made a point of saying that protection of plant or animal species was not by itself sufficient justification, but that protection of a nearby Great Pond was in the interest of the public welfare. Similarly, in Needham a two-acre minimum lot size was upheld due to public water supply protection, but in Sharon an argument to require 100,000 square foot (two and a half acre) lots as a means of preserving land in its natural state was not upheld.

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Large lots in the Massachusetts context are usually in the range of two or three acres, while other states allow large lots of ten, twenty or forty or more acres. Conventional two- to three-acre zoning does little to protect natural resources or preserve agricultural uses, but instead contributes to sprawl and creates lots that are “too small to farm but too large to mow” and make the provision of infrastructure more costly

Another limitation on land use regulation to protect open space is that Massachusetts does not have legislation explicitly enabling Agricultural Protection Zoning (APZ).³¹ 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. The Zoning Act is silent on the use of APZ, which means that it may be permissible under the Home Rule Amendment. Current case law on large lot zoning casts some doubt as to whether the reduction in density that accompanies APZ would be allowed. However, it has never been tested in the courts and municipalities have been reluctant to risk trying it.³²

Some Massachusetts towns are moving away from large lot size as a way to preserve open space, to lowering density and clustering the residential units together. This approach is

³¹ In APZ districts, residential densities are reduced. A survey by the American Farmland Trust found that densities in APZs in the Northeast averaged twenty acres per unit, whereas in the West density might be as low as 640 acres per unit. APZ is a form of down zoning, reducing a property’s development potential and therefore the financial yield from developing land.

³² Joel Russell, review comment

embodied in a new generation of Open Space Residential Development (OSRD) or Natural Resource Protection Zoning bylaws, discussed below. Natural Resource Protection Zoning, recently adopted in Shutesbury, and Brewster, Massachusetts, is an approach that does not rely on large lot size, and may provide a legal justification for APZ. Recent proposed changes to the state zoning act may also help to clarify local powers authorized in the Home Rule Amendment to enact low density zoning and would help facilitate use of this technique.³³ Low-density zoning and the Shutesbury and Brewster examples are discussed in greater detail later in this section.

While some aspects of proposed legislation to reform the state zoning act may help to alleviate these limitations to some degree, the limitations are in effect today and communities are seeking creative ways to protect open space within the constraints of existing state statutes and case law. A variety of regional and local open space protection tools are available to Cape Cod communities, but are relatively untested or under-utilized. The remainder of this chapter examines some of the available tools to preserve open space and agricultural lands.

Use of Regional Tools for Open Space Protection

Regional planning through the Cape Cod Commission Act places heavy emphasis on the protection of open space. The Commission has maps of open space and sensitive natural resource features, which are available to towns through its

³³ Joel Russell, review comment.

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Regional Open Space Plan and Interactive GIS Mapping Tool. The Regional Policy Plan (RPP) calls for the completion of a *Regional Open Space Plan*, and for continued close work with and technical assistance to town boards and local conservation trusts.

The 2008 RPP provides towns with a powerful new tool to augment open space protection. The RPP grants towns the ability to designate certain areas as Resource Protection Areas, which are inappropriate for extensive development. Resource Protection Areas may be areas that contain sensitive resources, such as public drinking water supply wells or zones of contribution, or otherwise may be identified on the Cape Cod Commission's *Capewide Significant Natural Resources Areas Map*. Within designated Resource Protection Areas towns may seek to modify the thresholds for Cape Cod Commission review of Developments of Regional Impact (DRI). For example, in a Resource Protection Area the threshold for Commission review may be lowered to encompass more potential development proposals.

The 2008 RPP also gives towns the ability to raise the thresholds for Cape Cod Commission review for Developments of Regional Impact in certain areas under certain circumstances. However, there is no requirement that towns offset any areas where thresholds are raised with other areas where thresholds for review will be reduced. As with changes to zoning where it is far easier to change zoning to increase density than to decrease density, it

remains to be seen whether any town will voluntarily reduce thresholds for Cape Cod Commission review.

Towns have another powerful planning tool in the District of Critical Planning Concern (DCPC) designation created by the Cape Cod Commission Act. A DCPC provides a framework and schedule for comprehensive planning of an area, and provides the only available means of superseding the vested rights provisions of Chapter 40A §6 that most often stymie rezoning efforts. DCPCs are designated following a rigorous nomination process that demonstrates an area's significant environmental, economic, transportation, historic or cultural resource characteristics. The DCPC designation results in the creation of local implementing regulations in the form of zoning, conservation, health or other bylaw or regulations needed to achieve the stated goals and objectives of the designation. DCPCs provide a mechanism for implementing each of the local zoning reforms noted above. Thus, DCPCs provide a means for implementing many of the changes in local zoning to protect open space outlined in this section.

Towns have rarely taken advantage of the DCPC tool in the nearly two decades since the designation was created. The reluctance of towns to employ the DCPC may have many reasons. One is the difficulty associated with changing zoning and other implementing regulations within a relatively short (12-15 month) timeframe. Another stumbling block is the misperception that a DCPC gives planning control to the Cape Cod Commission instead of the town. All DCPC implementing

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regulations must be adopted and implemented through local government.

The regional tools discussed above are important, but each depends on local action to adopt or implement changes in policies and regulation. The remainder of this section traces four key methods to strengthen open space protection at the local level.

Developing Open Space Plans and Resource Inventories

The realization that planning and regulatory tools are necessary to protect natural landscapes has not translated into better comprehensive open space planning in most Cape Cod towns. In a survey conducted in 2004 by the Cape Cod Business Roundtable and other county entities, few Cape Cod towns reported having an up-to-date comprehensive open space plan or natural resource inventory for use by town boards when faced with permitting or acquisition decisions.³⁴ Most towns have addressed open space needs through their Local Comprehensive Plans, and while these plans include a review of open space resources and needs, they do not provide the same level of detailed inventory, strategies and implementation actions found in a comprehensive open space plan. Suggested components of an open space plan are listed in Appendix 1.

Without a community approved open space plan that lays out the rationale, analysis, and strategy for open space protection,

³⁴ Cape Cod Business Roundtable et al. Facing the Future: A New Look at Growth Management on Cape Cod, Summary Report of the Cape Cod Growth Management Audit. November 2004.

protection efforts may languish or be ineffective in countering opposition from groups seeking to use the land for other purposes or to increase the local tax base. The open space planning process provides a context for setting priorities and assessing strategies, including acquisition and regulation, which could be applied to achieve a community's open space protection goals.

Due to competing demands, open space planning often suffers from a shortage of staff time and attention within town governments. However, Cape Cod towns can make use of technical assistance from the Cape Cod Commission and the experience and perspective offered by local land trusts. Involvement of local land trusts in setting open space protection priorities can help ensure coordination between local and private trust activities to achieve shared goals. Trusts can also help to build grass roots support for open space protection measures.³⁵

Reducing Density

In the 1970s and 1980s, one-acre zoning was widely adopted by towns concerned about the proximity of private wells to on-site septic systems in rapidly expanding neighborhoods. One-acre zoning was successful in protecting drinking water wells and also reduced the overall number of homes that could be built.

The motivating factors behind one-acre zoning have now all but disappeared. Public water systems have replaced private wells in

³⁵ Joel S. Russell "Land Trusts and Planning Commissions: Forging Strategic Alliances." Planning Commissioners Journal, #34. Spring, 1999

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the vast majority of towns. In other communities, plans are being considered to replace some on-site septic systems with sewers. Some towns are contemplating increased residential densities—up to multiple units per acre—in selected growth areas where sewerage and other infrastructure can be provided. The benefits of this type of compact development are that communities are able to concentrate development in vibrant mixed use centers—which are a key component of a desirable community—and also divert development away from outlying sensitive natural resource areas which provide a variety of ecological and community benefits.

On the other hand, some towns have sought to reduce residential development potential outside growth areas by increasing minimum lot size. Zoning that creates lot sizes greater than one acre is referred to as large lot zoning. Large lot zoning has the effect of limiting the subdivision potential of land. Barnstable successfully increased lot sizes from one to two acres in West Barnstable. Both Dennis and Harwich have increased lot sizes within portions of their respective Districts of Critical Planning Concern, and were aided in that process by the ability to override grandfathering through the DCPC process.

However, large lot zoning is not a tool without risks. Unless it is applied on a sufficiently large scale, large lot zoning merely encourages dispersed residential development and can undermine the value of open space for habitat or farming (lots that are too large to mow and too small to farm). It is generally agreed that in order for large lot zoning to be effective as an open space

protection tool, lots should be larger than the two or three acres typical of Massachusetts

Some states are moving away from the concept of lot size to one of development density. In Massachusetts that trend has emerged through the creation of new variations of cluster zoning that give towns the flexibility of lowering base residential densities to preserve open space and agricultural lands. The state of cluster zoning on Cape Cod, and how that could be enhanced by these new approaches, is described below.

Reviewing and Revising Open Space (Cluster) Zoning

Cluster zoning provides an alternative to a traditional grid subdivision layout by creating smaller lots and leaving a larger portion of the parcel as open space. Clustering usually starts with calculating how many traditional grid lots could be accommodated on a parcel under applicable zoning, and then clustering the same number of homes on smaller lots on the parcel with a significant portion of the parcel remaining as open space.

All Cape Cod towns now have some form of cluster bylaw. The most common variation of cluster bylaw on Cape Cod is the Open Space Residential Development (OSRD) bylaw. Some towns have used their regulation frequently and effectively. However, cluster zoning bylaws are not widely or consistently used in all Cape Cod towns.

Skeptics of this type of zoning claim that as many Cape towns are nearly fully developed, it is too late for clustering to do much to

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preserve open space. Supporters argue that the scarcity of available open space makes use of cluster zoning more important than ever. Remaining parcels available for subdivision encompass recharge areas to public water supply and significant wildlife habitat. OSRD bylaws also could play a key role in protecting and even reclaiming open space and public views when properties are redeveloped. Older subdivisions or homes may be assembled for redevelopment to meet demand for more modern housing. On Cape Cod, older commercial properties such as motels and restaurants have been torn down to create new housing, which in most cases has been clustered to make the most efficient use of property.

OSRD bylaws help preserve open space by offering developers an alternative to conventional subdivision layouts with uniform lot sizes that are generally more land consumptive, less walkable and more difficult to serve with sewers. Under an OSRD plan, a developer can create the same number of lots as allowed under a grid plan, but the lots are smaller and consolidated on the parcel, allowing the remaining portion of land—typically one-third of the site—to be protected as open space. The advantages of cluster layouts go beyond protection of open space and wildlife habitat to include lower costs for installing roads and utilities, more efficient options for wastewater treatment, and fewer impacts on surrounding property owners.³⁶

³⁶ A variant of the OSRD is the Conservation Subdivision Design developed by Randall Arendt. This approach seeks to maximize the natural resource values of land in balance with the economic feasibility of development. It does so by approaching subdivision design in four steps: (1) identify priority

Traditional resistance to cluster as being a less marketable style of subdivision has been dispelled by the success of many upscale cluster neighborhoods built on Cape Cod in the past several years as well as research that demonstrates the market value associated with access to open space to views.³⁷

Despite its many advantages, OSRD bylaws are considered “frequently used” in only six towns on Cape Cod.³⁸ Modifications to existing OSRD bylaws are needed to encourage more frequent use and make them more effective. For example, most towns allow conventional subdivision layouts by right, and require a special permit if a developer seeks an OSRD subdivision. As a result, developers may forego OSRD to avoid the special permit review process. In 2006, Mashpee amended its OSRD bylaw to make OSRD mandatory for all subdivisions of 5 acres or more. Brewster has one of the more comprehensive OSRD bylaws in terms of prescribing the amount, use, configuration and on-going ownership of required open space. A model OSRD bylaw is available on the Cape Cod Commission

conservation areas for protection; (2) site houses to avoid these areas and to maximize views and other marketable amenities; (3) lay out roads to minimize length, disturbance, and cost; and 4) draw lot lines.

³⁷ A study by Jeff Lacy at the Center for Rural Massachusetts, UMASS-Amherst, compared differences in home value appreciation between homes in clustered and conventional subdivisions in Concord and Amherst. Using assessors’ data in each community over eight-and twenty-year periods, respectively, Lacy found that home values appreciated substantially more for the clustered homes in both communities.

³⁸ Growth Management Audit

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website. Key elements of OSRD zoning are summarized in Appendix 2.

Some Massachusetts towns are modifying the concept of OSRD to preserve larger expanses of open space and to protect designated resources. This method of zoning is known as Natural Resource Protection Zoning, or NRPZ, and can be used to help protect many types of resources, including drinking water supplies, sensitive watersheds, forestry, agriculture and even critical habitats. The emphasis of this type of bylaw is to place resource protection as the highest priority within the zoning district, and as a result, significantly reduce potential density while rethinking the concept of subdividing land for residential development.

NRPZ was first introduced to Massachusetts in the town of Shutesbury for the purpose of preserving the municipality's forestry resources. In 2009, the town of Brewster became the second town in the state to adopt NRPZ, designating it for the areas of town containing zones of contribution for public water supply, the town's portion of the Pleasant Bay watershed, and numerous freshwater ponds. Two other towns in western Massachusetts at the time of this writing are also working on drafts of NRPZ bylaws.

The Brewster bylaw closely follows the Shutesbury model in structure and requirements. Both bylaws combine elements of OSRD and conservation subdivision with other resource protection planning tools. Most importantly, the bylaws first set aside those areas of a property that are the most environmentally

sensitive, and then cluster development on the remaining land. They require between 65 – 80 percent of a property to be set aside as permanently protected open space. These innovative bylaws make clustering the “by right” or easier option, and require a special permit for a conventional subdivision. The allowed number of dwelling units is calculated using a density formula rather than a hypothetical conventional large lot subdivision layout. Depending upon the specific district, densities are set at three or five acres per unit averaged over the property. However, because houses are clustered, individual house lots are actually much smaller.³⁹ Lot sizes and setbacks are flexible (i.e. there are no minimums), and shared driveways are encouraged as a way of limiting paved surfaces. Clustering in this manner results in greater environmental protection and also has the added benefit of providing cost savings to developers in the way of reduced clearing, grading and infrastructure.

Densities in an NRPZ subdivision can be increased through an incentives system. For example, a developer in the Brewster NRPZ district is allowed to add extra units for adopting 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. Elements of Natural Resources Protection Zoning are summarized in Appendix 3.

³⁹ Jeff Lacy, Shutesbury Planning Board Member, email distributed through Mass planners

Revisiting Transfer of Development Rights (TDR)

Large lot zoning or Natural Resource Protection Zoning are forms of downzoning that reduce the development potential of a property. The downzoning inherent in these tools is a source of opposition from landowners, developers, and others who derive economic gain from development.

Transfer of Development Rights (TDR) is often mentioned as a remedy for downzoning opponents. TDR is a land use tool that enables a community to transfer development potential from areas where it wants to limit or prevent growth—such as open space and natural resource areas—to areas where additional development is desired and can be supported by infrastructure.

The appeal of TDR is that it provides a means of moving development rights from sensitive areas that need protection to areas where development is desired while preserving the development value of the involved properties. Thus, TDR is viewed as a way to achieve the effect of downzoning an area without actually doing so.

TDRs have been applied in communities across the country to achieve many different objectives, including protection of historic resources and preservation of farmland. Many of the most successful cases involve regions with significant amounts of undeveloped land or urban areas with high-value development potential. None of the scenarios provide a close match to conditions on Cape Cod, where undeveloped land parcels are

smaller by comparison and often dispersed among fifteen towns, and where there are few areas where a desire for significant density has been clearly determined. High land costs on Cape Cod are an impediment to the use of TDR because they make it that much more difficult to create transfer situations where there is adequate return on investment in the receiving zone to motivate developers to participate.

Chapter 40A §9 of the Massachusetts General Laws limits a town's flexibility in using TDR by requiring that it be used to create extra density. In the absence of such a provision, TDR could be used more flexibly. Three towns on Cape Cod—Falmouth, Sandwich, and Mashpee—have a TDR bylaw. However, TDR as a means of re-directing growth from sensitive areas to town centers remains a largely untested tool on Cape Cod.⁴⁰ In part this may be due to the difficulty of defining sending and receiving zones in a single community. Some think that a regional program could have much more impact and chance for success than individual local programs.

In its Call to Action issued in 2006, the Cape Cod Business Roundtable called for creation of a regional TDR program to bypass the difficulties associated with multiple locally devised

⁴⁰ Falmouth and Mashpee have a Transfer of Development Rights provision in their zoning bylaw, although application of this provision has been extremely limited. Barnstable and Harwich are other communities looking at TDRs as a possible component of Hyannis and East Harwich village center plans, respectively.

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programs. Specifically the Call to Action called for creation of a Cape-wide transfer of development rights (TDR) program to:

- Prioritize properties for redevelopment or “undevelopment” (undeveloped properties could create development credits);
- Designate sending areas (areas of reduced development) and receiving areas (growth centers with appropriate infrastructure);
- Market and select properties for redevelopment;
- Create incentives to involve the private sector and harness market forces;
- Provide a mechanism and/or entity (a “TDR Bank”) to hold and coordinate utilization of TDR rights and credits.

The Cape Cod Commission Regional Policy Plan (2008) recommends the Commission evaluate the potential for a regional TDR program, and provide support for individual town programs that may evolve. Although the creation of a regional program has yet to occur, towns are encouraged to assess how such a tool could be applied in their town. For towns with limited planning resources, support for TDR analysis should be considered as part of funding for LCP implementation projects. As the community progresses through these steps, the potential for developing a local TDR, or contributing to a regional program, may become apparent. Steps to include in a TDR evaluation are found in Appendix 4.

V. Public Perceptions about Zoning Reform

Introduction

The previous sections of this paper describe changes that could be enacted through state and local regulations to facilitate smart growth through zoning reform. In essence smart growth policies call for less development in some areas and more in others. If this is the case, some property owners may benefit (from increased development potential and therefore value) and others will lose (from less of both.) However, this black and white treatment of value ignores the possibility that smart growth policies may lead to more attractive, vibrant and sustainable neighborhoods and thereby enhance property values across the entire community.

In practice, the ability of communities to enact smart growth zoning changes is hampered by negative public attitudes toward the types of zoning changes needed to implement these policies. In particular there is resistance to reduce development potential—or downzone—certain areas. Resistance is rooted in the perception that downzoning is somehow unfair to property owners and may even be illegal. This section explores public attitudes toward downzoning and how they may be addressed more effectively in the future.

Zoning Powers and Limitations

The government's right to control or regulate private action for the public good is the legal foundation for all forms of local regulation, including zoning. States grant municipalities the

power to exercise controls on land use to protect the public welfare, and this is accomplished through zoning.

The power of eminent domain allows the government to take property for the public welfare provided it justly compensates the landowner. If just compensation is not provided, then there is a taking. This legal construct provides the basis for the claim that a zoning change resulting in decreased in development potential or property value results in a taking for which the owner should be justly compensated. Several Supreme Court decisions have honed the balance between police power and takings and have established four clear rules that identify when a regulation does or does not constitute a taking.⁴¹ There is increasing pressure within some states to enact legislation that would establish specific triggers for determining when a taking occurs, thereby making it easier for property owners to claim compensation for downzoning.

Rebutting Arguments Against the Takings Claim

Despite the legal nuances, downzoning is too often dismissed out of hand on the basis of the takings claim. Fears that communities would be subject to, and likely to lose, lengthy and expensive legal challenges are often enough to dissuade officials and citizens from considering downzoning.

Opponents to downzoning often assert that a property owner has an unlimited right to secure that investment and potentially see its

⁴¹ From APA bulletin

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value grow over time. To change the zoning at a later date is seen as unfair to the property owner. While protection of property rights against capricious zoning changes is necessary and warranted, there are arguments that counter the assertion that downzoning is unfair to property owners. These include:

- The assertion that a property owner should be compensated for reductions in value owing to zoning changes begs the question as to whether a property owner should pay for increases in value resulting from zoning changes. It does not seem logical, or fair, for compensation to be required in one instance and not the other.⁴²
- The assertion that a property owner who holds property for a period of years as an investment for retirement or to fund college tuition should not see that value undercut by downzoning often hits an emotional chord. However, the same claim would be available to someone who purchased the property only recently for speculative purposes. More to the point, there are no comparable methods of investment where regulations affecting the ultimate value of the investment are prohibited. For example, a regulation that diminishes the value or profitability of a company and its stock is not grounds for a taking.

Most important there is a question of fairness to the community. Community well-being should not be held hostage by zoning laws enacted years before when community needs were very

different. Communities must be able to respond to emerging economic, environmental or other public welfare concerns.

Many, including planning boards and other town officials, are not comfortable countering claims such as “downzoning is illegal,” not because they disagree, but because they are not fully informed of the underlying facts. A training module from an objective and respected source available to planning officials and interested citizens would provide a way to convey this information and begin to build confidence in promoting a fuller discussion on property rights and zoning reform. The Citizen Planners Training Collaborative at University of Massachusetts Extension or the Cape Cod Commission would be appropriate entities to undertake or underwrite such a training module.

The dynamic nature of real estate values on Cape Cod adds a new dimension to questions about the economic implications of zoning changes, particularly downzoning. If one thinks of downzoning as consisting of reducing potential density in either a residential or a commercial zone, then it is easy to assume that less density translates into lower value. While in some cases this may be true, it is also possible that reductions in density could lead to a more attractive and appealing type of development and actually increase property values. Similarly, a change in use from commercial to residential is considered downzoning. However the presumption that commercial use is more valuable than residential use is under question in many Cape Cod towns in which developers are purchasing and redeveloping commercial properties as residences.

⁴² APA

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Despite the difficulties inherent in downzoning, there are some successful examples on Cape Cod. The Towns of Orleans down zoned a portion of Route 6A by reducing the level of commercial activity and encouraging more infill residential development. This helped to reduce commercial sprawl and concentrate commercial growth at designated nodes along the roadway. Barnstable and Harwich designated areas of town, where residential lot sizes were increased. This helped to reduce overall build-out in areas of remaining open space, and protect significant natural resources and wellhead areas for public water supply.

Communicate the Benefits of Zoning Reform

Zoning is an arcane and detail-oriented subject that is familiar to few citizens and well understood by even fewer. As a result, zoning proposals can easily be misconstrued or misrepresented either willfully or unintentionally. Communities often make an effort to convey information about proposed zoning changes ahead of time, but often it is difficult for citizens to visualize the effects of the proposed zoning, or what would likely happen without it. Many voters first learn about zoning proposals on town meeting floor and may tend to respond to the momentum of one argument or another rather than weigh the merits of the proposal. When in doubt, voters will often retain the current regulation rather than risk the outcome of the proposed change. As a result, it is notoriously difficult to obtain the 2/3 vote at a town meeting or town council needed for a proposal to succeed.

There are a number of steps towns can take to help communicate the elements and benefits of a proposed zoning change and build grass roots support for change. Many of these steps are detailed in an accompanying document, *Cape Cod Guide to Town Center Revitalization*. The guide describes a five-step process to engage citizens and property owners in developing and implementing zoning proposals. These steps include:

- Step 1: Identifying a community vision for the planning area, and designing an interactive and inclusive planning process;
- Step 2: Understanding the status of current regulations and the build-out they support and assessing market conditions and opportunities;
- Step 3: Visualizing a desired level of growth potential through photo-realistic visualizations and identifying the zoning changes and density offsets needed to achieve that level of growth;
- Step 4: Creating tools and incentives such as bylaws, design guidelines, and infrastructure plans; and
- Step 5: Fostering public and private involvement throughout implementation of the zoning and incentives.

APCC has promoted the use of photo-realistic imaging to help communities understand the visual impact of zoning changes in town centers. This technique has contributed to passage of zoning changes in Dennisport, downtown Hyannis, Orleans Village Center, and has been contributed to planning efforts in East Harwich and North Falmouth. Recently, the Cape Cod Commission expanded its design services offered to towns. This technical assistance includes preparation of computer

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visualizations ranging from photo-simulations to three-dimensional models that could be used to illustrate the massing and scale of proposed developments, the effect of potential zoning changes on a specific area, or choices between alternate development scenarios.

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Appendix 1. Components of an Open Space Plan

Introduction

The introduction for an open space plan should include:

- Identification of committee members, contributors, and acknowledgement of professional services used and consultant roles in plan development.
- Reference to comprehensive plan and other town documents that direct the open space planning effort.
- The local definition of open space: what types of features are considered by the plan? Conservation and passive recreation areas only? Ball fields and downtown parks? Scenic areas? Farmland? Cemeteries?
- Benefits of open space to the town-economic implications, social values, environmental functions. Why should we, the citizens of town X, care?
- What is the guiding open space vision for the town? List the goals and objectives that come from this vision.

Methods

The methods section of an open space plan should address:

- What implementation strategies or town goals identified in the comprehensive plan informed or directed open space plan development, and how were these utilized in plan development?

- How was public input solicited and utilized in determining open space plan goals and objectives?
- What professional studies or inventory efforts were completed as a result of the effort?
- What process was used to distill the various recommendations and findings into a list of actions?

Inventory and Analysis

The inventory and analysis section of an open space plan should include:

- A description of existing open space resources in town, the functions they serve, and an analysis of unmet management or maintenance needs.
- A description of ecologically significant resource occurrences in town including an assessment of whether adequate protections are in place locally.
- An inventory and analysis of other types of features as determined important to the open space vision of your community. These can include:
 - Historical/Cultural resources
 - Scenic resources
 - Parks and active recreational resources
 - Public access to water
 - Farmland
 - Trails

Recommendations

Recommendations for an open space plan should restate the guiding open space vision for the town as included in the

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introduction, and it should break down open space plan recommendations by individual goal as identified in the introduction. Under each goal, the recommendations should include identified public priorities, and a description of what needs to be conserved and how. Addressing the "what and how" will require a close examination of existing tools available locally (town committee roles and responsibilities, land trust roles and responsibilities, and current land use ordinance protections). What resources are currently not adequately protected in your local ordinance? What mechanisms are available that could result in more open space conservation? Approaches to consider may include:

- Creating a local dedicated fund for open space acquisition.
- Revising local subdivision ordinances to encourage open space protection of priority open spaces or local focus areas.
- Increasing local protections for wetlands, streams, and rare feature occurrences.
- Encouraging voluntary protections by promoting current use tax programs or offering conservation lease options.
- Implementing a local open space impact fee.
- Establishing a local open space or trails committee.

Implementation Strategy (Action Plan)

As is the case with any successful plan, implementation depends on actions being clearly defined and responsibility for those actions being clearly assigned to the most appropriate party.

Implementation strategies defined in the plan should also be prioritized and a time frame should be assigned for accomplishing the specific tasks. For each action recommended by the plan, the reader should be able to answer the question: "who is doing what, and by when?"

Source:

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A program of the
Maine Department of Inland Fisheries & Wildlife
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Augusta, Maine 04333-0041

Appendix 2. Cluster/OSRD Elements

Minimum Size: Often a cluster option is reserved for subdivisions of a certain size, say, five acres or more. However, towns are now considering ways to encourage clustering for smaller parcels where it can help preserve open space or sensitive resources.

Applicability: Mashpee is the only Cape Cod town to require a cluster layout for parcels of five acres or more.⁴³ In all other towns, OSRD is an option available to developers by going through a special permit process, provided they meet other minimum requirements of the bylaw.⁴⁴ The Cape Cod Commission model bylaw recommends that OSRD applicants be required to submit a preliminary cluster and a traditional grid plan to verify the number of units that would be allowed under a traditional layout, and to weigh the merits of both approaches. Few Cape Cod towns require developers to submit both types of preliminary plans.

⁴³ The Mashpee bylaw gives the planning board the flexibility to approve a conventional subdivision for larger parcels if it can be demonstrated that the same public interests would be better met using that design approach.

⁴⁴ Some have argued to allow cluster subdivisions “as of right” in order to remove the perceived hurdle of the special permit. However, the special permit process allows the planning board greater leverage than is afforded through traditional site plan review that would apply if as of right.

Density: The same number of houses should be allowed as under a traditional subdivision layout. However, the Cape Cod model bylaw notes that towns have the option to consider allowing a density bonus (limited to 15%) in consideration for provision of affordable housing or public access to open space. The Mashpee bylaw includes a potential density bonus for creation of affordable lots or units or for providing more than the minimum required open space.

Dimensional Requirements: Dimensional requirements refer to lot sizes, set backs, frontage requirements, lot shape, and required open space. The Cape Cod Commission model bylaw suggests the following standards:

- Minimum lot size for cluster development is either 50% of the required minimum lot size for the zoning district or 15,000 square feet, whichever is smaller.
- Minimum frontage is reduced from requirements of the zoning district. A 50-foot minimum frontage requirement applies only to lots fronting on internal roads. Sharing of driveways to reduce curb cuts is encouraged.
- All lots must be able to contain a circle with a minimum diameter of 50’ from front lot line to rear building line.
- Setbacks may be reduced 50% from district requirements if they are deemed to result in better design and layout. Notwithstanding, a dwelling must be 15 feet from the roadway right of way, and 50 feet from the outer boundary of the subdivided property. The perimeter buffer strip should remain naturally vegetated.

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Open Space Requirements: The Cape Cod Commission's model bylaw recommends that a minimum of 60% of the upland portion of the property remain as protected open space, noting that towns may need to adjust this percentage to meet local needs. A town may wish to consider reducing the open space requirement slightly, to say 50%, if the open space is deeded to the town or a qualified land trust. Wetlands and water bodies are to be included in, but not counted toward, the open space. Examples of open space requirements towns may wish to consider include:

- Open space should be required for recreation, conservation, agriculture or forestry by residents and/or the public;
- At least half of the open space must remain in its natural state;
- At least 10% or two acres must be provided in a condition suitable for use as a recreational field or community garden;
- A portion of the open space may be designated to accommodate portions of a sewage disposal system, provided this use will not be detrimental to the character of the open space or natural resources;
- 5% of open space may be allowed for structures accessory to the use of the open space;
- The town must be granted an easement to access the open space for maintenance in the event that owners do not adequately maintain the property and a public nuisance is posed. In such cases the cost of maintenance by the town would be assessed against the property owners.

Design Requirements: The model bylaw includes design requirements aimed at ensuring that the open space is visually

appealing; accessible, usable, and that natural resources contained within the open space are protected. Examples of design requirements include:

- Open space shall be as wide and contiguous as possible;
- Open space may be contained in more than one parcel under certain conditions;
- Adequate buffers to wetlands and water bodies should be included in open space design;
- The plan should seek to place the maximum number of houses abutting open space as is consistent with good design, unless resource sensitivities require an alternate layout.

Appendix 3: Natural Resource Protection Zoning and Subdivision Regulations

Natural Resource Protection Zoning (NRPZ) is an effective way to preserve large amounts of open land with natural resource value (farmland, watershed, aquifer, habitat, forestland, scenic areas, wetland buffers, etc.). It preserves a high percentage of land as permanent open space while concentrating development in the most appropriate portions of a site. It is an extension and variation on the basic concept of clustering, but takes it further than is usually seen in Massachusetts.

NRPZ is the approach adopted by the town of Shutesbury, Massachusetts in May, 2008, and in Brewster, Massachusetts in October, 2009. Some of the key elements of this approach include the following:

- This approach to development is allowed by right. There is no need for a special permit, creating an incentive for NRPZ vs. conventional development.
- Conventional development requires a special permit, which gives a further advantage to NRPZ development.
- The number of units allowed to be developed is based upon a “net acreage” formula, not a layout of a conventional subdivision plan.
 - The total acreage is reduced by specified percentages of “constrained land” such as wetlands, floodplains, and steep slopes, and then the “net acreage” is divided by the allowable “base density” as stated in the zoning.
- This is a much simpler process than typical “cluster by special permit” and avoids the need to develop a hypothetical conventional plan (“yield plan”), with the concomitant arguments over how many lots could be developed in a conventional subdivision that will never be built.
- The number of allowed units is based upon a base density lower than typically found in Massachusetts (Shutesbury uses a base density of five acres in most of the town and Brewster uses a base density of three and five acres depending upon the district). This density must be justified by a natural resource protection rationale, not a desire to keep population growth low or reduce build-out.
- The base density can be increased for a specific development based upon incentives that offer a public benefit, such as creation of affordable housing, allowance of public access, donation of land to the town or a land trust, preservation of working farmland, preservation of more than the required minimum amount of open space, and/or offering infrastructure that the town needs (water supply, sewage treatment, etc.) beyond what is needed to service that particular development.
- In Shutesbury, the unit count can be modified by treating smaller units (cottage housing and small

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apartments) as fractional units. This provides an incentive for a greater mix of units and for smaller and less expensive housing units.

- The location and layout of the development area is based upon an in-depth “conservation analysis” of the land, performed before any plan is submitted. This is prepared by the developer and submitted to the planning board, which must walk the land, independently evaluate the analysis, and issue “conservation findings” that establish which areas of the site can be built upon and which must be preserved in order to protect the land’s conservation values. Only after the conservation findings have been made will the developer be able to submit an approvable development plan. The conservation analysis and conservation findings requirements must be made part of the subdivision process through the subdivision regulations. This approach is the reverse of the usual way of doing business, where a developer lays out a development according to zoning, brings it to the planning board as a preliminary plan, and then finds out (after incurring much expense) which land the planning board deems worthy of preservation.
- A minimum percentage of the land must be preserved, selected by the planning board based upon the conservation analysis. This may range from 60% to 90%, depending upon the community, the type of zoning district, and the natural resources at stake. Incentives in the form of bonus density can push this open space percentage higher, but only if the developer chooses to take advantage of them.
- The land preserved must be protected in perpetuity by a recorded conservation restriction (or APR or similar statutory instrument) approved by the selectboard and the state.
- There is tremendous design flexibility within the developed areas; generally there is no minimum lot size, minimum frontage, or minimum setback requirement. Variable lot sizes and a variety of housing types are encouraged to enable the town to provide for different housing needs and the developer to target different price points.
- Dimensional standards for individual lots are established by the developer and approved by the planning board, based on design considerations and the availability of water and/or sewer infrastructure. Title V and/or board of health regulations will control lot sizes and setbacks where there is no sewer system. With sewers, the development can be much more compact and more open space can be preserved.
- Buffers may be required from adjoining land not part of the development.
- Road designs are intended to be appropriate to the scale and location of the development. Flexible frontage requirements can encourage the use of shared driveways in some locations, provided that overall conservation objectives are satisfied.

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- A town may establish design standards for the developed areas. It may even use a form-based code (see below) within the developed area if it chooses to do so. It may also choose to enact this approach with mixed-use to enable the creation of a new village center as a complete community located on a large parcel.
- This approach can be combined with Transfer of Development Rights (TDR) to allow increased density in the developed area in return for preservation of non-contiguous land that the Town would like to protect.

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Appendix 4. Transfer of Development Rights Elements

1. Establish TDR program objectives

In this step the community would need to assess the objectives of the TDR program, including whether it is to limit or altogether prevent growth in designated sending areas, and what type of growth it seeks to promote in designated receiving areas.

2. Define sending and receiving areas

In this step the community will need to clearly identify areas where protection is needed (sending areas) and where development can be supported (receiving areas). This will require a determination that the receiving areas have sufficient infrastructure to support added density, and that there is sufficient market demand for that development, and sufficient sending and receiving opportunities to make the program viable.

3. Develop an allocation formula

This will involve estimating residential or commercial build-out in sending and receiving areas, calculating the relative development values and determining a reasonable

transfer value of sending to receiving credits. It is widely believed that in order for a program to be successful, a transfer ratio of greater than 1:1 is required. For instance, a development credit from a sending area would need to translate into some multiple of development credits in the receiving area to provide an adequate incentive for TDR program participation. Completion of this step may require a real estate market analysis to determine relative land and development values and an appropriate allocation formula.

4. Create, implement and monitor a TDR bylaw

The final stage is to develop and enact a bylaw, and then monitor its results. The bylaw would:

- Define areas
- Define the allocation rate and other criteria for inclusion
- Define transfer process
- Define administrator

Based on the experience of the programs across the nation, programs seem to have been developed over several years and been tweaked after being initially enacted, to enlarge or retract the areas, or add or delete requirements.