



Chapter 4:

Practical Applications of Land Conservation

THE surest methods for permanently conserving land involve acquisition of property rights. Conservation-minded individuals, organizations and agencies may acquire full ownership in land. Conservation organizations and governments may also acquire less than full ownership in land, instead securing a conservation easement that protects certain natural resources on a property while allowing another party to retain basic ownership of the property.

Some transactions are quite simple – a landowner may donate a property or conservation easement to a land trust. Other transactions may be complicated, involving combinations of techniques. Because each property is unique, the key to saving land is finding the technique or

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combination of techniques best able to provide the protection desired by the parties involved. Complicated projects may involve several different players, including conservation organizations, developers, government agencies and individuals, as well as various sources of funds.

Forms of Ownership

Fee Simple

Fee simple ownership of land gives the landowner maximum control over the use and management of the property and its resources. Generally, when someone owns land in fee simple, he has title to the land.

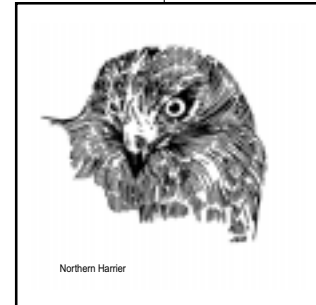
Conservation organizations should evaluate whether fee simple ownership is appropriate before purchasing or accepting a donation of property. Conservation organizations should seek fee simple ownership where the property's resources are highly sensitive and the protection of the resources cannot be reasonably guaranteed using other conservation approaches. Owning land places great long-term demands on any landowner and conservation organizations are no exception. Liability, monitoring, maintenance, vandalism, insurance, tax and management issues should be carefully analyzed and their potential costs determined prior to acquiring fee interests in any property.

A landowner may not wish to give up all control over his land, or an organization may lack the resources to purchase the property or meet the long-term demands of ownership. In these cases, an organization may work with a landowner to implement another conservation method, such as creating a conservation easement, or the organization may acquire the property, place a conservation easement on it and then resell it to another party.

Conservation Easement

Property owners have the right to use their property for many different purposes, subject to local zoning and public health and safety requirements. A property owner can plant trees or cut them down, build buildings or demolish them (with permits), grow crops or dig holes, allow public access or prohibit it, etc. To understand the easement concept, it is helpful to think of these rights as a bundle of rights. A landowner may sell or give away the whole bundle, or just one or two of the rights. These may include the rights to develop or subdivide the land, to restrict access, or to harvest timber. A conservation easement may involve selling or giving away some or all of these rights to a qualified conservation organization — such as a public agency, a land trust or an historic preservation organization. The instrument transferring these rights usually conveys to the organization the right to enforce the easement.

A conservation easement is a legal agreement between a qualified conservation organization or government agency and a landowner



that permanently limits certain specified uses on all or a portion of a property for conservation purposes while leaving the property in the landowner's ownership. Conservation easements can be tailored to the conservation requirements of a particular property and to the desires of the landowner and the conservation organization alike. An easement might state, for example, that no building or road may be placed and no logging may occur within 200 feet of a stream passing through a property but allow for a house to be built or for logging to occur on another portion of the same property.

For a 500-acre farm that has been in a family for generations and lies in the path of suburban sprawl; for a strip of rural private property that borders a scenic river used by thousands for recreation; for a half-acre community garden in the midst of an urban neighborhood; the flexibility and applicability of conservation easements is nearly endless.

Easements are called by different names, usually according to the resource they protect. An easement designed to protect the facade and surroundings of historic structures or areas might be termed an historic preservation easement; when created to ensure public access to a resource, it might be called a public access easement; when used to protect an agricultural operation, it could be termed an agricultural conservation easement; when the resource protected is primarily scenic, it can bear that name, and so on. The term conservation restriction is simply another term for a conservation easement. All of the above-referenced forms of easements operate under the same basic concept.

Every conservation easement is unique, the terms of the easement tailored to the particular piece of property and to the particular needs of the landowner and conservation organization. The rights and restrictions on use necessary to protect the property should be identified as specifically as possible by the organization and landowner in each easement document.

There is no need for anyone to develop a conservation easement from scratch. Model conservation easements are available from many conservation organizations, including the Western Pennsylvania Conservancy and the Land Trust Alliance.

Where long-term protection is important but where private ownership and management are preferred, easements are the right tool. Local governments may favor easements since properties subject to easements remain on the tax rolls, albeit at perhaps a lower assessment. Conservation organizations may favor easements because they can cost less than outright acquisitions.

No simple formula exists that determines whether a conservation organization should prefer fee or easement ownership for a particular piece of land. The difference in acquisition costs between easement and fee purchases or donations may not amount to much. Fee

ownership may entail long-term maintenance, insurance and other costs, whereas easement ownership may entail considerable long-term monitoring and enforcement costs. An organization should weigh all the various short- and long-term cost factors prior to making acquisition decisions.

Purchases, Donations and Bargain Sales

A variety of methods for acquiring conservation easements and fee interests in land exist.

Purchase at Fair Market Value

Purchasing land or interests in land (such as conservation easements) at fair market value is the most expensive acquisition method, and should usually be pursued as a last resort by conservation organizations. It should be pointed out to landowners that nonprofit, charitable organizations generally do not have the resources to pay fair market value for land.

Installment Sale

Where the acquisition of a particular property is of vital importance and there is no alternative to purchase at fair market value, the conservation organization and landowner could explore the possibility of an installment sale. The conservation organization could make payments over a period of time for a single land transaction or property interests could be conveyed in a series of purchases.

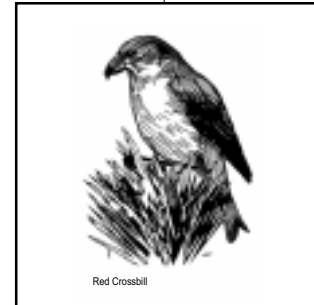
Donation of Land

A conservation organization's preferred method of acquisition is, of course, outright donation by the landowner. Landowners may donate almost any property right or interest in their land, including the entire parcel in fee, a conservation easement, or other property rights such as an option or lease.

The donation of a conservation easement can generate a federal income tax deduction for the landowner. To qualify for a deduction, an easement must first be donated in perpetuity. Second, it must be given to a qualified organization such as a land trust or historic society or a public agency. Third, it must be given "exclusively for conservation purposes." Donation of land "in fee" is also tax-deductible, as are other types of donations.

Remainder Interests

Landowners may donate their land to a conservation organization but reserve the right to live on or use the land for their lifetimes (a "life estate"). Since the life estate may have considerable value, especially if the donor is relatively young, donations of remainder interests can result in considerably smaller tax benefits than outright donations.



Undivided Interests

Landowners may donate undivided interests in property over a period of time, ultimately transferring the entire property interest to a conservation organization. An undivided interest is a portion of an entire interest in a property. As such, an owner of undivided interests in a property becomes a co-owner of the property, sharing in *all* ownership rights. While a conservation organization may be uncomfortable with a co-ownership arrangement, even when temporary, a landowner may find the donation of undivided interests over time preferable for tax purposes. To limit potential conflicts, provisions relating to use of the property during the co-ownership phase must be carefully drafted.

Bequests

A landowner may also leave land, a conservation easement or other assets to a conservation organization in his or her will. Donation by bequest can significantly reduce the estate tax for the donor's heirs by removing the value of the donation from the taxable estate. However, because the gift does not vest until the donor dies, there are no income tax benefits. If this method is preferred by a landowner, it is highly advised that the landowner and conservation organization discuss and negotiate the exact terms of the donation during the donor's lifetime to ensure that the organization will ultimately be able to accept the donation (for example, that the organization is given sufficient management flexibility and that adequate funds are available to manage the property in the long-term).

Bargain Sale

A bargain sale is a negotiated sale between the landowner and a conservation organization for a purchase price below fair market value. Bargain sales can be an attractive option for landowners who wish to preserve their land but also need income from the transaction. Although a landowner can receive more from a sale at fair market value than from a bargain sale, certain tax benefits may reduce or eliminate the disparity. The difference between the fair market value and the actual price paid may qualify as a tax-deductible charitable donation. For example, if a property with a fair market value of \$250,000 is sold to a conservation organization for \$100,000, the seller has made a contribution of \$150,000 to the organization. The sale portion of the transaction, however, is fully taxable.

Other Acquisition-based Conservation Methods

Tax-Delinquent Properties

Government bodies often hold title to many tracts of land, some of which have valuable conservation resources. They obtain title to these properties by means of foreclosure upon a failure by the landowner to pay county, local, or school district taxes. The government body will

usually attempt to sell the properties at a Sheriff's sale. The minimum bid price at a Sheriff's sale is usually determined by the amount of the tax liens on the property. These properties may also be subject to other liens, so it is imperative for the interested purchaser to examine the public records to determine the nature and extent of any liens against property available at a Sheriff's sale.

If a tax-delinquent property fails to sell or be redeemed within 90 days of a Sheriff's sale, a government body interested in conserving the property may request the other government taxing bodies to relinquish their equity rights in the property and then dedicate the property to public use.

Properties that do not sell at a Sheriff's sale also present an opportunity for conservation organizations to obtain valuable conservation lands. The government taxing bodies holding title to the land are not in the real-estate owning business. Their hope is to find a buyer for the property to get it back on the tax roles. The three taxing bodies may bring a court action to waive the delinquent taxes and convey the property to an individual or organization in order to get the property back on the tax roles. The problem with the three taxing bodies waiving delinquent taxes and granting the property to a conservation organization is that most conservation organizations are public charities, and therefore are exempt from taxation. Therefore, it does the taxing bodies little financial good to waive the delinquent taxes, since they will receive no revenues from the property if granted to a conservation organization.

Conservation Buyer

A land trust recognizing this paradox may be able to link a *conservation buyer* interested in owning a property having conservation resources with the government body wishing to "unload" the property in hopes of getting it back on the tax roles. The prospective owner may be able to convince the government unit to waive the delinquent taxes. To meet the conservation purpose, the new buyer would be expected to donate a conservation easement to the organization. Thus, the property can be protected without the land trust financing the purchase itself; the property is back on the tax roles (though perhaps at a lower assessment due to the conservation easement); and the new buyer has a protected property with valuable conservation resources.

Likewise, conservation organizations are sometimes able to link potential conservation buyers with other sellers of naturally significant properties. This method of finding a conservation buyer for the property protects the property without the organization's financing. The buyer will generally donate a conservation easement to the organization. The property may or may not pass through the conservation organization's ownership. A conservation organization seeking conservation buyers should try to work cooperatively with local realtors and avoid any public perception that the organization is becoming a

competitive real-estate broker.

Purchase and Resale

Conservation organizations and government agencies may purchase land and then resell the land with appropriate conservation restrictions. The organization or agency can accomplish its conservation goal through the conservation restrictions and also recover much or all of its expense associated with the original purchase. The restrictions are typically accomplished by recording a conservation easement on the property and/or by placing a reverter clause in the resale deed.



Conservation organizations have often acquired land in need of quick protection with the expectation of later selling it to a government agency for parkland, gameland, forest or other open space purposes. This action involves some risk, since the agency may – perhaps counter to earlier assurances – choose not to acquire the land from the conservation organization. However, this approach has many advantages. Unlike most government agencies, the conservation organization can move swiftly and with flexibility to complete critical land transactions. In some cases, a landowner may not be willing to deal with the government but would be happy sell at less than fair market value or even donate to the private nonprofit. To the conservation organization’s benefit, transferred land is conserved but the organization avoids long-term management costs.

For an example of a reverter clause, the Western Pennsylvania Conservancy uses the following deed language in many of its transfers:

This Conveyance is made subject to the express condition and limitation that the premises herein conveyed shall forever be held as park, open space, or greenway, essentially in its natural state. Should the premises cease to be used solely as provided herein, then the estate hereby granted to the City of Pittsburgh, its successors and assigns, shall cease and determine and shall revert to and vest in Western Pennsylvania Conservancy, its successors and assigns, the said reversion and vesting to be automatic and not requiring any re-entry or other act or deed.

Limited Development

In a limited development project, a conservation organization acquires a piece of property and opens the least naturally significant portion of the property to development in order to help finance the original acquisition and the permanent protection of the remainder of the property. The conservation organization may simply subdivide the property into two parcels and sell one to a developer who will further subdivide, or the organization may prepare detailed development plans and play a large role in the development of the property.

Limited development is generally regarded as a tool of last resort. However, given ever-growing pressures on open land and limited financial resources, conservation organizations will likely increasingly

rely on it to accomplish their goals.

A conservation organization contemplating using limited development should be very cautious in taking on a first project. Limited development can be complex, time-consuming, controversial and financially risky. An organization should be well-informed and have good access to a variety of experts in the real estate and development fields before taking on a limited development project.

Buying Time

Conservation organizations do not always have the necessary resources to permanently conserve a highly desirable property. On the other hand, landowners sometimes desire to keep their property in a natural state but are not prepared to take an action that would permanently restrict the use of their property. Several approaches exist for dealing with these two types of situations.

Option

An option grants an exclusive right to purchase a particular property under certain terms and conditions by a certain date. Acquiring an option from a landowner gives a conservation organization time to raise funds for the ultimate purchase of the property without fear that the property will be sold to another bidder in the meantime. In the event the organization fails to raise the necessary funds before the option expires, the organization forfeits any money it paid for the option and the landowner is free to sell the property to another party.

A landowner may sell or donate the option to the organization. The option should be in the form of a written contract and the organization should pay at least a nominal sum to the landowner in order to strengthen the organization's legal claim.

Right of First Refusal

A right of first refusal is an agreement between a landowner and conservation organization that gives the organization the opportunity to match any legitimate purchase offer made on a property that is acceptable to the landowner. If the organization does not choose to match the offer within a specified period of time, the landowner may sell to the prospective purchaser. A right of first refusal places no obligation on the organization to acquire the property and places no obligation on the landowner to sell the property. Before matching an offer, an organization should seek to determine that the offer is in fact legitimate.

Leases, Management Agreements and Registration Programs

Leases typically give the leaseholder exclusive access rights to a property for the term of the lease. Where a conservation organization wants to permanently conserve a property but cannot accomplish this in the near term for whatever reason, it may seek to obtain a lease on a property to preclude potentially destructive uses of the site until a

more permanent arrangement can be made. Leases should be recorded at the County Recorder of Deeds office.

Landowners and conservation organizations can also enter into management agreements that specify how a property will be managed – either by the landowner or the conservation organization – for a certain period of time. This again is a temporary measure. Management agreements should also be recorded at the County Recorder of Deeds office.

Some conservation organizations have programs for registering conservation properties. Owners of naturally significant land are encouraged to voluntarily register their properties. This typically involves a non-binding agreement that the landowner will not develop the land, sell it or otherwise threaten the land's natural values without first notifying the conservation organization. In turn, the conservation organization provides advice to the landowner on how to protect the land's natural values and may provide other services.

Funding Acquisition Projects

Project Campaigns

A project campaign is a focused effort to raise money for a particular project, rather than for an organization's general operations. People typically find donating money for a particular tangible project, particularly an urgent one, more satisfying than helping pay an organization's insurance or phone bills. A well constructed and managed project campaign can effectively generate substantial contributions from one or a variety of sources including individuals, businesses, foundations and government. However, an organization should take care to limit the number and frequency of its project campaigns, especially those based on a crisis, lest their campaigns come to be seen as just another pitch for supporting the organization's general operations.

Government Funds

A variety of federal, state and local government agencies fund conservation projects. However, some government programs are limited to funding government-sponsored projects and cannot fund the efforts of nonprofit organizations. In those cases, it may be possible for a nonprofit organization to work in partnership with a local government or state or federal agency.

County and local governments vary widely in their commitment to conservation. One approach to local government fundraising has met with some success in eastern Pennsylvania. In a 1989 referendum, Chester County voters, by a margin of four to one, approved a \$50 million bond issue for the preservation of open space.

Private Donations

Donations from individuals are the meat and potatoes of American philanthropy. Conservation organizations should keep this in mind, whether in the pursuit of land or cash donations. However, foundations and businesses are also sources of potentially substantial donations.

Loans

A crisis situation may warrant a conservation organization's purchasing a property using a loan to finance the transaction. Loans may be obtained from banks, individuals, foundations, other nonprofits or businesses. A loan may be available from the seller or adjacent landowners who would benefit from the transaction. Depending on the organization's history, equity and fundraising potential; the number of directors willing to co-sign; and the creditor; an organization can obtain anywhere from a no-interest loan to a loan with a sky-high interest rate. The Trust for Public Land has helped a number of communities across the United States with interim financing for their conservation projects.

Revolving Funds

A conservation organization may establish a revolving fund to fund projects where all or a portion of the project costs can be recovered. Recovered project costs are recycled back into the revolving fund where they are used to fund the next project, and so on. Conservation organizations may raise the initial capital for a revolving fund through a special campaign or by setting aside a fraction of the organization's annual income over many years.

Trade Lands

Land that has no specific conservation value may still be donated to a conservation organization for its monetary value – just like a cash gift. The organization can then sell the property to finance other land protection projects or possibly trade the land for conservation property. The organization should make certain that the property to be donated is in fact marketable and that there are no hidden (e.g., environmental) liabilities that could jeopardize the organization's stability, just as with properties that an organization intends to keep.

Partnerships

Of course, a conservation organization or government agency with limited resources may join with one or more organizations or agencies to share in acquisition expenses or long-term protection responsibilities.

Enforceability of Conservation Easements

The grantee organization should monitor easement-protected land at least once a year to determine whether conservation easement restric-



tions have been violated. The grantee should also maintain careful monitoring records and photographs to document any violations.

If a grantee organization discovers a violation during a monitoring visit, the organization should immediately notify the landowner and take steps to halt the violation and abate any damages. Specific enforcement procedures should have been previously outlined in the conservation easement document.

There is very little case law dealing with the enforceability of conservation easements in Pennsylvania. Conservation easements, though a relatively new concept, are based upon the same common-law principles as other time-tested easements such as utility rights-of-way. Therefore, in examining the enforceability of conservation easements, it is helpful to examine the principles of common-law easements in Pennsylvania.

Easements created by deed, such as conservation easements, are usually designed to last *in perpetuity*, i.e., forever. They generally “run with the land.” In other words, land affected by an easement can be sold, given, or transferred at any time, but such transfers will not affect the integrity or the enforceability of the easement. Because easements involve such tangible property rights, courts are reluctant to declare them *extinguished* or *abandoned*, absent strong evidence indicating so.

In Pennsylvania, the law requires that there be a showing of intent of the owner of the dominant tenement (i.e., the holder of the easement, a conservation organization, for example) to abandon the easement, coupled with either

- 1) adverse possession by the owner of the servient tenement (the landowner); or
- 2) affirmative acts by the holder of the easement that renders the use of the easement impossible; or
- 3) obstruction of the easement by the holder of the easement in a manner that is inconsistent with its further enjoyment.

To establish title by adverse possession, the possessor must show

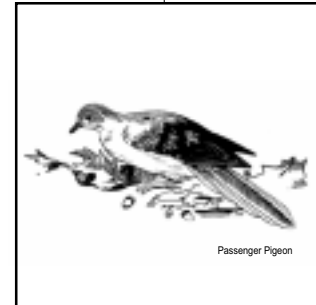
- (i) an *actual entry* onto the property encumbered by the easement giving the intruder *exclusive* possession of the encumbered property that is
- (ii) *open, notorious, and visible*, and
- (iii) *inconsistent with the further enjoyment of the easement and under a claim of right*, and

(iv) that this conduct has been *continuous* for a period of 21 years.

Open, notorious, and visible acts of possession are those that will provide reasonable notice to the owner of the easement that the adverse possessor is claiming dominion over the property subject to the easement, so that the owner has the opportunity to defend its rights.

While providing some evidence of intent to abandon, mere non-use of or failure to maintain an easement, acquiescence by a dominant owner to the conduct of a servient owner which obstructs a right-of-way, and/or the duration of any of these, taken alone, are insufficient to prove abandonment.

In cases of *selective enforcement*, a conservation organization may “look the other way” when a favored benefactor uses his property in a way that is inconsistent with the restrictions imposed by a conservation easement that he may have donated to the organization. In such cases, if it appears that the enforcement is waived in exchange for a contribution to the organization, this failure to enforce may be held to be an affirmative act indicating an intention on the part of the conservation organization to permanently relinquish the easement in consideration for the contribution. This selective failure to enforce should not, however, affect the validity of other conservation easements that have been donated to the organization in question. Importantly, selective enforcement may jeopardize the tax-exempt status of the conservation organization.



Conservation Through Land Use Planning

Nearly all of the most important decisions regarding the use of land in Pennsylvania are either made or approved by local government. The power to guide the character and pace of development in Pennsylvania is, in many ways, the individual province of each of the more than 2,500 municipalities in the Commonwealth.

Municipalities Planning Code (MPC)

The Pennsylvania General Assembly delegated many land-use planning powers to local governments with the enactment, in 1968, of the Municipalities Planning Code (MPC). The MPC gives municipalities the ability to plan for their futures. It does not, however, require that any planning be undertaken. If a municipality chooses to zone, plan or enact subdivision or other land-use ordinances, it is the MPC that provides the legal basis for that decision. (That land-use planning does not enjoy unconditional support in the Commonwealth can be seen in the fact that approximately 50 percent of Pennsylvania municipalities do not have zoning or subdivision ordinances in place.)

The legislative purpose of the MPC is to protect and promote safety,

health and morals; to accomplish coordinated development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; to promote the conservation of energy through the use of planning practices and to promote the effective utilization of renewable energy sources; and to permit municipalities to minimize such problems as may presently exist or which may be foreseen.

Although the MPC does not explicitly cite conservation as a purpose, the Code does provide a number of ways for municipalities and their citizens to include the conservation of open space, greenways, environmental features and agricultural lands in land-use planning decisions. With well thought-out planning, conservation objectives can be integrated into a community's vision of its future while, at the same time, accommodating future development.

Comprehensive Plan

Article III of the MPC provides for the preparation of a comprehensive plan. The comprehensive plan is the embodiment of a municipality's vision of its future and can be used as part of the basis for land-use decisions by the governing body.

If a comprehensive plan is prepared then it must include, among other things, a statement of the municipality's objectives for its future development and a plan for land use. One note of caution: Even if a municipality does adopt a comprehensive plan, no action taken by the municipality that goes against the plan will be considered invalid simply because it is inconsistent with the comprehensive plan.

In considering how future growth will occur, the comprehensive plan may include provisions for the amount, intensity, character and timing of land use proposed for residence, industry, business, agriculture, major traffic and transit facilities, utilities, community facilities, *public grounds, parks and recreation, preservation of prime agricultural lands, flood plains and other areas of special hazards and other similar uses.*" (emphasis added)

This section of the MPC is important in that it expressly invites municipalities to consider various forms of conservation early on in the planning process. Further bolstering conservation considerations is the requirement that, if a comprehensive plan is prepared, "the planning agency shall make careful surveys, studies and analyses of . . . natural features affecting development; natural, historic and cultural resources; and the prospects for future development in the municipality."

Thus, if a community does undertake to prepare a comprehensive plan, opportunities exist to ensure that land conservation is considered as an important part of a community's future.

Official Map

The official map, though rarely used, is a powerful tool for implementing conservation and other community objectives. Article IV of the MPC authorizes municipalities to develop and adopt official maps that show the locations of existing and proposed public lands and facilities for either the entire municipality or a portion thereof. The MPC explicitly cites proposed public parks and open space as items that may be reserved on an official map.

Lands identified on an official map are reserved for public use. A municipality is still required to acquire reserved land before the land is available for public use. However, the reservation gives a municipality time to carry out a systematic land acquisition program. If a landowner wishes to build, subdivide or otherwise develop land reserved on an official map, the landowner must submit written notice to the municipality's governing body announcing her intention to do so. The municipality must then acquire the property or initiate condemnation proceedings to acquire the property within one year of the landowner's notice.

Subdivision Planning

Article V of the MPC grants municipalities the power to control the development of subdivisions. A subdivision is defined as "the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts or parcels . . ." with the exception of certain agricultural uses. Ordinances controlling the development of subdivisions can include, among other things, standards for street design, water and sewer facilities, streetlights and walkways.

Dedication of Land

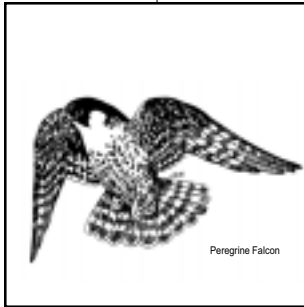
An important aspect of subdivision controls is an allowance for park areas and recreational facilities. Section 503(1) of the MPC expressly authorizes municipalities to require the public dedication of land, construction of recreational facilities or the payment of fees in lieu thereof. Many Pennsylvania municipalities call for a certain percentage of a subdivision, land development, or planned residential development to be set aside for parks, playgrounds or other open space.

Clustering

One approach to land development that can conserve open space and reduce infrastructure costs is called "clustering." With this approach, and variations on it, a municipality allows a developer to increase building density on a portion of a site, and in exchange, the developer sets aside the remainder of the site as open space. The overall allowed density of development on the site remains the same or is increased. For example, instead of building one hundred units on one acre lots, a developer could put the same number of units on fifty acres and conserve the remaining fifty acres as natural and recreation areas. This reduces the need for street, sewer and other infrastructure outlays by the developer, reduces a municipality's long-term maintenance costs

and helps keep development out of wetlands, woodlands, etc. The cluster technique is good for the developer's bottom line, good for the municipality's budget and good for the environment.

While the MPC does not expressly authorize cluster development, it does allow "provisions to encourage innovation and promote flexibility, economy and ingenuity in development." Typically, municipalities only allow clustering in special zoning districts or planned residential developments. However, to effectively take advantage of the cluster technique's potential and to make it more attractive and easy to use, municipalities may wish to consider allowing clustering in all or most zoning districts.



Zoning

Zoning is perhaps the best-known regulatory tool available to municipalities. It is used to control uses of land and water; the location of uses; the size, height and other dimensions of structures; setbacks; and the density of both population and use. The intricacies of zoning laws and requirements in Pennsylvania can become very complicated with issues like exclusionary zoning (a municipality's zoning ordinance has to provide for every land use), non-conforming uses (land uses that do not comply with the zoning ordinance but were in place before the ordinance went into effect) and a number of other legal precepts.

For purposes here, the most important aspect of the zoning power is that it can be used to determine how a community will go about the "protection and preservation of natural resources and agricultural land and activities."

The purposes of zoning in Pennsylvania include the "preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains." To accomplish this purpose, a municipality must ensure that it establishes a sound basis for its environmental protection zoning provisions. The municipality should clearly relate the public health, safety and welfare to the zoning provisions.

Overlay Districts

In addition to creating special zones, a municipality can adopt "overlay districts." An overlay district is superimposed over the main residential, commercial or industrial zoning of a municipality. Whereas the boundaries of traditional zoning districts are based on land use, the reaches of an overlay district are tied to a specific resource or interest.

For example, a house proposed to be built on land zoned for residential development but is also located in a flood plain may be subject to additional requirements because of its location in an area subject to an overlay ordinance. Overlay Districts can be created for a variety of different resources including riverfront protection, flood plains, historic

districts and transportation corridors.

Agricultural Zoning

Zoning ordinances often discourage farming. Some ordinances identify standard farming practices as public nuisances. The practice of zoning agricultural areas for one-acre lot residential development and other non-agricultural uses can encourage land speculation, drive up property taxes and encourage farmers to sell out.

Municipalities can use zoning to encourage farmers to continue using their lands for agricultural production. Section 603 of the MPC authorizes zoning to protect “agricultural land and activities” and the Pennsylvania courts have upheld agricultural zoning of 30 acres per dwelling unit.

Zoning to Protect Stream Corridors and Other Drainage Areas

Protection of stream corridors and special natural drainage areas is a land-use objective that can be accomplished by local zoning and subdivision regulation. Such zoning requires leaving wooded or vegetated buffer zones along identified stream corridors and defined drainage areas. In some states, legislation has been adopted to do this on a statewide basis or to protect a specific resource. In Maryland, for example, a 100-foot buffer zone is required along all tidal areas of the Chesapeake Bay.

While Pennsylvania has no statewide requirement for buffer zones or stream corridor protection, municipalities can address watershed protection through their planning process. Authority for creating a buffer zone is found in the MPC provisions that enable communities to zone for the “protection and preservation of natural resources.” This and other provisions of the MPC are strong backing for any municipality that wishes to zone to protect natural resources and promote and/or maintain a high quality of life for its citizens.

Site Capacity Analysis

Municipalities may require that development applicants prepare site capacity analyses. Site capacity analyses can provide detailed information about a parcel of land slated for development. The analyses can involve cataloguing the resources and features of a site as well as developing alternatives necessary to minimize the impacts on resources.

When used in conjunction with steep slope, flood plain and other resource protection requirements, site capacity analysis can indicate where development should and should not occur. After those areas unsuitable for development are subtracted, formulae can be applied that determine the maximum density of development for the buildable portion of the site.

Planned Residential Developments

Article VII of the MPC provides for Planned Residential Developments (PRDs), mixed-use developments combining housing at greater densities with open space and recreation facilities as well as commercial uses. (*See also Clustering above.*) The PRD ordinance combines elements of both zoning and subdivision ordinances in one regulation applying to a large tract of land. Although originally designed primarily for residential development, PRDs can now include “non-residential uses deemed to be appropriate for incorporation in the design of planned residential development.”

Transfer of Development Rights

The transfer of development rights (TDR) from one property to another is a program in the MPC designed to preserve farmland, open space, historic districts and other lands that may not be suitable or desirable for development. The program allows strict development restrictions to be placed on a property located in an area identified for conservation while still giving the property owner an opportunity to derive financial benefit.

Under a TDR program, the owner of land in an area to be preserved is allowed to sell or otherwise transfer the restricted development rights in the preservation area for use on a property in an area where development is more appropriate but where there are current restrictions on development or density. The purchaser of the development rights can then exercise the transferred rights to develop or increase the density of development on his land.

Pennsylvania’s TDR program is limited in that, in order for a TDR program to be valid, rights can only be transferred within the municipality (or, in the case of multi-municipal planning, within the planning area). Many municipalities may find that they are too small, geographically, to effectively exercise a TDR program. However, TDRs are still worth pursuing by any municipality interested in effectively managing its growth.

Environmental Advisory Councils

In December 1972, the Pennsylvania General Assembly passed Act 148, the Environmental Advisory Councils Law. The Law allows the governing body of any city, borough, town or township to establish, by ordinance, an environmental advisory council (EAC). An EAC is to act as an advisory body to local governmental agencies including the planning commission, park and recreation board and elected officials on matters dealing with the protection, conservation, management, promotion and use of natural resources.

EACs can identify problems and recommend plans and programs for the community, conduct educational programs and inventory natural features and resources. An EAC can also review all proposed subdivision and land development plans. It is important to note that the EAC

is *advisory*, the councils have no decision-making powers and, generally, rely on the efforts of their members to undertake projects. Currently there are approximately 100 EACs in Pennsylvania.

Pennsylvania Government Programs

Several Pennsylvania state government programs support conservation efforts in the Commonwealth.

Importance of Agricultural Lands

More than 52,000 farms comprise Pennsylvania's largest industry. In signing Executive Order 1994-3 on May 9, 1994, Robert P. Casey, then-Governor of Pennsylvania, stated that this industry "generate[s] over \$3.6 billion annually in farm receipts, support[s] a \$38 billion a year agribusiness economy and employ[s] nearly one-fifth of Pennsylvania's work force . . ."

While all these numbers are impressive, they must be taken in the context of a harsh history of decline for farms and farmland in the Commonwealth. It has been shown that since 1954, the area of cropland in Pennsylvania has dropped from about 7.3 million acres to about 5.4 million acres – a drop of 26 percent and an absolute loss of an area as large as Adams, Cumberland, York and Lancaster counties combined. The number of farms has also dropped from some 129,000 in 1955 to only about 52,000 in 1987.

As a result of the increasing pressures on, and increased disappearance of, agricultural lands in Pennsylvania, the General Assembly has stated that "[m]any of the agricultural lands in the Commonwealth are in jeopardy of being lost for any agricultural purpose." The legislature found that this jeopardy stems from expanding urban influences that result in land speculation and the discouragement of farming practices due to scattered development and a concomitant increase in farm taxes.

Because of these pressures, "[i]t is the declared policy of the Commonwealth to conserve and protect and to encourage the improvement of its agricultural lands . . . It is also the declared policy of the Commonwealth to conserve and protect agricultural lands as valued natural and ecological resources . . ."

Not only has the General Assembly made clear the importance of farm land conservation; such action is also supported by the Pennsylvania Constitution. Article I, Section 27 of the Constitution states that: **The people have a right to clean air, pure water, and to the preservation of the *natural, scenic, historic and esthetic values* of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.** (Emphasis added.)



Clearly, farmland and farming operations qualify as “natural, scenic, historic and esthetic values” in the Commonwealth and, therefore, for the heightened protection called for in the Pennsylvania Constitution.

The environmental rights amendment applies not only to state agencies, but also to municipalities as “[a]ll of the branches and agencies of the state government, as well as the municipal subdivisions of the state, share the responsibility.”

Pennsylvania courts have devised a three-part “test” to be applied to Article I, Section 27 issues. To determine whether the constitutional requirements have been met, the court determines if:

- 1) all statutes and regulations relevant to the protection of natural resources have been complied with,
- 2) a reasonable effort has been made to reduce the environmental impacts of the activity, and
- 3) the environmental harm resulting from the challenged decision clearly outweighs the benefits to be derived.

Clean and Green

Pennsylvania tax law recognizes and encourages the conservation of agricultural land, open space and forested areas through the Clean and Green program. This program allows landowners to petition their county for tax assessments based on the land’s value as agricultural land, forest or open space rather than as developed. There are size and use requirements for inclusion in the program. In addition, there are penalties if the use of the property changes. For more information, contact the Pennsylvania Department of Agriculture, Bureau of Farmland Protection.

Introduction to Agricultural Security Areas

Originally enacted in 1981, the Agricultural Area Security Law serves as an effective means of protecting Pennsylvania farm land. The purpose of this law is to conserve and protect the Commonwealth’s agricultural lands as valued natural and ecological resources, and it provides for the designation of agricultural security areas (ASAs) of 250 or more contiguous or non-contiguous acres where the land and/or farming operations meet certain requirements. As of December 1990, 283 ASAs encompassed more than one million acres of Pennsylvania farmland. Establishment of an agricultural security area carries a number of benefits for the landowners in the ASA. Especially important to the farmers is that no local ordinance can define normal farming operations as a nuisance within the ASA and any condemnation of ASA land must be approved by the Agricultural Lands Condemnation Approval Board in addition to the usual condemnation proceedings.

The law outlines a series of procedural steps to ensure that applicants seeking to establish an ASA receive a fair hearing for their proposal.

The review of any application by the local ASA Advisory Committee, the local Planning Commission and the local governing body, as well as the requirement for a public hearing, provide ample opportunity for any objections or modifications to the proposal and arm the governing body with the requisite information and review before it takes action.

Agricultural Easement Purchases

The 1988 amendments to the Agricultural Security Area Law offer a legally binding opportunity for long-term farm land protection. \$100 million in electorally authorized bond money and the allocation of a portion of the state cigarette tax fund a state conservation easement purchase program. Counties that have established easement programs may apply to the State Agricultural Land Preservation Board for the purchase of agricultural easements from farm owners in ASAs. The state will reimburse a county for up to \$10,000 per acre of the easement purchase price.

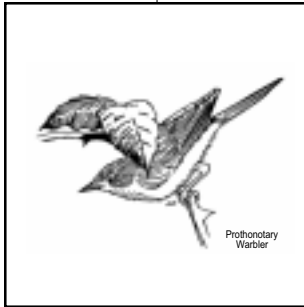
By selling or donating a conservation easement, the property owner gives up rights to develop the property except as stipulated in the easement. This in no way affects the owner's ability to sell, lease, or devise the property; though, any such transfer would be subject to the terms of the easement.

In exchange, the property owner accrues benefits above and beyond the revenue from the easement sale. Tax advantages include reductions of property taxes because assessments are based on the value of the land without the development rights rather than at full market value. Inheritance taxes will also be lower because of the downward adjustment of the property's fair market value.

Easements purchased under the Agricultural Area Security Law must be conveyed either in perpetuity or for 25 years and must be in an ASA of at least 500 acres. Under the law, the price to be paid for a conservation easement in perpetuity cannot exceed the difference between the nonagricultural value and the agricultural value of the land. If the easement term is 25 years, the purchase price can be up to 10 percent of the value of the perpetual rights.

Cataloguing Natural Diversity

In planning for both development and conservation, it is imperative to know what resources are currently present in a given area. To this end, the Pennsylvania Department of Environmental Protection began the Pennsylvania Natural Diversity Inventory (PNDI) program in 1980. The purpose of the inventory is to map the appearance and occurrence of natural features and diversity in the Commonwealth. As a result of this data collection, public and private land managers, decision-makers, owners and developers can better plan for future development and conservation practices.



In preparing the Natural Diversity Inventory, data is collected in five major categories: plants, animals, geologic landmarks, natural communities and other natural features. That data is then compiled in a comprehensive report for the area studied as well as being included in a database for the entire state.

An important aspect in compilation of the PNDI has been the preparation of Natural Heritage Inventories at the county level. Fourteen of Pennsylvania's counties have completed inventories. Counties can compete for financial support for the cost of preparing an inventory.

When discussing natural diversity inventories, whether at the state or local level, it is important to understand that these studies are *not* regulatory in nature; rather, they are intended to be used in developing comprehensive plans and assisting with land use and conservation planning. The intent and purpose of the program is as a resource to decision-makers. In and of themselves, the inventories do not regulate land use. In spite of this, County Natural Heritage Inventories and the Pennsylvania Natural Diversity Inventory have been attacked by some as an attempt by government to exert control over landowners' abilities to use their land as they see fit.

Originally established by the Pennsylvania Department of Environmental Resources - Bureau of Forestry, the Nature Conservancy and the Western Pennsylvania Conservancy, the PNDI is supported primarily by the Wild Resource Conservation Fund.

Wild Resource Conservation Fund

The Wild Resource Conservation Fund is best known for its license plates and voluntary check-off contribution on Pennsylvania tax forms. Vehicle-owners can purchase the colorful "Do Something Wild" plates, and a portion of the cost is applied to the fund. Recipients of tax refunds can contribute by simply checking the appropriate box on the tax return.

The purpose of the fund is the protection and conservation of wildlife and native wild plants. Enacted in 1982, the fund supports the PNDI as well as other projects.

Keystone Fund

In a November 1993 referendum, Pennsylvania voters overwhelmingly approved a \$50 million bond issue to fund the Keystone Recreation, Park and Conservation Fund. The referendum was authorized in the Keystone Recreation, Park and Conservation Fund Act of 1993. As of July 1995, the Keystone Fund is also supported by 15 percent of the State Realty Transfer Tax revenues. The Keystone Fund monies are used to fund nature preserves and wildlife habitats, improve and expand state parks, recreation facilities, zoos, historic sites and public libraries.

Under the Keystone program, land trusts can receive grants to pay up to 50 percent of eligible project costs for the planning and acquisition of natural areas and open space.

The Keystone Act defines a land trust as a nonprofit conservation or preservation organization, conservancy or land trust whose primary purpose is the conservation and preservation of open space, park lands or natural areas for public benefit.

To qualify for Keystone funding, land trusts must hold 501(c)3 tax exempt status under the Internal Revenue Code, be “registered with the Pennsylvania Commission on Charitable Organizations and have an existence for at least five consecutive years.”

Rivers Conservation Program

With nearly 54,000 miles of streams, Pennsylvania is second only to Alaska in total stream mileage. Because the Commonwealth’s rivers have significant value to its citizens and wildlife, the Pennsylvania Rivers Conservation Program was created under the Keystone Fund to foster grass-root efforts to protect streams and stream corridors.

The Rivers Conservation Program is designed to conserve Pennsylvania’s river resources through the creation and implementation of local river conservation plans. It establishes the Pennsylvania Rivers Conservation Registry to acknowledge and record local river conservation activities. The program also provides technical and financial assistance to river support groups or municipalities for the conservation of Pennsylvania rivers. The program complements the state’s existing Scenic River program.

To participate, groups or municipalities interested in conserving a river must create a conservation plan. (Funding is available to help underwrite 50 percent of plan preparation.) This river conservation plan identifies the significant environmental, recreational, economic, cultural, and aesthetic resources and values of the river while also identifying the potential threats to these resources. The conservation plan recommends policies and actions that can be undertaken in the watershed to conserve, maintain, and/or enhance these river resources and values. In addition, it provides the necessary information for inclusion on the Pennsylvania Rivers Conservation Registry.