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Land Preservation

John R. Nolon
Elisabeth Haub School of Law at Pace University, jnolon@law.pace.edu

Land Preservation – Chapter 3

John R. Nolon
James A. Hopkins Professor of Law
Pace University School of Law

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Chapter 3

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Land Preservation

John R. Nolon, Professor of Law, Pace University School of Law and Visiting Professor, Yale School of Forestry and Environmental Studies. The author acknowledges the contributions of Susan Moritz, particularly to § 3.04. Ms. Moritz is Research Consultant to the Land Use Law Center at Pace Law School

§ 3.01 Introduction

The preservation of land is affected by many influences. Predominant among them is local land use control. States subdivide themselves into municipal jurisdictions and give cities, towns, villages, boroughs, counties and other municipalities authority to determine the activities that are permitted on the land. The intensity, density, and scale of the use of private land under local rules will determine whether and to what extent natural resources and environmental functions will be protected. This chapter explores the opportunities inherent in local legal authority and practice to achieve land conservation. It looks first at the power of local governments to regulate land then at their authority to acquire it.

This exploration of local preservation law and practice recognizes the critical influences of federal, state, and regional governments. Local governments are instruments of state governments; municipalities derive their authority from state statutes. Extensive control over land use has been given to localities, but important powers have been retained. State governments are the partners of federal agencies that are charged with protecting environmental resources that are subject to federal jurisdiction. The land use system that has evolved over the last century in this country is intensely intergovernmental and interdependent. While this system was not designed as a whole and is often fragmented in its operation, these interconnections are many and important. This chapter identifies, explains, and explores the intergovernmental aspects of the subject from the bottom up, looking at them from the perspective of local control.

Within those sections that explore the regulatory authority of local governments, the chapter starts with traditional land use control techniques such as planning, zoning, and subdivision and site plan regulation. It then discusses more modern strategies such as requiring the dedication of land to conservation purposes, arranging development on less sensitive portions of the land, and rearranging large-scale development patterns to preserve large landscapes. Following the exploration of these overtly land use control measures, the materials focus on local environmental law: a field of law that has its roots in land use law but which has become a distinct and environmentally-oriented regime of its own.

Local environmental law is based on state-delegated land use authority, home rule power, and discrete state enabling laws, many of relatively recent vintage. These state statutes recognize the importance of local governments in preventing non-point source pollution, the disappearance of wetlands, soil erosion, surface water sedimentation, viewshed degradation, and a number of other adverse impacts of development that threaten the quality of community life.

The chapter next examines the techniques used at the local level to acquire title to or interests in sensitive environmental lands. The chapter proceeds in this order (regulation first, acquisition second) because of the author's belief that land should be acquired on behalf of the public after it has been regulated appropriately. Local land use and environmental regulations make manifest what investor due diligence should discover: that some lands have essential environmental qualities that are important to the public.

The land acquisition sections of the chapter explore the many opportunities that local governments have to protect private lands through the purchase of a variety of types of interests, by taking advantage of several sources of raising revenue for acquisition programs, and by cooperating with nongovernmental entities and higher levels of government. Since the conservation easement plays a central role in land acquisition programs, a separate section is devoted to it and its tax treatment. The role of land trusts in land acquisition is then explored, particularly their flexibility to adapt to market demands and purchase opportunities; these characteristics recommend land trusts as appropriate partners for governmental agencies interested in land conservation.

In Parts B and C a number of helpful references are included that amplify and explain these subjects. These include an exemplary local law that protects multiple environmental resources, the Uniform Conservation Easement Act, the much-cited Michigan Conservation Easement Act, and the Raisin Valley Land Trust Conservation Easement. Bibliographic materials include recent books, monographs, periodicals, and articles as well as a large number of internet sites including references to forms and other primary materials, as well as the home pages of a variety of federal, planning, land use, environmental, educational, and other agencies and institutions.

§ 3.02 Local Land Use Authority and Regulations

[1] In General

In this section the devolution of power to local governments to determine land uses and to conserve land is explored and the techniques municipalities use are described and evaluated. The principal powers that local governments have been given by their states are the authority to adopt comprehensive plans, zoning laws, and subdivision and site plan regulations. The models for the state laws that delegate such authority to municipalities were created over 80 years ago by a federal department and adopted quite quickly by most of the 50 states. These added to the delegated and inherent police powers of local governments to legislate to protect the public health, safety, welfare, and morals and to the home rule authority given to them to adopt laws regarding their property, affairs, and government.

In the material that follows, care is taken to trace this evolution of local authority to control the private use of the land and to conserve land and its natural resources. The section begins with an examination of traditional land use controls such as planning, zoning, and the regulation of land subdivision and site plan development. More recently developed techniques such as open space dedication requirements, clustering of development, transfer of development rights, and declaring moratoria are then explored and explained.

[2] Specific Techniques

[a] Comprehensive Planning

Local land use regulations in most states must conform to the locality's comprehensive land use plan. This requirement is prevalent in large part because it was contained in the model enabling act promulgated in 1922 by the U.S. Department of Commerce,[1] which served as the basis for the delegation of land use control authority by states to their localities. Effective comprehensive plans contain long-term environmental goals, intermediate-term conservation objectives tied to each goal, and shorter-term strategies designed to accomplish each objective. In this way, they encourage the adoption of local laws designed to achieve land and resource conservation.

The legislatures of the 50 states have created a variety of approaches to comprehensive planning. Most permit but do not require local governments to adopt comprehensive plans and are not specific in defining how it is that local zoning and land use laws are to comply with such plans. Some state enabling acts require local governments to adopt plans and to include specific elements within them. Local governments may be required to include references to sensitive environmental areas or to include a conservation element. A few states mandate that the conservation element of local master plans be based on the best available science, while others require that local master plans be subjected to an environmental impact review before they are adopted. Some state legislatures have adopted statewide planning principles or goals, which local master plans must reflect with some consistency.

New Jersey state law stipulates that local governments must adopt master plans.[2] In drafting a master plan, the local planning board must include standards and policies to guide land use development proposals. The plan must also include a land use element showing the existing and proposed land uses, as well as a specific policy statement showing the relationship of the municipality's proposed land development to the master plans of adjoining municipalities.[3] Each community's land use element must also take into consideration "natural conditions, including, but not necessarily limited to, topography, soil conditions, water supply, drainage, flood plain areas, marshes and woodlands."[4]

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[1] Standard State Zoning Enabling Act reprinted in 5 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning Planning app. A. (2003).
[2] N.J.S.A. 40:55D-1 *et seq.*
[3] N.J.S.A. § 40:55D-28.
[4] N.J.S.A. § 40:55D-28(b)(2)(a).

Connecticut's planning and zoning enabling statutes not only require the state's 169 municipalities to adopt plans of conservation and development, but stipulate that such plans shall be reviewed and updated at least every ten years.[5] The Plan of Development of the Town of Southington, Connecticut states that "development on severe slopes will be limited to reduce erosion and maintain steep slope areas." An implementation measure of that plan encourages the preservation of "unique natural features such as kettle holes, bogs, rate plant species, rock formations and topologies which may be of scientific value to the town."[6]

Under Oregon's comprehensive statewide planning program, each of the state's cities is surrounded by an "urban growth boundary," or UGB, designating undeveloped land that can accommodate the city's future growth.[7] A UGB typically creates an urban growth area that encircles the city, containing land that is not within the city's limits but under county jurisdiction. Planning is coordinated through urban growth management agreements. These agreements clarify which local government will administer land-use regulations in the urban growth area, how the area should be zoned until it is urbanized, what standards for public services and facilities should be applied there, and what interim controls should be used to protect the growth area's potential for development. UGBs are intended to preserve land and resources outside the designated growth districts from random or leap-frog development prevalent in many metropolitan areas.[8]

Nebraska requires that its local governments adopt a comprehensive plan before they adopt any zoning regulations, and courts declare as *ultra vires* any zoning adopted in the absence of such a plan.[9] The City of Lincoln and Lancaster County have adopted a Joint Comprehensive Plan[10] containing an Environmental Resources chapter[11] that requires developers to take into account factors such as topography, climate, soils, watersheds, groundwater, and floodplains in their proposals. The stated goal of this chapter is to "ensure a quality natural environment for future generations."[12]

In Maryland, local comprehensive plans must include "a sensitive area element that contains goals, objectives, principles, policies, and standards designed to protect sensitive areas from the adverse effects of development."[13] Sensitive areas include floodplains, areas vulnerable to pollution, habitats of threatened and endangered species, and steep slopes.[14] Similarly, in Delaware, county comprehensive plans are required to include a "conservation element for the conservation, use and protection of natural resources in the area and which results in the identification of these resources. At a minimum, the element shall consist of such natural area

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[5] C.G.S. § 8.2.
[6] Southington, Connecticut, Plan of Development, III-15 (1991).
[7] O.R.S. Chapter 195, Local Government Planning Coordination; O.R.S. Chapter 197, Comprehensive Land Use Planning Coordination.
[8] *See* Oregon's Statewide Planning Goals and Guidelines, Goal 14: Urbanization, OAR 66-015-0000(14), at http://www.lcd.state.or.us/goalpdfs/goal14.pdf.
[9] Neb.Rev.Stat. § 23-114.03, Enterprise Partners v. County of Perkins, 619 N.W. 2d 464, 260 Neb. 650 (2000).
[10] City of Lincoln – Lancaster County Comprehensive Plan (2002).
[11] *Id*. at E-23, F-51.
[12] *Id*. at E-23.
[13] Md. Ann. Code art. 66B § 3.05(a)(4)(viii).
[14] *See* Stuart Meck, ed., Growing Smart Legislative Guidebook (American Planning Association 2002) at 7-134.

classifications as wetlands, wood uplands, habitat areas, geological areas, hydrological areas, floodplains, aquifer recharge areas, ocean beaches, soils, and slopes."[15] Agricultural uses, silvicultural uses, and watershed protection must also be considered in the conservation elements of local comprehensive plans.[16]

Local governments in Florida also are required to incorporate conservation elements into their comprehensive plans. These elements must be designed for the conservation, use, and protection of natural resources in the community, including "wetlands, estuarine marshes, soils, beaches, shores, flood plains, rivers, bays, lakes, forests, fisheries and wildlife, and marine habitat."[17] Florida state law further requires extensive citizen and intra-municipal participation in developing a future vision as a required part of local plans:

> Each local government is encouraged to articulate a vision of the future physical appearance of its community as a component of its local comprehensive plan. The vision should be developed through a collaborative planning process with meaningful public participation and shall be adopted by the governing body of the jurisdiction. Neighboring communities, especially those sharing natural resources or physical or economic infrastructure, are encouraged to create collective visions for greater-than-local areas. Such collective visions shall apply to each city or county only to the extent that each local government chooses to make them applicable . . . When a local vision of the future has been created, a local government should review its comprehensive plan, land development regulations, and capital improvement program to ensure that these instruments will help move the community toward its vision in a manner consistent with this act and the state comprehensive plan.[18]

An important component of the planning system in Georgia is the preparation by each county and municipality of a 20-year comprehensive plan, which has several required elements, including the preservation of natural and historic resources.[19]

Washington State requires that the local governments not only designate critical areas and adopt development regulations to protect these areas in their comprehensive plans, but also to use the "best available science" when these regulations are adopted.[20] The Washington statute also requires that each county and city in Washington identify significant agricultural, forest, and mineral resource lands and other defined critical areas.[21] Seattle's Comprehensive Plan, Toward a Sustainable Seattle,[22] identifies environmental stewardship as one of the city's core values. The plan includes a separate Environmental Element.[23] The goals and policies of the plan's Land Use, Transportation, Utilities, Housing and Neighborhood Planning elements are at least partially directed at finding environmentally sustainable approaches to growth management.

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[15] 9 Del. Code § 6959(g)(4).
[16] *Id.*
[17] F.S.A. § 163.3177(6)(d).
[18] F.S.A. § 163.3167(11).
[19] Rules of the Office of Coordinated Planning, Ch. 110-12-1-.04(5).
[20] R.C.W. § 36.70A.172.
[21] R.C.W. § 36.70A.170.
[22] Adopted as Seattle, Washington, Ordinance No.117221 (1994).
[23] Seattle Comprehensive Plan (2003) at E-1.

The American Planning Association offers another approach to using the comprehensive plan to achieve environmental protection. It suggests that state planning statutes be amended to require local planning agencies to prepare an "environmental evaluation" of each element of the comprehensive plan before adoption.[24]

There is impressive evidence that local governments in other states are insinuating land and resource conservation policies in their comprehensive land use plans. The Ancorage, Alaska, includes sections on environment and design, natural open space maps, and growth strategies in its comprehensive plan.[25]. The Jefferson County, Missouri, master plan contains a section entitled "Environment and Open Space."[26] The explicit policy of the plan is "to ensure environmentally sensitive development throughout the county, particularly large-scale development, such as industry." The environmental goals of the plan are to protect watersheds and water resources from pollution runoff, erosion and flooding, maintain the county's rural character, and maintain air quality. The Fort Smith, Arkansas, comprehensive plan[27] establishes the following land use goals: "Protect natural resources and reduce their waste and overuse" (Goal 6); "Preserve, protect and improve Fort Smith's existing neighborhoods" (Goal 4); "Regain access to the Arkansas riverfront" (Goal 9).[28] The City of Sioux Falls, South Dakota, has adopted a comprehensive development plan[29] to guide growth and inform the city's land use decisions. The plan's guidelines include: "Allow only compact, contiguous growth along the City's fringe; preclude development of land which is environmentally unsuitable for construction; prevent unlimited outward expansion by maintaining urban growth boundaries and integrate park and open space areas into residential neighborhoods whenever possible."[30] In Kent County, Delaware, the comprehensive plan recommends amending zoning and subdivision laws to protect natural resources and steer growth into development overlay zones.[31] Johnson County, Iowa, includes Proactive Protection of the Environment as a policy element of its comprehensive plan.[32]

[b] Zoning

Zoning laws and ordinances divide communities into zoning use districts. In each district, all future developments proposed on privately owned land must conform to the uses permitted. In most communities, the majority of the land is zoned residential, often single-family residential. Other typical zoning districts permit non-residential uses such as industrial, light industrial, manufacturing, office, research, commercial, retail, neighborhood retail, to name a few. Zoning laws go on to specify the size of building lots, the heights of buildings permitted,

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[24] *See* Growing Smart Legislative Guidebook, *supra* Note 14, Chapter 12.
[25] Anchorage, Alaska, Anchorage 2020 – Anchorage Bowl Comprehensive Plan (2001), implemented by Anchorage Code § 21.05.080.
[26] Jefferson County, Missouri, Master Plan at 36.
[27] Fort Smith, Arkansas, Comprehensive Plan (2002).
[28] *See* Fort Smith Comprehensive Plan, Executive Summary, at 7-10.
[29] Sioux Falls Year 2015: A Comprehensive Development Plan, adopted 1996, updated 2002.
[30] Jeffrey Schmitt. *Sioux Falls, SD 2015: A Growth Management Plan,* APA National Conference, April, 2002, at 6.
[31] Kent County, Delaware, Comprehensive Plan Update (2002).
[32] Johnson County, Iowa, Land Use Plan (1998) at 9.

setback distances from streets and lot lines, the percentage of the lot that may be built upon, and a host of other requirements that prescribe land development.

Zoning districts and their development specifications provide communities with a method of conserving natural resources and the environment. By placing environmentally sensitive land in large lot residential zoning districts, for example, a basic prescription for conservation can be written. Low-density residential development, such as five-acre zoning, does accomplish some land conservation objectives by minimizing the number of houses and households allowed in a district; this limits water use, waste production, and runoff that comes from impervious surfaces such as driveways, rooftops, and accessory land uses associated with residential living. In San Monica, California, one of the purposes of the zoning regulation is to protect and enhance the quality of the natural and built environment and to ensure adequate park and public open space.[33] Each of the city's zoning districts has certain property development standards. These standards include maximum unit density, lot coverage, building height, minimum lot size, setback requirements, and building spacing, as well as a requirement for open space.

Other municipalities adopt explicit conservation policies in their zoning ordinances. A purpose of the Durham County, North Carolina, zoning ordinance, for example, is to promote the health, safety, and general welfare of the residents of the city and county by conserving land and water resources, providing adequate light and air, and preventing overcrowding of land and undue concentrations of population.[34] The zoning ordinance of Manhattan, Kansas, includes in its statement of purpose a reference to the conservation of natural resources, including open space preservation.[35] The zoning ordinance of the Town of Dover, New York, includes among its purposes the conservation of natural resources, the preservation of agricultural land and open space, growth management, and the protection of large contiguous areas of undeveloped land.[36]. The ordinance establishes very low-density rural and resource conservation districts, along with a variety of mixed-use districts that protect floodplains, stream corridors, and aquifers.[37] The Town of La Grange, New York, references its comprehensive plan in setting out the purposes of its zoning ordinance and states that the plan and the ordinance together are intended to guide the future growth of the town and to preserve open space and other natural and historic resources of the town.[38]

Open space and its associated natural resources and environmental functions can be protected by zoning techniques in additional ways. For example, in the Santa Monica ordinance referenced above there is a requirement in the Ocean Park residential zoning district that at least "one hundred square feet per housing unit of usable common open space [be] accessible and available to all project residents for outdoor activities."[39] Development in any of the city's residential districts must provide "usable" common open space, private open space, or both. In Pennsylvania, the Township of West Manchester amended its single-family residential district regulations to require open space preservation in undeveloped areas. Before amending the

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[33] City of Santa Monica, California, Zoning Ordinance § 9.04.02.020 (b) and (d).
[34] Durham County, North Carolina, Zoning Ordinance § 1.1.2.
[35] City of Manhattan, Kansas, Zoning Ordinance § 2-101.
[36] Code of the Town of Dover, New York, § 145-3.
[37] *Id*. § 145-8.
[38] Code of the Town of La Grange, New York, § 240-13.
[39] City of Santa Monica, California, Zoning Ordinance § 9.04.08.50.060.

ordinance, the local legislature prepared maps showing potential future development under the existing conventional zoning. This exercise, often described as a build-out analysis, illustrated the great amount of existing open space and farmland that would be lost under the present zoning ordinance. In addition, the legislature mapped anticipated open space preservation areas "to show landowners and developers exactly what was envisioned: interconnected open spaces crossing parcel lines."[40]

The zoning regulations of the Town of Wallingford, Connecticut, require "that existing trees are to be preserved to the maximum extent possible."[41] Trees and landscaping are to be preserved and provided under the town's regulations "to reduce excessive heat, glare, and accumulation of dust; to provide privacy from noise and visual intrusion; and to prevent the erosion of the soil, excessive run-off of drainage water, and the consequent depletion of the ground water table and the pollution of water bodies.[42] The Zoning Commission in New Milford, Connecticut, amended its zoning to exclude all wetlands, watercourses, and steep slopes from the calculation used to determine the minimum lot area required for development. Landowners sued, claiming that such a provision lacked a rational connection with legitimate local police power objectives. Pointing to language in the State of Connecticut's zoning enabling statute that permits municipalities to encourage the most appropriate use of the land through zoning provisions, the court determined that the amendment had a "reasonable relationship to the legitimate goal of balancing development and conservation."[43]

The Knoxville, Tennessee, zoning code establishes an Open Space Preservation District[44] to provide areas in which the principal use of the land is devoted to open space and/or the preservation and protection of park and recreation lands, wilderness areas, beach and shoreline areas, scenic routes, wild and scenic rivers, historical and archaeological sites, watersheds and water supply areas, and wildlife and their habitats. Property within this district must meet criteria set out in the city's open space plan.

Zoning also can achieve environmental objectives by requiring compliance with performance objectives that limit adverse environmental effects: erosion and sedimentation, flooding, storm water runoff, impervious coverage, habitat destruction, ground water contamination, and wetland removal. The Cherokee County, Georgia, code establishes conservation subdivisions to preserve open space and maintain residential density. The ordinance intends small residential areas to be surrounded by areas of particular aesthetic or ecological value. The ordinance identifies rare plants and animals that are to be protected by zoning. Some of these include Dwarf Sumac, Freckled Darter, and Amber Darter, which are listed on the national endangered species list. Additionally, the ordinance purports to protect "wetlands, aquifers, topographical or soil features, marine and wildlife habitat; and other features having conservation values, including views, vistas, and indigenous vegetation."[45]

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[40] See Randall Arendt, "*Open Space*" *Zoning: What It Is and Why It Works* (1992), available at http://www.plannersweb.com/articles/are015.html.
[41] Town of Wallingford, Connecticut, Zoning Code § 7.2E.
[42] *Id*. § 6.14A.
[43] Harris v. Zoning Commission of the Town of New Milford, 259 Conn. 402 (2001).
[44] Knoxville, Tennessee, Zoning Regulations Article IV, § 1a.
[45] Cherokee County, Georgia, Code of Ordinances § 23.1.

Union County, Georgia, has included a Mountain Protection Plan in its zoning ordinance to protect slopes in excess of 25 degrees and to preserve the wildlife habitat and the aesthetics of mountainous areas, along with adjacent sensitive areas such as wetlands and floodplains.[46] DeKalb, Georgia, has included in its zoning ordinance an innovative Environmental Overlay Zone,[47] which allows the zoning commission to identify and protect environmentally sensitive areas. The overlay preserves viewsheds, limits impervious surfaces, and provides for increased density of development in exchange for environmental benefits to the town.

The City of Naples, Florida, adopted a marine turtle protection ordinance applicable to its beachfront area which is used as a nesting ground by endangered loggerhead turtles.[48] This ordinance limits the use of artificial lighting visible from the beach, which disorients turtle hatchlings and guides them away from the ocean, and prohibits other activities that disturb nesting turtles and hatchlings. New development must conform to strict lighting regulations intended to minimize outdoor lighting and mandate the use of low-profile illumination or the fitting of lights with special hoods to avoid reflection on the beach. For existing development, outdoor lighting is prohibited at nighttime during turtle nesting season unless lights are retroactively fitted with hoods or positioned so they are not visible from the beach.

The Beaufort, South Carolina, zoning ordinance establishes a buffer area of from 30 to 40 feet from the mean high water line within which impervious surfaces, vehicular use areas, and structures are proscribed. The purpose of the buffer is to "protect sensitive visual and ecological resources and to preserve or restore the native condition of the shorelines" as well as to "mitigate the impact of tropical storms and hurricanes."[49]

The Marlboro County, South Carolina, zoning ordinance does not allow swine operations in floodplains and prohibits waste lagoons.[50] This provision was passed in reaction to the economic and environmental devastation of Hurricane Floyd. Large swine operations contributed too much of the devastation, especially as a result of waste lagoons. The ordinance also stipulates how far apart swine operations must be from one another as well as from neighboring residents and places of congregation.

Zoning districts also can be drawn to conform with watershed boundaries or to include large landscapes rich in natural resources. Zoning standards can specify that environmental functions in these districts be considered and minimally impacted by land development. In Cumberland, Maryland zoning regulations in identified conservation districts provide that "no structure shall be erected, nor shall any material or equipment be stored, nor shall any fill be placed, nor shall the elevation of any land be substantially changed." The only permitted uses in the district are agricultural, horticultural, and forestry uses; public and private parks; recreation areas; historic areas; conservation areas; and other similar uses employing open land with open

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[46] Union County, Georgia, Code § 30-151.
[47] DeKalb, Georgia, Ordinance No. 27-681.
[48] Naples, Fla., Code ch. 114, art. IV, sec. 114.101.
[49] Beaufort, South Carolina, Code Chapter 6, Article H, § 6.
[50] Marlboro County, South Carolina, Zoning Ordinance § 5-10.

structures, gardening, and outdoor plant nurseries. All residential uses are prohibited in the zoning district.[51]

In Cheltenham Township, Pennsylvania, a Soil Conservation District was created to conserve and protect areas having steep slopes from inappropriate development and excessive grading and to permit and encourage the use of these areas for open space purposes. Among the many objectives of this regulation is to "permit only those uses in steep slope areas that are compatible with the preservation of existing natural features" and to protect individuals and adjacent landowners in the Township from the possible harmful effects of inappropriate grading and development on steep slopes. Permitted uses in this zoning district are limited to passive recreation, wildlife sanctuary, game farm, pasture, crop cultivation, and related uses.[52]

Grandview, Missouri, has created a conservancy district within its zoning ordinance to preserve in perpetuity marshes, wetlands, open space, slopes, and other areas of high aesthetic and ecological value. The ordinance sets out both ecological and economic reasons for establishing the district: the protected areas are valued not only for pure ecosystem functions but to prevent the community from having to deal with the economic costs of unsuitable development.[53]

In Wells, Maine, a coastal community, a resource protection district was created to protect and preserve fragile environmental areas from intrusions that would upset ecological systems or create potential public health or safety problems. Passive recreation is a permitted use in the district, while aquaculture, municipal facilities, piers, docks, and wharves are also permitted, but subject to site plan approval.[54]

Environmentally sensitive zoning begins with an inventory and analysis of the natural resources, open spaces, and environmentally sensitive lands in the community. It then permits and proscribes land development to protect resources that the community values while permitting development of less constrained land. The basis for this approach to zoning is found in the 1922 Standard State Zoning Enabling Act upon which most state statutes were based.[55] That act noted that one of the purposes of zoning is "to encourage the most appropriate use of the land." Courts will declare zoning laws that pursue purposes that are not within the scope of delegated authority as *ultra vires* or will find that they are not valid exercises of the permissible police power objectives of land use regulations. Where it is clear how zoning restrictions achieve the most appropriate use of the land, courts are less likely to invalidate them.

A number of state courts have held that the preservation of agricultural or timberland is a legitimate land use objective under the delegated police powers.[56] Protection of wetlands or

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[51] City of Cumberland, Maryland, Zoning Ordinance § 6.12.
[52] Cheltenham Township, Pennsylvania, Zoning Ordinance § 295-164 (A).
[53] Grandview, Missouri, Zoning Code Chapter 31.
[54] Wells, Maine, Zoning Ordinance § 145-32.
[55] Standard State Zoning Enabling Act reprinted in 5 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning Planning app. A. (2003).
[56] Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974); Gardner v. New Jersey Pinelands Comm'n, 227 N.J. Super. 396, 547 A.2d 725 (Ch. Div. 1988), *aff'd*, 235 N.J. Super. 382, 562 A.2d 812 (App. Div.

floodplains, soil conservation and related ecological goals have also passed muster in the courts as proper regulatory goals.[57] Other ends, such as wildlife habitat protection,[58] and the protection of scenic vistas,[59] are increasingly being accepted as legitimate state objectives in land use regulation. The preservation of open space has been found to legitimate land use objective.[60] In some states, however, the preservation of open space for purely aesthetic reasons has not been sufficient to validate zoning regulations.[61]

Other cases that sustain local environmentally-oriented zoning regulations uphold the following actions: denial of a permit to place fill in a bay,[62] wetlands legislation which forbade dredging on plaintiff's property,[63]; denial of permit for filling and dredging 51 acres for development of 108 homes,[64] a Natural Resources District which prevented development of home sites on a lake,[65] the setting of encroachment lines along a stream and a regulation forbidding the placing of buildings within the lines,[66] a "Land Conservation District" which limited uses to farming, marinas, recreational uses, and landfill operations,[67] and an injunction against construction of two lakefront houses which would significantly block the view of other homeowners near the lake.[68]

[c] Project Review, Conditions, and Approval

Land use projects for the development of private property are reviewed by local administrative bodies and either are issued a permit to proceed, with or without conditions, or denied permission for failure to comply with local regulations. In reviewing development

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1989), *aff'd*, 125 N.J.193, 593 A.2d 251 (1991); Codorus Township v. Rodgers, 89 Pa. Commw. 79, 492 A.2d 73 (1985).

[57] *See, e.g.*, Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979).

[58] *See* Amestoy & Di Stefano, *Wildlife Habitat Protection Through State-Wide Land Use Regulation*, 14 Harv. Envtl. L. Rev. 45 (1990) (citing Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979)).

[59] *See* Williams, *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 Wash. U. J. Urb. & Contemp. L. 3, 3–24 (1990). *See also* Karp, *The Evolving Meaning of Aesthetics in Land-Use Regulation*, 15 Colum. J. Envtl. L. 307 (1990).

[60] Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (zoning ordinance with goal of discouraging premature and unnecessary conversion of open space land to urban uses held to advance legitimate state goals). Furey v. City of Sacramento, 592 F. Supp. 463, 468 (E.D. Cal. 1984) (``[t]here can be no doubt that the conservation and preservation of open space lands substantially advances legitimate state interests''), *aff'd*, 780 F.2d 1448 (9th Cir. 1986).

[61] Scheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (Law Div. 1982) (regulations which conferred a benefit to the public only to extent of providing an appealing vista were not reasonably related to harmonious growth of land use). Corrigan v. City of Scottsdale, 149 Ariz. 553, 720 P.2d 528 (Ct. App. 1985) (preservation of open space for aesthetic purposes alone not a valid exercise of police power), *aff'd in part and vacated in part*, 149 Ariz. 538, 720 P.2d 513, *cert. denied*, 479 U.S. 986 (1986).

[62] Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Comm'n, 11 Cal.App.3d 557, 89 Cal.Rptr. 897 (1970).

[63] Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972), certiorari denied 409 U.S. 1040, 93 S.Ct. 525, 34 L.Ed.2d 490 (1972).

[64] In re Loveladies Harbor, Inc., 176 N.J.Super. 69, 422 A.2d 107 (1980).

[65] Chokecherry Hills Estates, Inc. v. Deuel County, 294 N.W.2d 654 (S.D.1980).

[66] Turner v. County of Del Norte, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972).

[67] Dur–Bar Realty Co. v. City of Utica, 57 A.D.2d 51, 394 N.Y.S.2d 913 (1977), affirmed 44 N.Y.2d 1002, 408 N.Y.S.2d 502, 380 N.E.2d 328 (1978).

[68] State Dept. of Ecology v. Pacesetter Constr. Co., Inc., 89 Wash.2d 203, 571 P.2d 196 (1977).

proposals, administrative boards may only condition or deny applications based on standards in the operative regulations. Michigan law, for example, requires that site plan applications must be approved if the application is in compliance with the zoning ordinance and other applicable local standards.[69] In addition to the standards that appear in zoning regulations, such provisions may be found in subdivision or site plan regulations. In some states, local review bodies may impose conditions on development approvals as part of their responsibility for conducting environmental reviews of the projects' potential adverse impacts.

Local practice from state-to-state varies considerably regarding the review, approval, conditioning, or denial of development proposals. In some states all applicable regulations are found in the zoning regulations which may have separate articles dealing with the subdivision of land and the development of individual sites. In others, practitioners will find stand-alone subdivision or site plan regulations to which development proposals must conform. In some localities planning boards or commissions are charged with reviewing and approving development proposals; in others the local legislative body may retain this function for all projects or those of particularly high potential impact. For minor site plan approvals, some communities require only the approval of a hearing officer. In California the local legislative body approves the final subdivision plat but is advised by the local planning commission, in most communities.[70]

Using New York as a fairly typical example, parallel provisions of the Town, Village, and General City Laws empower local legislatures to adopt subdivision and site plan regulations and provide for local administrative boards to review and approve applications to develop subdivided land or individual sites. The state legislative purpose for granting subdivision authority to local governments is to provide for the future growth and development of the community, the provision of adequate infrastructure, and the "comfort, convenience, safety, health and welfare of its population."[71] Before local administrative bodies approve subdivisions, they "shall require that the land . . . be of such character that it can be used safely for building purposes without danger to health or peril from flood, drainage or other menace to neighboring properties or to the public health, safety and welfare."[72]

Site plan regulations are authorized by state law to include standards providing for proper parking, access, landscaping, location of buildings, protection of "adjacent land uses and physical features," and "any additional elements" specified by the local legislature.[73] The court in *Pomona Pointe Associates v. Incorporated Village of Pomona*[74] interpreted "any additional elements" to include environmental considerations. In *Pomona*, the plaintiff owned two lots with slopes of varying steepness. The village's steep slope law required the issuance of a special permit for the disturbance of a "very steep" or "extremely steep slope" as defined in the law. The plaintiff challenged the law, arguing that it granted authority to the planning board in excess of the authority contained in the state site plan statute. The court found that consideration of

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[69] Mich. Comp Stats. §125.286(e).
[70] Cal. Gov't Code, § 66440 (1998).
[71] N.Y. Town Law § 276(1), N.Y. Village Law § 7-728(1), N.Y. Gen. City Law § 32(1).
[72] N.Y. Town Law § 277(1), N.Y. Village Law § 7-730(1), N.Y. Gen. City Law § 33(1).
[73] N.Y. Town Law § 274-a(2), N.Y. Village Law § 7-725-a(2), N.Y. Gen. City Law § 27-a(2).
[74] *See* 712 N.Y.S.2d 275 (Sup. Ct. 2000).

steep slope criteria was within the authority delegated to the village pursuant to the site plan review statute. It held that the protection of "adjacent land uses and physical features" authorizes the adoption of regulations to protect steep slopes.[75] Such provisions "are directly related to the possible impact that disturbance of very/extremely steep slopes could have on water runoff and the stable cohesive integrity of the soil, rocks, trees and vegetation on such slopes."[76] The court thought that it was clear that site plan review can include consideration of natural resource protection, especially when adjacent resources may be adversely affected.

Subdivision Approval

The subdivision of land involves the legal division of a parcel into a number of lots for the purpose of development and sale. By adopting and applying subdivision regulations, a municipality insures that a new development is cost-effective is properly designed, and has a favorable impact on the community and the environment.

Subdivision regulations in some states may include extensive environmental standards. The local subdivision regulations of the town of Wethersfield, Connecticut, for example, require that adequate subsurface stormwater drainage systems exist. In addition, Wethersfield requires the use of solar energy techniques to be considered in the development of a subdivision plan.[77] The town of Prescott Valley, Arizona, provides that land may be deemed unsuitable for residential subdivision by reason of flooding, concentrated runoff, inadequate drainage, adverse soil or rock formations, extreme topography, or erosion susceptibility.[78]

In Wisconsin, the Appellate Division upheld a local ordinance that requires major subdivisions to be served by a public sewer system.[79] In Indiana, the Appellate Division upheld the denial of a subdivision proposal because of the threat of septic tank leaching and increased drainage problems.[80] The state courts in Maryland have acknowledged the contribution of subdivision regulations to a municipality's smart growth plan by holding that a board could disapprove a subdivision that did not comply with the comprehensive plan even though it met all the technical requirements of zoning.[81]

New Milford, Connecticut, uses the lot and area definition of its zoning and subdivision ordinance to protect the town's wetlands and steep slopes from inappropriate development.[82] Wetlands, watercourses, and steep slopes are excluded in determining the minimum lot area required for development. Development within these resource areas is not negotiable anywhere in the town of New Milford under these regulations. The ordinance has been upheld by the state Supreme Court.[83]

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[75] *Id*. at 277.
[76] *Id*. at 278.
[77] Code of the Town of Wethersfield, Connecticut, Chapter 143.
[78] Code of the Town of Prescott Valley, Arizona, Chapter 14.
[79] Manthe v. Town Bd., 555 NW2d 167 (Wis. App. 1996).
[80] Burrell v. Lake County Plan Community, 624 N.E.2d 526 (Ind. App. 1993).
[81] Board of County Commissioners v. Gaster, 401 A.2d 666, 672 (Md. 1979).
[82] New Milford, Connecticut, Zoning Ordinance Chapter 15, Subdivision Regulations § 5.02.
[83] Harris v. Zoning Comm'n of the Town of New Milford, 259 Conn. 402 (Conn. 2001).

The subdivision ordinance in Grandview, Missouri, has Land Suitability requirements and Open Space Regulations under the Design Standards.[84] The Land Suitability Requirements state that "[n]o land shall be subdivided which is found to be unsuitable by any reason of flooding, ponding, poor drainage, adverse soil conditions, adverse geological formation, unsatisfactory topography or other conditions likely to be harmful to the public health, safety or general welfare." This requirement establishes a development process that begins with an ecological evaluation of a site before proceeding to other development considerations. The open spaces provision of the subdivision regulations requires that anyone subdividing land set aside a specific percentage to be dedicated as open space or pay a fee.[85]

States such as Maine and Vermont require that subdivisions exceeding a certain size, or those deemed to be of state concern, must be reviewed at the state level.[86] This legislation was designed to preserve each state's environmental resources, including recreational land uses and lands that have special value to public. In Vermont, a state permit is required if a proposed development is on a parcel exceeding ten acres or if a subdivision application involves more than nine lots.[87]

Some states do not regulate the subdivision of larger parcels of land if open space or agricultural lands are preserved. In Idaho, for example, if the resulting lots will consist of at least five acres and will be maintained as agricultural land, the state's regulatory scheme does not apply.[88] The Maryland state courts have held that a Washington County subdivision review process did not apply when the resulting parcels would be used only for recreation and not for development.[89] These waivers provide an incentive to use land for environmentally sound purposes.

Site Plan Approval

In New York, a site plan is defined as the "arrangement, layout, and design of the proposed use of a single-parcel of land."[90] Local legislatures can, but are not required to, adopt site plan regulations. The legislature may retain the authority to review applications, but usually delegate that authority to the local planning board. The legislature may also limit the application of site plan review to certain types of development, such as commercial or high density residential projects.

Localities are authorized to impose conditions on site plan approval, waive certain requirements (if not needed to protect the public), require the reservation of parkland or require the payment of a sum of money in lieu thereof, and require the posting of a performance bond to secure the completion of improvements on the parcel. Local regulations are to specify the

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[84] Grandview, Missouri, Subdivision Ordinance § 27.51.
[85] *Id*. §§ 27.55 – 27.58.
[86] *See* Thomas R. McKeon, *Comment: State Regulation of Subdivisions: Defining the Boundary between State and Local Land Use Jurisdiction in Vermont, Maine and Florida*, 19 B.C. Envtl. Aff. L. Rev. 385 (1991).
[87] 10 V.S.A. §§ 6026,6083 (1984 & Supp. 1991).
[88] Idaho Ann. Code § 50-1301.
[89] *See* Groh v. County Commissioner of Washington Cnty., 245 Md. 441 (1967).
[90] N.Y. Gen. City Law § 27-a; N.Y. Town Law § 274-a; N.Y. Village Law § 7-725-a.

elements or features to be represented on site plan drawings and the standards to be applied to guide review by the planning board.

Local legislatures have considerable flexibility to regulate development through site plan review. Although site plan review is most often reserved for non-residential or multi-family residential development, site plan review can also be required for any development proposals in floodplain zones, in areas with steep slopes, or in historic preservation districts. More stringent review procedures can apply to applications that have major environmental impacts than apply to those that may only slightly alter the environment.

Many states authorize local governments to use the local site plan review process to protect natural resources and preserve open space. Some states authorize localities to consider possible environmental and aesthetic impacts as part of the review process, while other states require local legislatures to include standards to protect the environment in site plan regulations.

Site plan regulations may require open spaces and green spaces of adequate proportions. In New Hampshire, local legislatures are authorized to provide for open spaces, as well as green spaces, in their site plan regulations. The site plan review statute authorizes local planning boards to provide for the harmonious and aesthetically pleasing development of the locality and its environs.[91] New Jersey's site plan statute requires local governments to adopt local standards to preserve existing natural resources on the site, and to insure adequate screening and landscaping.[92] Other provisions of the New Jersey statute promote flexibility and economy in site plan layout and design.

Greenfield, Massachusetts, has adopted a Major Development Review ordinance, which addresses the size of use rather than type of use. [93] The ordinance is applied when uses exceed specified thresholds. The generation of vehicle trips per day is a defining criterion. Among the conditions that can be imposed by the permitting authority are provisions for buffer zones, stormwater management, and open space.

The Polk County, Iowa code contains a Resource Protection and Site Performance Standards ordinance which is intended to "provide for the protection of natural resources before, during, and after the development process," while also efficiently integrating new development into the community.[94] Resources are defined to include floodplains, mature and young woodlands, drainageways, wetlands, and native prairies. The ordinance provides guidelines for determination, protection level, design standards, mitigation, and regulations for the listed resources.

Typically, minimum open space requirements are set forth in local zoning regulations. As part of the site plan review process, the planning board is guided by these minimum standards. Some localities, however, retain considerable discretion to determine an appropriate reservation of open space on a case-by-case basis. An East Providence, Rhode Island, ordinance

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[91] N.H. Rev. Stat. § 674:44.
[92] N.J. S.A. § 40:55D-41.
[93] Greenfield, Massachusetts, By-Laws, § 7-12.
[94] Polk County, Iowa, Code Article VII, Division 7000.

requires preliminary site plans for planned unit developments to include "plans for the ownership, maintenance, and preservation of" open space.[95] An objective of the ordinance is "to encourage the provision of open space and public access and give due consideration to the quality and design of landscaping."[96] As part of the development approval process, the local legislature has authority to negotiate with the developer for open space set-asides. Ultimately, to insure that parts of the parcel remain "open," the developer is required to either: 1) retain title and agree to preserve the open space; or 2) convey title to the open space to the locality or a nonprofit conservation organization. The ordinance further provides that any agreement to conserve open space by easement must "insure that the open space [will] never be developed for other than the intended uses and not be built upon or developed for accessory uses such as parking or roadway."

By requiring that natural resources be depicted on site plan drawings, localities can protect these resources as part of the site plan review process. In Martin County, Florida, local regulations require that site plan drawings show the location of watercourses, water surfaces, ditches, wooded areas, swamps, marshes, wetlands, tidal lands, and mangroves. Additionally, the locations, dimensions, and areas of all land proposed to be reserved for park or playground purposes, or other public use must be represented in the site plan.[97] According to the Code of the City of Steamboat Springs, Colorado, site plans must identify riparian areas, watercourses, wetlands, floodplains and floodways, as well as significant natural features, such as rock outcroppings, mature vegetation, and a specific delineation of all trees exceeding one foot in height.[98]

Environmental Impact Review and Conditions

A number of states have adopted statutes modeled after the National Environmental Policy Act (NEPA)[99]: Arkansas, California, Connecticut, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, South Dakota, Virginia, Washington, and Wisconsin, along with the District of Columbia and Puerto Rico.[100] All these statutes apply to state agencies, requiring them to conduct environmental reviews on their actions that may have an adverse impact on the environment. Less than half of them apply to local governments as well.

North Carolina's statute[101] modeled on NEPA applies to state agencies but also authorizes local governments to require the submission of impact statements for major developments in some circumstances. Minnesota's state Environmental Quality Board[102] includes five citizens and the heads of 10 state agencies. The board is authorized to create

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[95] East Providence, Rhode Island, Revised Ordinances Chapter. 19, Article. V, § 19-364j.
[96] *Id*. § 19-361(b)(7).
[97] Martin County, Florida, Code § 33-73(d)(2)(k-q).
[98] Steamboat Springs, Colorado, Code § 26-65 (d) (5).
[99] 42 U.S.C.§§ 4321 *et seq.*
[100] *See* David Sive and Mark A. Chertok, "*Little NEPA*'s" *and Their Environmental Impact Assessment Processes* (American Law Institute 2001); Kenneth A. Manaster and Daniel P. Selmi, State Environmental Law § 10A:2 (West 2003).
[101] N.C. Gen. Stat. §§ 113A-1 *et seq.*
[102] Minn. Stat. Ann. § 116C.

environmental plans and to review proposed projects that have significant environmental impacts. Under state law, local governments must consider the economic and sociological effects of proposed projects along with their environmental consequences, and must consider mitigation measures.[103] Washington's State Environmental Policy Review Act[104] is intended to provide comprehensive review of development proposals in conjunction with the provisions of the state's Growth Management Act and Local Project Review Act. Some Washington communities have adopted environmental rules by reference, while others have adopted procedures and policies supplementing the requirements of the state law.

Under California's Environmental Quality Act,[105] local agencies must prepare an environmental impact report "on any project that they intend to carry out or approve which may have a significant effect on the environment." Hawaii statutes require state agencies and local governments to review environmental impacts of actions involving public lands or funds.[106] Massachusetts requires local governments to report on mitigation measures and alternatives to proposed actions, as well as on anticipated environmental impacts.[107]

Some municipalities create environmental boards to serve as advisory boards to their decision-making bodies. The Voorhees Township, New Jersey, Environmental Commission[108] compiles a list of publicly and privately owned open spaces including marshes, swamps and other wetlands, conducts research into possible uses for open spaces, informs the public about conservation programs, manages donated or purchased lands for conservation purposes, and makes recommendations concerning open space preservation, water resource management, air pollution control, solid waste management, noise control, soil and landscape protection, environmental appearance, marine resources, and flora and fauna. The commission reviews all site plan and subdivision applications and advises the planning and zoning boards on the proposed project.

Other municipalities grant decision-making power to local environmental boards. The Hillsborough County, Florida, Natural Resources and Landscaping Appeals Board is the county commissioner's delegated body to hear appeals of hearing officer decisions for special exceptions of the Natural Resources and Landscaping Regulations of the Land Development Code.[109] The Chowchilla, California, Environmental Assessment Review Committee reviews all proposals initiated in the city.[110] The committee studies each project and determines whether the project will have a significant effect on the environment. If the Committee issues a negative declaration, an environmental impact report must be completed and filed prior to the project's approval by the planning commission.

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[103] Minn. Stat. Ann. §§ 116D.01 *et seq.*
[104] R.C.W. 43-21C.120.
[105] Cal. Pub. Res. Code §§ 21000 *et seq.*
[106] Haw. Rev. Stat. §§ 343-1 *et seq.*
[107] Mass. Gen. Laws Ann. Chapter 30 §§ 61 *et seq.*
[108] Voorhees Township, New Jersey, Code § 32.035.
[109] Hillsborough County, Florida, Land Development Code § 9.03.07.
[110] Chowchilla, California, Code § 19.04.

The city of Virginia Beach, Virginia, has given its Chesapeake Bay Preservation Area Board jurisdiction over lands designated as the Chesapeake Bay Preservation Area.[111] The board consists of nine members appointed by the city council for three-year terms. The Chesapeake Bay Preservation Area Ordinance[112] grants the board the power to issue variances, based on the evaluation by the city manager, so long as the board holds a public hearing within 60 days of receiving the application. The board may grant the variance if the issuance does not confer special privileges on the applicant, is the minimum necessary to afford relief, does not conflict with the general plan set forth by the ordinance, and will not lead to a net increase in non-point source pollution or negatively affect water quality.

[d] Dedication of Open Space and Incentive Zoning

As part of the process of reviewing and approving land development projects, local administrative bodies may be empowered to secure open space, recreational, and other natural resource benefits for the community. Their authority to do so must be contained in local law and such local laws must be authorized by the state statutes that delegate land use authority to local governments. Conditions imposed on development projects may require developers to dedicate land to the community for public use, reserve land for the recreational use of the projects' residents, or contribute cash in lieu of land dedication. In some states, local legislative bodies are authorized to award extra, bonus density to developers in exchange for their agreement to preserve natural resources or provide recreational facilities. In other states, developers may be permitted or required to cluster permitted density on a portion of the site preserving natural resources on the remainder. Clustering is discussed in § 3.02[2][e] below.

The approach taken to securing open space benefits from the developers of privately owned land varies from state to state. Some state statutes expressly permit the local planning board to require the dedication of park lands or a fee in lieu of such dedication.[113] Some require dedication or set-asides with subdivisions.[114] Some state statutes are silent or vague regarding the matter.[115] Courts vary in their interpretations of state enabling statutes.[116] A few states expressly prohibit as confiscatory the dedication of land or fees to achieve open space objectives.[117] In some instances, the state distinguishes between dedication, which is permitted, and impact fees, which it considers to be an invalid tax and not a proper exercise of regulatory authority under the police power.[118] In other states, impact fees may be specifically permitted under taxing authority delegated to the locality.[119]

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[111] City of Virginia Beach, Virginia, Code § 2-452.
[112] City of Virginia Beach, Virginia, Code Appendix F (Ord. No. 2006 11-6-90; Ord. No. 2790 12-9-03).
[113] Conn. Gen. Stat. § 8-25(a); Nev. Rev. Stat. § 278.4979; N.C. Gen. Stat. § 160A-372.
[114] Mont. Code Ann. § 76-3-606.
[115] F.S.A. § 163.3161(3); Ind. Code §§ 36-7-4-700 to 36-7-4-713.
[116] *Compare* Enchanting Homes, Inc. v. Rapanos, 4 Mich. App. 109, 143 N.W.2d 618 (1966) *with* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury, 160 Conn. 109, 273 A.2d 880 (1970), and Black v. City of Waukesha, 125 Wis. 2d 254, 371 N.W.2d 389 (Ct. App.), *review denied*, 125 Wis. 2d 585, 375 N.W.2d 216 (1985).
[117] *See, e.g.*, Mass. Gen. Laws ch. 41, § 81Q.
[118] *See* Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962).
[119] *See, e.g.*, Cherry Hills Farms v. City of Cherry Hills Village, 670 P.2d 779 (Colo. 1983).

In New York, state statutes authorize planning boards to insure that the recreational needs of the occupants of residential subdivisions and site plans are met by requiring land to be set aside where a municipal study shows that there is now or will be an unmet need for recreational facilities in the municipality.[120] The planning board may require a financial contribution in lieu of a land reservation only where it specifically determines that, in a particular case, the land subject to subdivision or site plan review is not of a sufficient size or adequate character to create a suitable recreational area for the subdivision's occupants. The statutes that allow for the reservation of parkland or money in lieu thereof were adopted to meet the need for recreational facilities of the residents of the residential development and their guests, not to provide recreational facilities for the public at large. This was clarified by the Court of Appeals when it set aside a local requirement that the reserved recreational area be deeded to the town for park purposes.[121]

In *Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*, the court decided that a municipality cannot adopt a general recreational fee schedule and arbitrarily require developers to pay the established fee.[122] The court held that a planning board must make two findings before it may exercise its authority to require a payment in lieu of setting aside park or recreation lands under the Town Law § 277(1). First, the planning board must determine whether a "proper case" exists for imposing the requirement by evaluating the present and future needs for park and recreational facilities in the town. Second, the planning board must determine whether the proposed plat contains adequate and suitable space for recreational facilities. Only if it determines that a "proper case" exists and that the plat does not contain such space may the planning board require the developer to pay money as a substitute.

The courts and the legislature in New York have made it clear that the authority to require land reservation for recreation or the payment of money in lieu thereof, must be exercised on a case-by-case basis and may not be administered under fixed formulas applicable to all development. In each case, a two step process must be followed. First, the planning board must make a determination that the residential development under review will add to the recreational needs of the community. This finding must be based on an evaluation of the present and anticipated future recreational needs of the municipality as determined by estimates of the projected population growth to which the particular subdivision will contribute. Second, based on a review of the particular plat before it, the planning board must determine whether it contains adequate and suitable space for recreational facilities. Only if the board finds that such space does not exist may it require the developer to make a cash contribution. All such contributions must be deposited into a trust fund to be used by the municipality exclusively for recreational purposes.

Some states allow their municipalities to impose impact fees on developments directly for infrastructure and amenities needed to support the development and its residents. The Lincoln,

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[120] Subdivision provisions are found in N.Y. Village Law § 7-730(4), N.Y. Town Law § 277(4), N.Y. Gen. City Law § 33(4). Parallel provisions regarding site plans are found N.Y. Village Law § 7-725-a, N.Y. Town Law § 274-a, and N.Y. Gen. City Law § 27-a.

[121] Kamhi v. Planning Board of the Town of Yorktown, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983).

[122] 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990).

Nebraska municipal code requires private developers to pay impact fees to cover infrastructure costs.[123] This ordinance states that "[i]t is only proper that those property owners who benefit from the expansion of public facilities for new development should bear their proportionate share for the cost of that expansion." The objective of the provision is to ensure adequate water, wastewater treatment, streets and parks given the shortage of funds for providing these services and amenities. The ordinance exempts certain developments from the fees based on the properties' location and the income-level of prospective residents.

While providing adequate open space has been generally considered by the courts to be a valid state police power objective by the courts,[124] the scheme must be a reasonable one. The relationship between the dedication of land or fees and the proposed development should be carefully designed. If the amount of required land or fees is considered unrelated to the development and its likely impacts (*i.e.*, if there is not a sufficient nexus), the courts may find that the dedication is a tax on development instead of a land regulation and thus beyond the authority granted by the state enabling legislation.[125] The dedication could be challenged as a taking or as presenting a due process or equal protection claim. In any of these instances, a nexus requirement is present.[126] The test used by the Illinois courts is whether the need for the open space to which the property or fee is dedicated is "specifically and uniquely attributable" to the development.[127] There must be a direct relationship between the amount of land dedicated and the needs of the new residents, and the dedicated land must directly serve the project residents. The Illinois text is considered by some to represent the conservative approach among states which allow open space dedications.[128]

The California courts employ a more liberal formulation: the amount of the fee or property must bear a "reasonable relationship" to the number of users attributable to the new community.[129] Some commentators have questioned whether this would withstand the recent takings test articulated by the U.S. Supreme Court in *Nollan v. California Coastal Comm'n.*[130] One seminal case on the subject requires that there be a rational nexus or reasonable connection between the fee or property requested and the need created by the new development.[131]

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[123] Lincoln, Nebraska, Code § 27.82.020.

[124] *See* Land Use and Zoning Controls, Ch. 9 (Matthew Bender) and cases cited therein.

[125] *See, e.g.*, Newport Bldg. Corp. v. City of Santa Ana, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962).

[126] *See generally* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976), *aff'd*, 68 Ill. 2d 352, 12 Ill. Dec. 185, 369 N.E.2d 892 (1977).

[127] Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799, 802 (1961); Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976), *aff'd*, 68 Ill. 2d 352, 12 Ill. Dec. 185, 369 N.E.2d 892 (1977).

[128] *See, e.g.*, Blaesser & Kentopp, *Impact Fees: The ``Second Generation,''* 38 Wash. U. J. Urb. & Contemp. L. 55, 103–04 (1990); Holmes v. Planning Bd. of Town of New Castle, 78 A.D.2d 1, 15–19, 433 N.Y.S.2d 587, 597–98 (1980).

[129] *See* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (dedication of road widening improvements); Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (fees for recreational purposes), *appeal dismissed*, 404 U.S. 878 (1971).

[130] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). *See, e.g.*, Blaesser & Kentopp, *Impact Fees*: *"The Second Generation,"* 38 Wash. U. J. Urb. & Contemp. L. 55 at 100 (1990).

[131] Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). *See also* Schwanke, *Local Governments and Impact Fees*, 4 J. Land Use & Envtl. L. 215, 227 (1989), and cases cited therein.

Where local governments are permitted to provide zoning incentives to developers in exchange for the provision of amenities such as recreation and open space benefits, legal challenges to open space dedication regimes are less likely. A few examples of communities using such authority follow:

The Lancaster County, Nebraska, zoning resolution allows development under an approach it calls the Community Unit Plan.[132] This plan includes impact fees for developers and development bonuses for developments that preserve the rural character of the site, natural habitats, natural environmental features, and existing drainage courses. Developers may receive density bonuses of up to 20% for conserving energy, protecting environmentally sensitive areas, and for maintaining agricultural lands. The zoning ordinance of Gallatin County, Montana, provides density bonus incentives if the developer conserves a specified amount of open space.[133] To obtain the density bonus, the developer must formally apply by submitting a site plan indicating the location and amount of open space conserved, its existing vegetation, wildlife, and riparian areas, property lines, topographic information and other site characteristics. The planning staff decides if the proposed development meets the county's requirements.

Under an open space incentive program adopted by New Berlin, Wisconsin, conservation subdivisions that include the minimum open space may be eligible for a density enhancement.[134] If 55% of the land is dedicated to open space, a density enhancement of 10% more building over that allowed by the zoning requirements is allowed. A 60% dedication allows for a 20% density enhancement. In Suffolk, Virginia, a density bonus is awarded for the provision of public parks, open space, agricultural and critical area preservation, retirement housing, the redevelopment of existing strip centers, traditional neighborhood development, and cluster or hamlet development. An incentive zoning point table is used to determine the maximum number of development points that may be awarded for a given category.[135] In Milton, Florida, increased height and floor area are granted in exchange for the provision of public access along a development's waterfront, for pedestrian-oriented features, public recreational and entertainment features, on-site parking screened from public view, creative open space landscaping with perpetual maintenance, energy-conservation measures, underground utilities, and screening of all utilities.[136]

Rochester, Minnesota, allows private developers density bonuses who provide open space amenities and affordable housing.[137] In Lakewood, Colorado a density bonus is granted in exchange for: increased usable open space, enhancing landscaping and ground over, improved visual impact, increased plant materials, and any design feature that significantly improves the quality of the living environment.[138] Somerville, Massachusetts, development incentives are provided to developers who provide and maintain public open space.[139]

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[132] Lancaster County, Nebraska, Code § 14.003.
[133] Gallatin County, Montana, Code § 76-2-201.
[134] New Berlin, Wisconsin, Development Code § 18.05(E).
[135] Suffolk, Virginia, Code of Ordinances § 31-409.
[136] Milton, Florida, Code of Ordinances Article III § 12.5.
[137] Rochester, Minnesota, Code § 62.600.
[138] Lakewood, Colorado, Code § 17-6-4.
[139] Somerville, Massachusetts, Zoning Ordinance §17.4.

[e] Cluster Development

Normally, land is subdivided and developed in conformance with the dimensional requirements of the local zoning ordinance which often require single family homes to be on lots of a certain minimum size such as one or two acres. Zoning typically requires that the entire parcel be divided into lots that conform to these minimum lot sizes and that buildings on subdivided lots conform to rigorous setback, height, and other dimensional requirements. So, for example, in a half-acre residential zone, a property owner will be required to lay out lots of no less than a half acre in size and to place homes on them that are at least 30 feet from the front lot line and no more than 35 feet high.

Under cluster development, the locality permits a land developer to vary these dimensional requirements. This can allow, for example, homes to be placed on quarter-acre lots in a half-acre zone. The land that is saved by this reconfiguration may then be left undeveloped to provide open space or serve the recreational needs of the residents of the development. Often this land is owned and maintained, if necessary, by a homeowners' association.

Cluster development is a land use tool that can be used to protect open space, the rural character of a community, and other critical natural resources while still providing an opportunity to develop land. Cluster development also offers economic advantages by reducing the need for new roads, water and sewer lines, and public services such as snow removal or road maintenance. By helping to address community open space needs, there is often less need for local governments to purchase open space or development rights. Cluster development may also lower site development costs, encourage affordable housing development, and create safer traffic patterns by reducing the number of access points to adjacent roads.

For the developer, clustering may permit the retention of density that would otherwise be lost because of steep slopes, rocky outcrops, or other conditions; may reduce infrastructure costs such as road paving or utility line extensions; and may increase flexibility in building design and layout. For the new residents and the community-at-large, clustering encourages the preservation of natural resources such as lakes, wooded areas, wetlands, and open space generally, and may allow for a variety of housing types, such as townhouses or other multiple dwellings.

Clustering is usually allowed by local law adopted by the legislative body authorizing a planning or other review board to approve clustered developments. Variations in practice are many. Clustering may be voluntary or mandatory. It may allow development on slightly smaller lots or allow permitted density to be arranged in attached or multiple-family buildings. Clustering may be limited to certain zoning districts or geographical areas within the community and be used to achieve objectives ranging from preserving a sense of open space, to protecting critical environmental functions, to providing affordable housing.

Cluster development can achieve public benefits in addition to the preservation of open space. The zoning law of North Haven, Connecticut, contains standards for development projects to qualify for a special permit for clustering. These include the permanent preservation

of areas of ecological significance and the protection of wetlands, streams, rivers, aquifers, potential municipal water supplies, and ponds as natural resources.[140] Cluster development may be used to "encourage innovation in land use and variety in design, layout, and type of structures constructed . . ."[141] In Atlantic City, New Jersey, one of the purposes of cluster development is to encourage "[a]n efficient use of land resulting in smaller networks of utilities and streets and thereby lower development and housing costs."[142] Among the purposes of cluster development in Lewiston, Maine, is the protection of wildlife cover and other natural land features. Developers must consider scenic vistas, natural topography, and potential solar access when selecting building sites.[143]

Local laws may authorize cluster development on parcels of land of a particular size or type, and mandate minimum open space set-asides. For example, in Montgomery County, Maryland, the purpose of cluster development is to "provide greater flexibility in achieving a compatible mixture of agricultural and residential uses, and to protect scenic and environmentally sensitive areas without jeopardizing farming or other agricultural use[s] on a portion of the property or on adjacent or nearby properties."[144] These regulations permit development of residential areas that are carefully located, that are designed to reduce their perceived intensity, and that preserve agricultural lands, so long as a minimum of 60 % of the site is protected as open space.[145] In Seymour, Connecticut, only parcels consisting of more than 25 acres and located entirely within residential districts are eligible for cluster development.[146] Norwalk's Conservation Development ordinance encourages clustered development that protects natural resources, including wetlands, marine and wildlife habitat and other areas with conservation values.[147]

New Hampshire state statutes permit cluster development and encourages its use as an innovative land use control.[148] Under this authority, the Town of Peterborough, New Hampshire, adopted a cluster development provision in its zoning code which seeks to "permit greater flexibility in the design of housing projects; discourage development sprawl; facilitate the economical and efficient provision of public services; [and] preserve more usable space, agricultural land, recreational areas, and scenic vistas."[149] Peterborough permits residential clustering as a special exception in its General Residence and Rural Districts and as-of-right in its Retirement Community District. The maximum number of dwelling units permitted in a clustered development may not exceed the density allowed in the zoning district where the parcel is located. The town's cluster development provision requires that a minimum of 30% of the total land area be dedicated as common open space.[150] To insure that the open space remains undeveloped, title to the open space must be deeded to a neighborhood association or to the town

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[140] North Haven, Connecticut, Zoning Regulations § 4.3.3.
[141] Michigan Zoning Enabling Act, Mich. Comp. Laws § 125.584b (2).
[142] Code of the City of Atlantic City, New Jersey, § 163-154 (B).
[143] Lewistown, Maine, Code of Ordinances, Art. VII, § 6.
[144] Montgomery County, Maryland Code § 59-C-9.51.
[145] Montgomery County, Maryland, Code § 59-C-9.52.
[146] Seymour, Connecticut, Town Code, Appendix A: Zoning, §10.
[147] Town of Norwalk, Building Zone Regulations, Art. 41,§ 118-410.
[148] *See* N.H. Rev. Stat. Ann. § 674:21.
[149] Code of the Town of Peterborough, New Hampshire, § 245-26(A).
[150] *See* Code of the Town of Peterborough, New Hampshire, § 245-26(C)(8).

or to a conservation organization. The regulations require that the development be situated so as to minimize alteration of the parcel's natural features and to protect the surrounding landscape and the character of adjacent development.[151]

Minimum open space requirements can be established to retain the rural or suburban character of a community, or to meet the development and conservation needs of more densely populated areas. The town of Meriden, Connecticut, requires that the total ground area occupied by buildings, structures, and parking lots in planned residential cluster developments not exceed 20 %, preserving at least 80 % of the site as open space.[152] In the city of Minneapolis, Minnesota, not less than 40 % of land in each cluster development must be designated as open space.[153] This ordinance defines "open space" broadly to include landscaped yards, water bodies, wetlands, recreation areas, and common parking lots.

The Critical Environmental Zone program in Mapleton, Utah includes an allowance for clustering as well as provisions that protect ridgelines and wildlife habitat. The Critical Environmental Zone overlay includes areas with steep slopes, flood hazards fragile soils, or wildfire hazards. The allowed density within the Critical Environmental Zone is one single family dwelling per three acres of buildable area and one lot per twenty acres of non-buildable area. With the recommendation of the planning commission and the approval of the city council, a developer may reduce lot size requirements and cluster the dwellings on one acre lots. Clustering is approved based on the following conditions: 1) ridgeline protection is enhanced, 2) the risk of environmental hazards is not increased or is reduced and 3) the cost of infrastructure to the city is reduced. If clustering is approved, the right to the ownership and maintenance of open space in the site plan is reserved for the city or a non-profit organization.

The Johnson County, Iowa, zoning ordinance provides for clustered subdivisions using conservation easements to provide permanent protection of the preserved environmental resources. The purpose of the provision is to "allow development that will meet future growth projections while preserving and protecting agriculturally, environmentally, and historically significant features, and other open areas of the County."[154] The ordinance contains provisions for maintenance of conservation easements and includes a process for acquiring a density bonus as long as no less than 50% of the parcel is designated open space or limited use agriculture. Easement and site plan requirements consider topography, drainage, topographical features, areas for mitigation and preservation, existing zoning and land use, and approximate density of residential uses.

Laws authorizing cluster development can also specify how open space will be maintained and controlled. A recently enacted Montana statute requires that open space be preserved through an irrevocable conservation easement, prohibiting further division of the parcel.[155] In the city of Fall River, Massachusetts, open space shall be either "conveyed to a

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[151] *See* Code of the Town of Peterborough, New Hampshire, § 237-22.
[152] Meriden, Connecticut, Town Ordinance, Art. VII, § 213-26.3(F).
[153] Minneapolis, Minnesota, Code of Ordinances, Title 20, § 536.20.
[154] Johnson County, Iowa, Code § 05-16-02.
[155] Mont. Code Ann. § 76-3-509(1)(c).

community association . . . conveyed to a non-profit . . . [or] conveyed to the city at no cost."[156] The Town of Seymour, Connecticut, requires that development rights to open space land be conveyed to the town.[157] In Thornton, Colorado, developers may preserve open space through dedication to either the town or a homeowner's association, or by imposing deed restrictions on individual parcels.[158] Financial guarantees may also be required to insure that the open space and related facilities are properly maintained.[159]

New York law allows local legislatures to authorize their planning boards to waive zoning standards such as minimum lot sizes, height requirements, and set backs to "preserve the natural and scenic qualities of open lands."[160] The Bedford, New York, town board authorized its planning board to use clustering to preserve "a unique or significant natural feature of the site, including but not limited to a vegetative feature, wildlife habitat, surface water supply, underground aquifer, endangered species, rock formation, and steep slopes" and to protect "a unique or significant feature of the man-made environment of the site, including but not limited to a building, structure, or artifact of architectural, historical, or archeological value."[161]

The Town of Stanford, New York, may require residential developments to be clustered to protect agricultural soils, to preserve farming, and to maintain its rural way of life.[162] The Southampton, Long Island, New York, zoning resolution includes an agricultural overlay district. Within this district, an owner has the option of clustering the permitted dwelling units on a small portion of the land and deeding the remaining land to the community to be used as an agricultural land trust.[163]

New York statutes do not specify a method of determining the permitted project density to be clustered. The law states that such density must not exceed the number which could be permitted, in the planning board's judgment, if the land were subdivided into lots conforming to the requirements of the zoning ordinance and conforming to all other applicable requirements. Local governments must be consistent in their approach to avoid uneven, arbitrary, and discriminatory treatment of applicants for cluster subdivision approval. The local law giving the planning board authority to cluster must contain sufficient guidelines to insure that similar situations are treated in a similar fashion.

Cluster zoning has been upheld as a legitimate exercise of the police power.[164] Many state enabling acts specifically permit cluster zoning, often by allowing planning boards — once authorized by local governing bodies — to approve cluster zoning as part of their subdivision approval authority.[165] Where such authorization in the state enabling act is not explicit, care

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[156] Fall River, Massachusetts, Code § 86-322.
[157] Seymour, Connecticut, Town Code, Appendix A: Zoning, § 10.
[158] Code of Thornton, Colorado, § 18-424 (c).
[159] City of Nashua, New Hampshire, Code § 16-346 (8).
[160] N.Y. Town Law § 278; N.Y. Village Law § 7-738; & N.Y. General City Law § 37.
[161] Code of the Town of Bedford, New York, § 107-50.1.
[162] Town of Stanford, New York, Code § 140-24.
[163] Southampton, New York, Zoning Ordinances, chs. 330-47 to 330-51.
[164] Zoning and Land Use Controls § 12.01 [3] (Matthew Bender) and cases cited therein.
[165] *See, e.g.*, Ill. Ann. Stat. ch. 24, para. 11-13-1 *et seq.;* Ind. Code § 36-7-4-713; Ohio Rev. Code Ann. § 519 *et seq.* and § 713 *et seq*.

must be taken to determine whether the governing body has or can grant such authority. In *Chrinko v. South Brunswick Township Planning Bd*., the court upheld the planning board approval of a clustered subdivision plan where the state's enabling act did not explicitly allow for clustering. [166] *But see Niccollai v. Planning Bd. of Township of Wayne*.[167] Such planning board approval has also been held *ultra vires* where not permitted under the local zoning ordinance and not explicit in the enabling act.[168] Once such authority is granted to the planning board, its approval is often discretionary unless specifically limited by the local governing body. This is not universally the case.[169]

[f] Planned Unit Development

Under most local zoning ordinances, different types of land uses are carefully separated from each other and the development of each parcel of land must meet numerous size and density requirements. These are strictly applied throughout each zoning district. The application of such standards prevents the mixing of land uses within the same development and ensures uniformity in the appearance of developments along streets and within neighborhoods.

To achieve greater flexibility, some localities have added planned unit development (PUD) provisions to their zoning ordinances. Under some PUD laws, the owners of several adjacent parcels may apply for a special permit to create a higher density, mixed-use development, with considerable design flexibility. This PUD approach permits developers to combine several smaller parcels into one large parcel and to locate improvements on appropriate portions of the larger parcel to provide more cost-effective development and to conserve the larger site's sensitive environmental features. Other PUD laws operate more like clustering provisions, allowing the developers of single parcels to cluster mixed-use development on appropriate portions of their sites, leaving the remainder as open space.

Planned Unit Development provisions and cluster laws both emerged in the middle of the last century to respond to a new trend toward large-scale development projects. These innovative techniques allowed developers and planners to provide for flexibility in building and site design while allowing significantly-sized developments to proceed.[170] Local authority to adopt PUD provisions as part of their zoning is either found as an implied power under the delegation of the general zoning authority or enabled by a specific state statute.[171] An example

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[166] 77 N.J. Super. 594, 187 A.2d 221 (Law Div. 1963).
[167] 148 N.J. Super. 150, 372 A.2d 352 (App. Div.), *cert. denied*, 75 N.J. 11 (1977).
[168] *See* Hiscox v. Levine, 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961) (decided prior to 1963 revisions in New York State law).
[169] *See* Rouse v. O'Connell, 78 Misc. 2d 82, 353 N.Y.S.2d 124 (Sup. Ct. 1974).
[170] *See* Patrick J. Rohan, Eric D. Kelly, Gen. Editors Zoning and Land Use Controls (Matthew Bender, 1991), §32.01[1], for a detailed history on the emergence of PUDs.
[171] Conn. Gen. Stat. Ann. §8-13(b), *et seq*.; Kan. Stat. Ann. §§12-728a(2),(3), 12-733: Colo. Rev. Stat. §§24-67-107, 24-67-108; Mont. Code. Ann. §11-3842 *et seq*.; N.Y. Town Law §261-C, N.Y. Village Law §7-703-A, N.Y. Gen. City Law §81-F; N.J. Stat. Ann. §40:55 D-1 *et seq*.; Ohio. Rev. Code. Ann. §§ 303.022, 519.021; Pa. Stat. Ann. §53:10702 *et seq*. A model statute is found in the APA Growing Smart Legislative Guidebook, 2002 edition, § 8-303, p. 8-77 *et seq*.

of a local PUD law adopted under the state zoning enabling act is the Planned Development and Mixed Use Planned Development Ordinance of East Greenwich, Rhode Island.[172]

PUD ordinances evidence much variety from place-to-place. They may offer developers incentives to provide a range of public benefits or simply require that such benefits be provided. PUDs can be shaped to fit rural, suburban, or urban neighborhoods and be targeted to achieve a number of objectives, including environmental protection, pollution prevention, and open space preservation. PUDs vary also with respect to the degree of flexibility provided to local review boards in approving developers' proposals. Quite often PUDs operate like an overlay district. In this instance, landowners are allowed to develop their land pursuant to the underlying, traditional zoning district provisions or, alternatively, to petition the community to develop their land, individually or in conjunction with adjacent owners, as a planned unit development.

This variety is illustrated by the following examples of community innovation using the PUD device.

1. In Windsor, Vermont, the PUD provisions aggressively protect the environment while offering developers the opportunity to design projects that mix types of housing or that mix residential, commercial, and retail uses. The Windsor law requires that 50% of the land involved be left as open space for any parcel over 25 acres. It establishes two approaches: a standard mixed use, PUD, option and an option called Planned Residential Development (PRD) that allows developers to mix single-family, attached, and multi-family housing types.[173]

2. Coralville, Iowa also adopted a PUD approach that establishes two types of PUD districts.[174] PUD-1 accommodates large, comprehensively planned developments that are likely to be created over time. PUD-2 accommodates projects for which the specific design of individual buildings and elements may be determined. Several PUD-2 projects may be incorporated in a single, larger PUD-1. Both types of PUDs are available to be used in three contexts: vacant land where conventional zoning may artificially limit or constrain good urban design; community development areas in need of rehabilitation or redevelopment, where flexibility in zoning may be required; and neighborhood contexts—areas in which sensitive project design is needed to protect property values of nearby owners. The Coralville ordinance was created to encourage innovation in project design that incorporates open space and other amenities and to insure the compatibility of developments with the surrounding urban environments. Applicants are required to submit a pre-petition concept plans that comply with stated performance standards including those related to open space preservation and protecting the adjacent natural and built environment.

3. The Longmont, Colorado, development code authorizes four types of special purpose PUD districts and one that may be applied as an overlay in existing residential, commercial, or industrial districts.[175] The four specific-purpose districts are: a Residential PUD, to achieve

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[172] East Greenwich, Rhode Island, Code Article VIII, adopted under the Rhode Island Zoning Enabling Act of 1991, R.I. Gen. Law Title 45-24.
[173] Windsor, Vermont, Zoning Regulations § 5.5.
[174] Coralville, Iowa, Code §165.33.
[175] Longmont, Colorado, Land Development Code § 15.03.060.

superior innovation in land use, neighborhood compatibility, high-quality architectural design, and environmental design, and to integrate resident-serving commercial uses within residential neighborhoods; a Commercial PUD, to accommodate consumer-oriented commercial uses that incorporate high-quality architectural design and well-planned and rational connections between structures, people, and automobiles; an Industrial PUD, to establish well-designed office and industrial parks; and a Mixed Use PUD, to facilitate the integration of residential, commercial, and light industrial development, incorporating high-quality architectural design, on parcels of sufficient size to support a self-sustaining project.

4. Temecula, California adopted a Planned Development Overlay (PDO) zoning district to provide the opportunity for mixtures of residential, retail, commercial, and office uses within a project site or within a single structure. The ordinance creates specific PDOs for a commercial area within the city; for a pedestrian-oriented small-lot transitional development between adjacent single-family and multi-family residential areas; for two mixed-use areas within the city; and for a 50-acre site outside the city center, which "envisages a symbiotic assemblage of possible uses, including a church and its associated administrative and ministerial structures, church-based schools, community-accessible recreational facilities, professional offices, medical support services, and supportive retail."[176]

5. PUD provisions often contain zoning incentives to encourage developers to propose projects that achieve their objectives. In St. Charles, Missouri, for example, the city council may approve a 20% increase in density in planned residential developments if the developer devotes areas to open space or uses creative design elements or landscaping. The project must comply with several performance objectives, including storm drainage management, landscaped parking, and development that allows shared access by adjacent properties.[177] In Universal City, Missouri, a density bonus of up to 20% may be awarded if the project design devotes a minimum additional 5% of the net development area to common open space and is improved with public pedestrian ways, bike paths, parkland, swimming pools, tennis courts, community centers, or club buildings. A density increase is also granted for creative site design and landscaping and for building groupings that take advantage of natural terrain to resolve existing on-site or off-site problems of stormwater run-off and erosion.[178]

6. Many PUD provisions are applicable only to parcels that exceed a certain size, such as 10, 20, or 50 acres. The Custer County, Colorado, PUD law applies to sites that exceed 35 acres in some cases and 80 in others. Cluster County's PUD standards for granting a permit include adequate water and sewer; adequate street and transportation improvements to accommodate traffic generated by the project; appropriateness of the development to the surrounding area; preservation of the county's rural character; avoidance or mitigation of adverse impacts on wetlands and wildlife; and landscaping, buffers, and screening with native plants and trees. Fifty percent of the PUD acreage must be dedicated perpetually as open space or agricultural production. Permit application is a three-phase process: sketch plan, including public hearings;

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[176] Temecula, California, Municipal Code Chapter 17.22.
[177] St. Charles, Missouri, Code § 156.180.
[178] Universal City, Missouri, Code § 34-40.7.

preliminary plan, which must consist of the entire concept of the PUD; and final plan, with final engineering and completed professional design of the PUD.[179]

PUDs must conform to the local comprehensive or master plan. In *Bridger Canyon Property Owners' Association, Inc. v. Planning and Zoning Commission*, a local homeowners' association challenged the local planning and zoning commission's conditional approval of a PUD application. In overturning the commission's PUD approval, the Supreme Court of Montana determined that the commission exceeded its authority when it approved the PUD, which failed to comply with the community's general plan for zoning.[180] Large scale, mixed use development with significant environmental benefits can easily be provided for in a comprehensive plan as a means of accommodating appropriate types of development.[181]

PUDs provide review boards with varying degrees of discretion in approving projects. In all cases, the legislative body must include sufficient standards so that PUD laws do not run afoul of standards regarding the unauthorized delegation of legislative prerogatives. The Great Falls, Montana, PUD law, for example, does not prescribe specific design, density, and setback requirements.[182] Instead, such matters are left to be negotiated between the developer and the planning board. The PUD ordinance provides that "PUDs are characterized by cluster developments and common open space. Only by proper design can the traditional values of privacy, light, air and ventilation be preserved. It is not practical to set specific standards that would be applicable to all PUDs for these items, but it is incumbent upon the developer and the Planning Board to consider these items in the design and review of the PUD."[183] In contrast to Great Fall's PUD provisions, the City of Robbinsdale, Minnesota, prescribes specific requirements such as minimum project size, required frontage, yard setbacks, height restrictions, and density bonuses.[184]

Most local governments require that the land to be developed as a PUD be under single ownership or be controlled by a single entity. For example, the City of Robbinsdale, Minnesota PUD provision states that the "property shall be in single ownership or under the management or supervision of a central authority or otherwise subject to such supervisory lease or ownership control."[185] This requirement allows the community to impose responsibility for establishing and maintaining the site's environmental features in a reliable fashion.

Several examples of PUD provisions that are particularly focused on environmental protection follow:

1. In Northport, Alabama, the PUD ordinance permits the Planning and Zoning Commission to require that the developer prepare an environmental impact assessment for the proposed PUD project.[186] The planning and zoning commission requires that the landowner prepare and submit

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[179] Custer County, Colorado, Zoning Resolution § 11.
[180] 890 P.2d 1268 (Mont. 1995).
[181] *See* Code of the City of Gurnee, Illinois, § 9.2(1).
[182] Code of the City of Great Falls, Montana, § 17.63.010.
[183] *Id*. § 17.63.140.
[184] Code of the City of Robbinsdale, Minnesota, § 530.05(5).
[185] *Id*. § 530.05(2)(a).
[186] Northport, Alabama, Code of Ordinances § 5-10.13.

for its review an environmental impact statement containing known natural, historic or archaeological sites, or other unique site characteristics which may be threatened by the proposed planned development.

2. The PUD provisions of Lenaxa, Kansas, require the preservation of natural features and the incorporation of open space. Specifically, "if natural habitats of significant value or environmentally sensitive areas are determined to exist, the Governing Body may require the area so defined to be left in an undisturbed state and adequately protected or incorporated into the design of the PUD as a passive recreation area with a minimum of improvements permitted."[187]

3. The Great Falls, Montana ordinance, while allowing discretion in approving projects, is very specific in encouraging the provision of open space and respecting environmental design standards. The PUD ordinance requires that the open space be protected by restrictive covenants or other legal agreements acceptable to the city of Great Falls.[188] With respect to environmental design, the ordinance requires the developer to submit a landscaping plan that protects existing natural features and vegetation by minimizing the impact of the PUD development on these resources.[189] The planning board may require measures to mitigate the PUD's impact on natural resources. Finally, the ordinance requires that the developer provide financial guarantees to the city to insure that the PUD is developed in accordance with the submitted plans and according to the construction schedule provided by the developer. If, for example, the approved environmental conservation plans are violated, the city can remedy the problem and charge the costs to the developer, using the financial guarantee.

4. The objective of the Planned Development Zoning District in the City of Sioux Falls South Dakota, is to:

> Encourage more creative, higher quality and more ecologically sensitive urban design with special consideration given to projects that incorporate desirable design features, including but not limited to underground parking, orientation or design to take advantage of solar energy, environmental preservation, historic preservation, handicapped accessible structures, unique use of open spaces or other desirable design features.[190]

To receive a development permit under this initiative, a developer must submit a comprehensive "development plan" to the planning commission for review. The submitted plan must comply with the County's comprehensive plan and with the guidelines of the ordinance.

[g] Transfer of Development Rights

Where authorized by state law to do so, localities can provide for the transfer of the right to develop property under current zoning provisions from one part of the community to another.

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[187] Lenexa, Kansas, Code § 4-1-B-20.
[188] Code of the City of Great Falls, Montana, § 17.63.140.
[189] *See id*. § 17.63.210.
[190] Sioux Falls, South Dakota, Code of Ordinances Chapter 15.45.

This technique, called the Transfer of Development Rights or TDR, is often used to preserve critical environmental areas, farms and forests, or valuable open spaces. A 1997 survey of 3,500 local governments and a review of planning literature found 107 TDR programs in 25 states.[191] The programs have been established in rural communities and in some of the country's largest cities, including New York and Chicago.

There are three basic elements to a TDR program: the sending district, the receiving district, and the TDR credits themselves. The sending district consists of the area to be protected from development. The receiving district is located where additional density can be absorbed and supported with existing or expanded infrastructure and services. The TDR credits are a legal representation of the abstract development rights that will be severed from property in the sending district and grafted onto property in the receiving district. The TDR credits are traded in a free market, although a TDR bank may be established to facilitate exchanges.[192] When a TDR credit is purchased from a property owner in the sending district, that property owner records a deed restriction prohibiting development on the property. The TDR credit can then be applied to property in the receiving district as a density bonus.[193]

TDR is one of a few land use techniques that truly is capable of making a basic adjustment in the large-scale pattern of land development in a community. In Chesterfield Township, New Jersey, for example, the TDR ordinance allows for the shifting of development pressure from agricultural, environmentally sensitive, or open space areas of the township to villages designated for growth.[194] The program allows the township to maintain its rural character while encouraging planned development and minimizing potential conflicts between farmers and non-farming neighbors. The Chesterfield program was set up under the Burlington County Transfer of Development Rights Demonstration Act.[195] The development rights are traded through a Transfer of Development Rights Bank, which is run through the New Jersey State Agriculture Development Committee.[196] This type of intergovernmental cooperation is needed, often, to provide local TDR initiatives the type of technical competence, scale of operations, and resources needed to be successful.

The comprehensive plan for the Long Island Pine Barrens in New York, as another example, allocates development credits to land in the fragile pine barrens aquifer, based on the land's development yield under local zoning, and greatly restricts development in these sending districts.[197] This TDR program was created under state legislation adopted in response to bitter division among stakeholders regarding future development over the aquifer.[198] The plan

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[191] *See* John B. Bredin, Transfer of Development Rights: Cases, Statutes, and a Model, 2000 APA National Planning Conference, available at http://www.asu.edu/caed/proceedings00/BREDIN/bredin.html.

[192] *See* Sarah J. Stevenson, "Banking on TDRs: The Government's Role as a Banker in Transferable Development Rights." 1999 Zoning and Planning Law Handbook (West 1999).

[193] For an article discussing the elements of a successful TDR program, *see* Tripp & Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Program,* in 1990 Zoning and Planning Law Handbook ch. 18 (Clark Boardman 1990) *reprinted from* 6 Yale L.J. on Regulations 2.

[194] King County Transfer of Development Rights Program website, http://dnr.metrokc.gov/wlr/tdr/bank.htm.

[195] N.J.S.A. § 40:55D-113 *et seq.*

[196] New Jersey Department of Agriculture, http://www.state.nj.us/agriculture/sadc/tdrbank.htm.

[197] Central Pine Barrens Comprehensive Land Use Plan, ch. 6 (adopted June 28, 1995).

[198] The Long Island Pine Barrens Protection Act, N.Y. Envtl. Conserv. Law §§57-101 to 57-137 (1997).

establishes receiving districts into which these development credits may be transferred. Developers who own land in these receiving districts may purchase credits from landowners in sending districts. Each purchased credit allows the developer to build one housing unit over that permitted by the receiving district's zoning. In this TDR program, a 52,500-acre sending district and a 47,500-acre receiving district were established that crossed the jurisdictions of three towns and two villages.

The receiving areas in this program are structured to provide a demand for credits in the receiving sites that exceeds the number of credits created in the sending sites by a ratio of 2.5 to 1. This ratio was calculated to create sufficient competition to insure an active market for the development credits in the sending districts. The state legislation creating this program established a TDR bank, funded by an allocation of five million dollars to provide an initial market for the credits. The bank is authorized to purchase credits from owners in sending districts and sell them to owners in receiving districts.

Another illustrative TDR program is operating in Sarasota County, Florida. This TDR program was enacted for the purpose of preventing sprawl and preserving open space, agricultural lands, and environmentally sensitive areas.[199] Under the program, there are two sending overlay zones: a Residential Sending Zone (RSZ), and a Conservation Sending Zone (CSZ). For a property to be designated as a RSZ, the parcel must be: (i) in a platted subdivision and fail to conform to the county's development regulation because of a lack of paved streets or drainage, or some other deficiency; (ii) in an environmentally sensitive area, including lands identified by the county as having high ecological value; (iii) in an area which is needed for agricultural, open space, or other conservation use; (iv) have historical or archeological significance; or (v) be located on a barrier island.[200] For a property to be designated as a CSZ it must contain at least 500 acres and either (i) be designated by the county as a site of high ecological value; (ii) be in a flood hazard zone; (iii) be in a storm surge area; or (iv) contain an important watercourse with associated wetlands. Sarasota County's TDR ordinance established four receiving overlay zones which allow urban-style densities for landowners or developers who acquire development rights from the sending districts.

The owners of land in the sending districts must apply to have their parcels included in the program and must agree to grant a conservation easement to the county that limits property development to agricultural or open space.[201] If the application is approved by the county planning commission and the board of commissioners, the owner receives a transfer permit for a specified number of development rights. These rights may then be sold to the owners of land in a designated receiving district. To use the development rights, the purchaser must submit a copy of the transfer permit along with an application for a permit to develop the property. If the applicant receives approval for the proposed development, the applicant may use the transferred development rights in addition to the rights allowed under the existing zoning on the receiving parcel.

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[199] *See* County of Sarasota, Florida, Transfer of Development Rights Ordinance, Ordinance No. 82-61 (1982).
[200] *See*, County of Sarasota, Florida, Zoning Ordinance, § 7.20(a)(1).
[201] *Id*. § 7.20(c)(4).

A TDR program was established in the Pinelands area of southern New Jersey under the auspices of a regional pinelands commission created by the state in cooperation with local governments.[202] Under that program, development rights are being transferred from ecologically fragile and agriculturally valuable lands to central receiving districts. These rights are converted to development credits that are created on a per-acre basis. The program awards development credits to landowners in the sending districts by increments of 39 acres. One credit is awarded for every 39 acres of woodlands, two for every 39 acres of productive agricultural land, and 0.2 credits for every 39 acres of wetlands.

Under this New Jersey program, a developer who buys one credit is entitled to build an additional four houses in a residential receiving district. In other words, if a developer owns one acre in a receiving district which is currently zoned for one dwelling unit, he can develop five units on that acre by purchasing one development credit. If a developer wishes to build only one additional home, he would buy one quarter of a credit. A development rights bank has been created to purchase credits from landowners in sending districts and sell them to landowners in receiving districts.

TDR programs are complex. They require municipalities to engage in a sophisticated analysis of the impacts of the program in both sending and receiving districts. Programs typically raise significant issues that concern residents and owners in both sending and receiving districts:

- How much development potential is to be lost in the sending districts?
- How are these development "rights" to be measured and valued?
- How can a viable market for these rights be created?
- How many properties in the receiving district must be eligible for more intense development to create a viable market for the development rights created by the program in the sending district?
- Should a development rights bank be created?
- How are the administration of the bank and the execution and filing of the required conservation easement documents to be handled?
- What process should be put in place to review and approve development projects in the receiving district?

A particularly difficult aspect of designing a TDR program is determining how to define and value the development rights that are severed from the land and eligible to be transferred. A formula can be used to quantify the development rights to be transferred based on such factors as the lot area, floor area, floor area ratios, density, height limitations, or any other criteria that effectively quantify an appropriate value. The formula chosen converts development rights into specific development credits.

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[202] Pinelands Protection Act, N.J.S.A. § 13:18A-1.*See* New Jersey Office of State Planning, *Local Planning Techniques That Implement Provisions of the State Development and Redevelopment Plan: Document No. 110,* June 1996, available at http://www.nj.gov/dca/osg/docs/localplanning060196.pdf.

How development rights are valued and how a market for them is created will determine the viability of the TDR program and, perhaps, its legal validity. In recent programs, the agencies created from two to two and a half times the demand for development credits in the receiving district as the number of development credits in the sending district. For this market to work, there must be development pressure in the receiving area resulting in a desire by landowners to purchase development credits from the sending area. Whether such ratios can be established and whether sufficient development pressures exist are factors that must be considered by local leaders who create TDR programs.

The TDR program in King County, Washington was designed to be particularly sensitive to the impact of the transfer of density into receiving districts.[203] In this program, an allocation of funds was made to provide amenities in the receiving districts to mitigate the impact of the increased densities transferred. The ordinance establishes a program to transfer development credits from the rural and agricultural production district to preserve the environmental quality of these lands. A TDR Bank was established in 1999 with an appropriation of $1.5 million by the Metropolitan King County Council. The Council set aside $500,000 for urban improvements for neighborhoods that accept additional density through the TDR Program.[204]

Where state zoning enabling acts are broadly construed by the courts, local TDR programs can be established under them. Several states have adopted specific TDR enabling acts[205] where the implied authority to enact innovative zoning laws is in doubt or to be certain that localities have the specific authority they need to deal with the complexity of shifting densities from one part of the community to the other. State enabling acts must be read very carefully to determine precisely how and for what purposes local TDR laws may be enacted. Some are broad in these respects and other are more limited in their focus.

State courts have resolved a number of challenges to TDR programs. In *City of Hollywood v. Hollywood, Inc*., the court found that protecting the aesthetic value of a pristine coastal area was a legitimate public purpose and that transferring the right to residential development was a reasonable method of accomplishing that objective.[206] A similar result was reached when the New Jersey Pinelands TDR program was attacked[207] and when a Florida TDR law was challenged.[208] An early challenge that the new TDR development pattern violated the uniformity requirement of the zoning enabling act was also unsuccessful.[209] Similarly, a challenge that TDR constitutes legal spot zoning was rejected by the court.[210]

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[203] King County, Washington, Ordinance No. 13794 (2000).
[204] King County, Washington, Ordinance No. 119365 (1999).
[205] *See, e.g.*, Fla. Stat. § 70.001; Ga. Code. Ann. §36-66A-1; Idaho Code §67-4619; 65 Ill. Comp. Stat. §§5/11-48.2-1 to –7; Ky. Rev. Stat. Ann. §100.208; Md. Ann. Code art. 66B, § 11.01; N.Y. Town Law § 261-b, N.Y. Village Law §7-701, N.Y, Gen. City L. § 20-f; Pa. Stat. Ann. Tit. 53, §10619.1(a).
[206] 432 So.2d 1332 (Fla. App. 1983).
[207] Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 593 A.2d 251 (1991).
[208] Glisson v. Alachua Cty., 558 So.2d 1030 (Fla. App. 1990).
[209] Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, 355 A.2d 550 (D.C. App. 1976), cert den'd 429 U.S. 966 (1977). *See also*, Local & Regional Monitor v. City of Los Angeles, 16 Cal. Rptr. 2d 358 (Cal. App. 1993) (TDR program held not to be incompatible with the comprehensive plan).
[210] Fur-Lex Realty v. Lindsay, 81 N.Y. Misc. 2d 904, 367 N.Y.S.2d 388, (Sup. Ct. N.Y. Cty. 1975).

When a landowner whose sending district property is restrictively regulated challenges the regulation as a taking, courts often are asked to consider whether the TDR rights of the owner are adequate compensation. In *Penn Central Transp. Co. v. New York City*, the Supreme Court found that a taking had not occurred, in part because of TDR credits allocable to the site.[211] State courts differ as to whether TDR credits provide adequate compensation for a regulatory taking. In *Aptos Seascape Corp. v. Santa Cruz County*, the availability of such credits was found to preclude a finding that a taking occurred.[212] An Arizona court, however, held that TDR credits did not constitute compensation.[213] In *Suitum v. Tahoe Regional Planning Agency*, the U.S. Supreme Court rejected the argument of the Agency that until the value of TDR credits is determined, a regulatory taking challenge by the affected owner is not ripe for adjudication.[214]

TDR programs are obviously very effective in conserving natural resources and open space. Several examples of local TDR laws that achieve such objectives follow:

The Transfer of Development Rights Overlay Zone in Mapelton, Utah, focuses on decreasing hillside development within the municipality. [215] Hillside areas have been designated as sending zones, and areas desirable for development have been designated as receiving zones. In Mapleton, 75% of the land is zoned at one dwelling per two acres, so most new developments purchase TDRs to increase density. Hillside development is further restricted by the limitation of municipal and sewer services to hillside areas.

Mount Olive, New Jersey, adopted a TDR ordinance to preserve open space for the public and for agricultural purposes and to prevent development in environmentally sensitive areas.[216] The ordinance sets standards for land to be deeded in terms of lot size, and requires that land deeded for conservation purposes will have a restriction placed on it to prevent it from being developed on in the future.

West Chester, Pennsylvania uses TDRs to preserve open space. Its Neighborhood Conservation District provides for traditional neighborhood development and allows the use of TDRs to maintain the low-density conservation district. [217] Talbot County, Maryland uses TDRs in its rural conservation district to keep the residential density low. Sending areas are sensitive plant and wildlife habitat areas, drainage basins, natural park sites, or recreation open space sites. The receiving area must be an area with a low erosion rate.[218]

Charlotte County, Florida implemented a TDR program to preserve ecologically valuable, historic, or archaeological resources, and other real property that is unsuitable for development because of its location. The TDR program is intended to direct future growth in a

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[211] 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).
[212] 138 Cal. App. 3d 484, 496, 188 Cal. Rptr. 191, 197 (1982).
[213] Corrigan v. City of Scottsdale, 149 Ariz. 553, 720 P.2d 528 (Ct. App. 1985), *aff'd in part and vacated in part*, 149 Ariz. 538, 720 P.2d 513, *cert. denied*, 479 U.S. 986 (1986).
[214] 117 S. Ct. 1659 (U.S. 1997).
[215] Mapleton, Utah, Code Chapter 18.76.
[216] Code of the Township of Mount Olive, New Jersey, § 400-98.
[217] West Chester, Pennsylvania, Code § 112-16.
[218] Code of Talbot County, Maryland, § 190-57.

logical, efficient, and economical manner and to save areas not well suited for development.[219] The Portland, Oregon program aims to reduce development pressures in environmentally sensitive sites. [220] Portland's sending areas are its Environmental Protection Overlay Zone and its Johnson Creek Flood Plain sub-district. Its receiving areas are areas that can accommodate additional density without environmental conflicts. San Luiso, California has implemented a TDR program to relieve environmentally sensitive areas and agricultural lands from development pressures. The ordinance emphasizes that the program is voluntary, incentive-based, and market-driven to encourage use.[221]

[h] Development Moratoria

A moratorium on development prevents affected land owners from obtaining development approvals while the community takes time to consider, draft, and adopt land use plans or rules to respond to new or changing circumstances not adequately dealt with by its current laws. Where permitted by state law, local governments impose moratoria on certain types of development applications while preparing land use plan or amending its zoning. This helps accomplish the purpose of the new rules by giving them the broadest possible applicability and preventing development that is inconsistent with them. Moratoria are also used to prevent development for a time while the government agency decides whether to acquire land for a public use or until capital improvements are made.

Moratoria are extreme in their application since they suspend all development rights on all affected lands. Regulators should proceed cautiously in adopting moratoria since they are almost certain to be challenged. There are a number of questions to be answered before proceeding:

- Do local governments have the authority to adopt moratoria under state law?
- For what purposes?
- What are the conditions that justify the imposition of a moratorium?
- Are there no available alternatives less burdensome on property rights?
- Why are the existing land use plans and ordinances not adequate?
- What recent circumstances have occurred that justify the adoption of the moratorium?
- How serious and urgent are these circumstances?
- What hard evidence is there to document the necessity of the moratorium?

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the U.S. Supreme Court held that a moratorium on all development lasting 32 months was not, by itself, a regulatory taking.[222] Landowners challenged a moratorium on development adopted by the Tahoe Regional Planning Agency to protect the unique environment and tourist-based economy of the Lake Tahoe region. The purpose of the moratorium was to give the agency time to deal with the threat posed by land development to the clarity of Lake Tahoe, which had begun to cloud as early as the late 1950s. The problem addressed was the construction in the steeper

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[219] Charlotte County, Florida, Code § 3-5-432.
[220] Portland, Oregon, Code § 33.535.110.
[221] San Luiso, California, Code §§ 22.04.500, 22.04.640, 22.07.180.
[222] 535 U.S. 303, 122 S.Ct. 1465, 152 L.Ed.2d. 517(2002).

drainage areas near streams and wetlands. These resources act as filters for much of the nitrogen, phosphorous, and other pollution that water runoff carries. The agency's moratorium lasted for 32 months.

The landowners' argument was that, even though the regulation does not take the future right to develop, the temporary taking of all development rights, for the 32-month period, itself violates the Constitution. The landowners argued for a categorical rule which would classify a development moratorium as a taking without considering the moratorium's length, the severity of the problems addressed, the good faith of the agency involved, or what it did to conduct the required studies, analyze the underlying problems, and draft appropriate new regulations.

The U.S. Supreme Court rejected the plaintiffs' arguments and refused to declare that a moratorium is a categorical taking. It held that a moratorium, like most other land use regulations, is subject to an ad hoc inquiry that considers the circumstances of the case such as the character of the regulation, the public interest to be achieved, the extent to which it interferes with the owner's investment-backed expectations, and how severely they are affected by the regulation. In other words, a moratorium may be a taking, under the circumstances of a particular case, but is not categorically so. In the Tahoe case, the Court noted that the lower federal courts had concluded that the 32-month period was not unreasonable and that the Agency had acted in good faith during that time to do what needed to be done before the moratorium could be lifted. It further recognized that the consensus of land use planners is that moratoria are an essential tool of successful development.

Moratoria, the Court noted, prevent landowners from rushing to develop, causing inefficient and ill-conceived growth before a comprehensive plan can be adopted. They prevent regulators from making hasty decisions which would disadvantage landowners as well as the public. The Court recognized that land values can actually increase during a moratorium and that the public and all landowners are reciprocally benefited by moratoria because they protect everyone's interest against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. Of course, moratoria can be enacted that are not reasonable in these ways and they are vulnerable, under Tahoe, to challenge.

Moratoria may apply to only one type of land use or one geographical area. In *Duncanson v. Board of Supervisors of Danville Twp*., the court upheld a moratorium on feedlots despite the fact that the plaintiff's proposed feedlot was the only project known to be affected by the moratorium.[223] In *First Bet Joint Venture v. City of Central City*, a moratorium on zoning permits for future gaming facilities was upheld.[224]

In *Naylor v. Township of Hellam*, the Supreme Court of Pennsylvania held that the municipality lacked the authority to impose a moratorium on subdivision approvals while revising its comprehensive plan[225] because the state's Municipal Planning Code[226] did not

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[223] 551 N.W.2d 248 Minn.App.1996.
[224] 818 F.Supp. 1409 (D.Colo.1993).
[225] 773 A.2d 770, 565 Pa. 397 (2001).
[226] M.P.C. 53 §§ 10101-11202.

expressly authorize moratoria; the power to suspend development was found not to be implicit or incidental to the powers expressly conferred.

Where municipalities do have the power to adopt moratoria while creating or revising their comprehensive plan or zoning law, moratoria may be invalid because of their duration or other defect. In *Lake Illyria Corporation v. Town of Gardiner*, for example, a moratorium was declared invalid that lasted for four years and where the town did not show adequate progress in concluding its planning process.[227]

In *Foster v. Board of Comm'rs of Warrick County*,[228] the court upheld a moratorium on further building permits in a previously approved subdivision because earlier construction by the developer caused severe drainage problems affecting nearby residents; the county board imposed the moratorium until the inadequate drainage system previously installed by the developer was corrected. And in *McNaughton Co. v. Witmer*, the court held that a developer could not recover damages for delay in his project for the period during which a validly enacted sewer connection moratorium was in effect.[229]

New Jersey's Municipal Land Use Law forbids "the prohibition of development in order to prepare a master plan and development regulations" in addition to moratoria on applications for development or interim zoning ordinance … except … where the municipality demonstrate …clear imminent danger to the health of inhabitants … and in no cases shall exceed a six-month term."[230] In *Toll Brother's Inc. v. West Windsor Township*, the Township of West Windsor, New Jersey, adopted an ordinance that created timed growth districts, the purpose of which was to slow growth.[231] The court held that the township's timed growth controls constituted a moratorium because it effectively took away 40 percent of allowed density from any landowner who chose to apply immediately for a development permit. The township's moratorium was found to be out of compliance with the requirements of the state land use law.

When adopting a moratorium, the local legislative body should stipulate a number of matters:

- Citation to the legal authority the municipality has to adopt a moratorium.
- The new, unusual, or serious matters gave rise to need to adopt the moratorium.
- The local bodies and agencies that are responsible.
- The studies that are to be done, consultants to be hired, and data to be gathered.
- The resources being made available to complete studies.
- Deadlines to be established for various steps in the process.
- When the moratorium expires.
- Under what circumstances it can be extended.

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[227] 43 A.D.2d 386, 352 N.Y.S.2d (3rd Dep't 1974).
[228] 647 N.E.2d 1147 (Ind.App.1995).
[229] 307, 613 A.2d 104 (1992).
[230] N.J. Stat. Ann. § 40:55D-90.
[231] 712 A.2d 266, 312 N.J.Super. 540 (1998).

The more specific and legitimate this plan and timetable are, the more likely it is that the moratorium will be found to be reasonable if challenged. A moratorium should be adopted in conformance with all procedures required of any zoning or land use action, including notice, hearing, the formalities of adoption, and filing. It may be appropriate to exempt certain types of development from the application of the moratorium. These might include construction applications that have been approved and begun but where the developers' rights to proceed have not legally vested. Additionally, actions such as area variances or minor subdivision approvals may be allowed without compromising the integrity of the new strategy being developed.

A community needs to make reasonable progress in carrying out the plan and in adhering to the schedule. Moratoriums that have been extended for up to three years have been sustained by a showing that the community was diligently pursuing its plan and timetable, and shorter moratoriums have been voided because the community was making little or no progress. In the same way, the plan must be calculated to deal directly with the necessity or emergency at hand; otherwise, its reasonableness may be questioned. The plaintiff in *Mitchell v. Kemp* was denied a variance from the provisions of a moratorium of the Town of Pine Plains, New York, that had been extended for five years.[232] The court determined that the controversy was caused by the town's unreasonable delay in enacting a zoning ordinance. The court invalidated the moratorium because the town failed to offer any satisfactory reasons for the delay in enacting a zoning ordinance.

In *Timber Ridge Homes at Brookhaven, Inc. v. State*, the plaintiff challenged a moratorium that was imposed on property along a creek to determine if the creek should be included in the state's Wild, Scenic, and Recreational Rivers System[233] The plaintiff argued that the legislature's action was a regulatory taking. The court held that, since the plaintiff failed to apply to the New York State Department of Environmental Conservation for a permit exempting it from the moratorium, it had not exhausted all administrative remedies and was not entitled to relief.

§ 3.03 Local Environmental Law – Enabling Authority and Influences

[a] Authority

Local lawmaking authority is largely derivative. It is delegated by the state legislature to local legislative bodies. It is in this way that localities got their authority originally to adopt comprehensive plans and zoning regulations. Over the past several years, local governments throughout the country have adopted an impressive number of local environmental laws.[234] These include a variety of novel ordinances designed to protect discrete natural resources such as trees, stands of timber, hillsides, viewsheds, ridgelines, streambeds, wetlands, watersheds, aquifers, water bodies, and even wildlife habitats. The authority of local governments to adopt such regulations varies from state to state. The sources of this authority range from the planning

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[232] 176 A.D.2d 859, 575 N.Y.S.2d 337 (2d Dep't 1991).
[233] 223 A.D.2d 635, 637 N.Y.S.2d 179 (2d Dep't 1996).
[234] John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L.Rev. 363 (2002).

and zoning enabling statutes themselves to home rule authority and to discrete state laws that require or permit the protection of specific resources or the prevention of particular environmental harms.

The germ of this authority existed at the inception of zoning law itself. The U.S. Supreme Court referenced important land use studies that justified the initial adoption of traditional zoning ordinances. In Village of Euclid v. Ambler Realty Co., the court stated:

> These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; *decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to raise children, etc.*[235] (emphasis added)

Early advocates of zoning thought that it should and could be used to achieve environmental objectives.[236]

In its application, however, land use and zoning law became design-oriented, focusing on the layout of streets and highways, the location of public buildings, the ability of fire trucks and firefighters to reach and fight fires, the size and bulk requirements that protect property values, and the infrastructure connections that create a functional community. Subdivision and site plan regulations concerned themselves with the creation of safe intersections; the fluid movement of vehicles; the adequacy of road width, curbs, and sidewalks; the siting of buildings; and the prevention of off-site impacts such as flooding. In *Golden v. Ramapo*, the leading state court case sustaining local growth management ordinances, New York's highest court referred to subdivision control as a mechanism to encourage "the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents."[237] At their inception, regulatory tools such as subdivision and site plan regulation were not designed to protect natural resources from degradation.[238] References in section 3.02 above illustrate how this changed as courts gradually construed the delegated power to adopt zoning and basic land use regulations to include environmental regulations that encourage the most appropriate use of the land.

Subsequent to the delegation of basic planning and zoning authority, state legislatures have passed a variety of laws that influence local environmental lawmaking in a variety of ways. These include statutes that delegate discretionary authority to local governments to adopt local laws that protect natural resources and prevent environmental damage, that require them to do so,

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[235] 272 U.S. 365, 394 (1926).

[236] See Earl Finbar Murphy, Euclid and the Environment, *in* Zoning and The American Dream: Promises Still to Keep at 154, 168–174.

[237] Golden v. Planning Bd., 285 N.E.2d 291, 298 (N.Y. 1972).

[238] "Land use law, zoning, and subdivision controls typically are not concerned with environmental degradation; their purposes are to regulate the timing and sequence of development to minimize costs to the community and to avoid conflicting uses." Thomas J. Schoenbaum & Ronald H. Rosenberg, Environmental Policy Law 379 (3d ed. 1996).

that encourage and guide them, or that preempt them from doing so. A few examples of these state laws follow:

- In Georgia, local governments are required to identify existing river corridors and to adopt river corridor protection plans as part of their planning process.[239] They have the further authority to regulate shoreland developments[240] and to regulate land-disturbing authority in order to control soil erosion and sedimentation.[241]
- Connecticut statutes establish a detailed system for the creation of an inland wetlands and watercourse protection regime that allows local wetland agencies to have significant control over development affecting wetlands and watercourses.[242] Local governments in Connecticut can adopt wetlands regulations that are stricter than the wetlands standards of the state.[243] Applications made to local review agencies seeking development approval must contain a soil erosion and sediment control plan, and local zoning and subdivision regulations must make proper provision for soil erosion and sediment control.[244]
- In North Carolina, the state legislature adopted a legislative rule of broad construction of powers delegated to local governments.[245] Prior to that time, the courts had strictly construed specific grants of authority to local governments. A Raleigh, North Carolina, requirement that a developer create open space in a subdivision and convey title to it to a private homeowners' association was upheld using the legislative rule of broad construction.[246] The reach of this rule was evident in *Homebuilders Ass'n v. City of Charlotte*,[247] in which the power to impose user fees on applicants for rezoning, special use permits, plat approvals, and building inspections was upheld in the absence of expressly delegated authority.
- In New York, municipalities have been delegated specific, but discretionary, authority to protect the environment under the state's home rule law. The home rule provisions of Article IX of the New York Constitution and legislation passed pursuant to it give local governments broad home rule powers.[248] The state legislature implemented Article IX with the enactment of the Municipal Home Rule Law (MHRL), the provisions of which are to be "liberally construed."[249] Under the MHRL, localities are given the authority to adopt laws for "the protection and enhancement of [their] physical and visual environment."[250] In *Ardizzone v. Elliot*,[251] the court stated that the municipality had the

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[239] Ga. Code Ann. § 12-2-8(2) (2001).
[240] *Id*. § 12-5-241.
[241] *Id*. § 12-7-4.
[242] *Id*. §§ 22a-36 to 22a-45.
[243] Aaron v. Conservation Comm'n, 441 A.2d 30, 37 (Conn. 1981).
[244] Conn. Gen. Stat. § 22a-329 (2001).
[245] N.C. Gen. Stat. § 160A-4 (1999) (stating that "[i]t is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect….").
[246] River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538, 542 - 44 (N.C. 1990).
[247] 442 S.E.2d 45 (N.C. 1994).
[248] See N.Y. Const. art. IX.
[249] N.Y. Mun. Home Rule Law § 51.
[250] *Id*. § 10(1)(ii)(a)(11).
[251] 550 N.E.2d 906 (N.Y. 1989).

"power to regulate the freshwater wetlands within its boundaries under the Municipal Home Rule Law." [252]

- In Colorado, the Local Government Land Use Control Enabling Act of 1974[253] and the Colorado Land Use Act[254] provide local governments with the authority to adopt local environmental laws.[255] The Colorado Land Use Act was enacted in part "to encourage uses of land and other natural resources which are in accordance with their character and adaptability [and] to conserve soil, water, and forest resources . . . ."[256] The Colorado Land Use Act grants local governments, in conjunction with the appropriate state agencies, the authority to identify, designate, and promulgate guidelines for areas and activities of state interest.[257] The Act limits local governments' legislative authority to certain activities and listed areas of state interest.[258] There are twenty-one potential areas or activities of state interest, a menu of regulatory options for local lawmakers. These include mineral resource, flood hazard, and wildlife habitat areas, as well as site selection and development of new communities and solid waste disposal sites[259].
- The South Dakota Constitution provides that "[a] chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state . . . . Powers and functions of home rule units shall be construed liberally."[260]

[b] Influences: Federal, State, and Regional

In some of the examples above, it is obvious that laws adopted by state legislatures, and state constitutions, influence the adoption of local environmental regulations. In fact, the role of higher levels of government is crucial in local environmental law making beginning, of course, with basic enabling acts but including more discrete influences, as well. Examples include:

- The National Flood Insurance Program contributed greatly to the evolution of local involvement in environmental protection. It required local governments to adopt and

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[252] *Id*. at 908.
[253] Colo. Rev. Stat. §§ 29-20-101 to 29-20-107.
[254] *Id*. §§ 24-65-101 to 24-65.1-502.
[255] *See id*. §§ 29-20-101 to 29-20-105 (Local Government Land Use Enabling Act of 1974); id. §§ 24-65-101 to 24-65-106 (Colorado Land Use Act).
[256] *Id*. § 24-65-102.
[257] *See id*. §§ 24-65.1-101, 24-65.1-302 (stating that the "appropriate state agencies" are primarily Colorado's Water Conservation Board, Soil Conservation Board, Soil Conservation Districts, Geological Survey, State Forest Service, Division of Mines and Department of Natural Resources).
[258] *Id*. §§ 24-65.1-201, 24-65.1-203, 24-65.1-301. See also City and County of Denver v. Bd. of County Comm'rs, 782 P.2d 753 (Colo. 1989) (holding that these limits contain sufficient safeguards to satisfy the state constitutional bar on delegation of legislative power).
[259] Office of Smart Growth, Colo. Dep't of Local Affairs, Land Use Planning in Colorado 3 - 4 (2001), http://www.dola.state.co.us/SmartGrowth/Documents/Land%20Use%20Planning%20In%20Colorado.pdf; see also Colo. Rev. Stat. §§ 24-65.1-201 to 24-65.1-204.
[260] S.D. Const. art. IX, § 2; *see also* Ill. Const. art. 7, § 6 (stating that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare."). The California constitution provides that a city "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. 11, § 7.

enforce floodplain management programs as a prerequisite to local eligibility for national flood disaster assistance payments.[261]

- The Coastal Zone Management Act[262] and natural catastrophes themselves have led, for example, to the adoption of stringent setback requirements along the coasts of barrier islands that are particularly vulnerable to hurricane damage.[263]
- Regulations issued by EPA under the Clean Water Act require local governments that operate storm water systems to regulate construction activities to reduce pollutants entering stormwater and surface waters.[264] The effect on local land use autonomy is evident in the fine print of the regulations. Local governments are required to adopt erosion and sediment control laws, establish site plan review procedures for projects that will impact water quality, inspect construction activities, and adopt enforcement measures. Zoning measures targeted by the regulations include the requirement of buffer strips, designation of riparian preservation zones, and maximization of open space. This extensive effort by the federal government to influence local land use regulation raises a number of political and legal issues, not the least of which is whether it violates the sovereign right of state governments to control land use without federal interference.[265]
- The Colorado legislature created the Colorado Land Use Commission to develop a land use planning program that "may include but need not be limited to an environmental matrix."[266] The Commission is required to recognize that "the decision-making authority as to the character and use of land shall be at the lowest level of government possible."[267] The purpose of the Land Use Enabling Act is to achieve "planned and orderly development within [the state]" and to maintain a balance between "basic human needs" and "legitimate environmental concerns."[268]
- Vermont's Act 250 influences local environmental regulations by usurping it regarding certain land development projects.[269] Statutorily defined developments in Vermont require a permit from the state, independent from and in addition to any local regulation or permits. To qualify for such a permit, the development must meet ten distinct criteria. These include findings that the development will not result in undue water or air pollution; will not cause unreasonable soil erosion; will not have an undue adverse effect on the scenic or natural beauty of the area; and will not destroy or significantly imperil necessary wildlife habitat.[270]
- An example of indirect state control is California's Open Space Lands Act, enacted in 1970, which requires every city and county to adopt a local open space plan for the

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[261] 44 C.F.R. § 60; *see also* 42 U.S.C. §§ 4011, 4013.
[262] 16 U.S.C. §§ 1451 *et seq*.
[263] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[264] 33 U.S.C. §§ 1251-1387.
[265] *See* Environmental Defense Center, Inc. v. EPA, 319 F.3d 398, Ninth Cir. 2003. (holding that Tenth Amendment guarantees were not violated by the Phase II rules because local governments were given nonregulatory options for complying with the regulations and thus were not unconstitutionally forced to regulate private landowners on behalf of the federal government).
[266] Colo. Rev. Stat. § 29-65-104(1)(a).
[267] *Id*. § 24-65-104(1)(b).
[268] *Id*. § 29-20-102.
[269] Vt. Stat. Ann. tit. 10, §§ 6001–6092. *See* Amestoy and Di Stefano, *Wildlife Habitat Protection Through State-Wide Land Use Regulation*, 14 Harv. Envtl. L. Rev. 45 (1990).
[270] *Id*. § 6086(a)(1), (4) and (8).

comprehensive and long-range preservation of open space lands within its jurisdiction.[271] The plan must be submitted to the Secretary of the Resources Agency, a state entity, but the state is not given direct permitting authority.

- As an alternative to statewide jurisdiction, regional entities can be established by the state and delegated land use authority. The New Jersey Pinelands Commission,[272] the Adirondack Park Agency,[273] and the California Coastal Commission[274] are examples of regional entities established primarily to preserve land in areas with valued and sensitive natural resources.

§ 3.04 Local Environmental Regulations

[1] Introduction

This section focuses on two key issues: how have communities used their delegated authority to protect discrete natural resources and to prevent particular adverse environmental resource; and what laws have they adopted that protect large landscapes or combinations of natural resources in significant geographical areas. Awareness of the importance of the role of local governments in environmental protection, and their regulatory power, is growing. A study by the National Academy of Sciences, for example, emphasizes the importance to watershed management—even within a broad regional framework—of "the use of locally developed knowledge": "A truly effective watershed management effort is most likely to be a bottom-up process, driven largely by citizen concerns about local or regional problems and guided by sound data and information."[275]

Communities have begun to adopt natural resource protections expressly to preserve ecological functions and quality of life. The ordinances discussed in this section vary greatly in the types of resources they protect, in the degree to which protections are discretionary or mandatory, and in the degree to which they are influenced by state or federal laws or policies. Some communities identify protected resources through local inventories, and with varying degrees of scientific analysis, while others rely on state or federal definitions. Although the regulatory strategies discussed here overlap somewhat with those discussed in § 3.02 above, they enter terrain not yet explored: stand alone environmental resource regulations, comprehensive landscape protection regulations, and innovative methods such as environmental overlay districts, environmental performance standards, and environmental impact review requirements.

[2] Landscape Protection as a Focus

A critical element of planning for comprehensive natural resource protection is the preservation of large contiguous undeveloped spaces—natural corridors that preserve the ecological functions of watersheds, for example, or of native plant and animal habitats. In

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[271] Cal. Gov't Code §§ 65302(e), 65563 *et seq*., § 65910.
[272] Pinelands Protection Act, N.J. Stat. Ann. §§ 13:18A-1 to 13:18A-49.
[273] N.Y. Exec. L. § 800 *et seq*.
[274] Cal. Pub. Res. Code § 30000 *et seq*.
[275] National Research Council, New Strategies for America's Watersheds (National Academy Press 1999) at 3.

practice—even though poorly planned local zoning decisions have fragmented landscapes—it is possible for communities to use conventional zoning and subdivision techniques to protect multiple natural resources. District boundaries can be designed to conform to natural boundaries and to protect sensitive areas. Dimensional requirements can be used to limit impervious surfaces. Special permits can be required for development in sensitive areas. Open space requirements can be imposed on subdivision approvals, and erosion, drainage, and grading standards can be adopted. Clustering or conservation development can be encouraged. Conditions can be placed on site plan approvals for individual parcels. Landscaping codes can include standards that protect ecological functions.

A model comprehensive ordinance for natural resource protection—the Conservation Area Overlay District (CAOD)—has been developed by the Metropolitan Conservation Alliance of the Wildlife Conservation Society.[276] The CAOD is a mapped overlay district, which may cross political boundaries, and which includes performance standards to maintain and protect the diversity of habitats and species; to protect open space, water resources, steep slopes, and ridgelines; to preserve ecological communities, environmentally sensitive areas, and native vegetation; and to protect scenic and historical resources.[277] The CAOD can extend across municipal boundaries to follow the natural contours of ecosystems rather than political contours.

[3] Overlay Districts to Protect Natural Resources

Overlay districts are mapped areas, superimposed on existing zoning districts, in which additional or occasionally different regulations are imposed. An overlay district, or zone, is applied to an underlying zoning district, as the American Planning Association describes it, "like a bedspread over a blanket."[278] The regulations of the underlying district remain in place and are supplemented by the provisions of the overlay. With overlay zones, municipalities can also regulate property and protect resources that extend beyond existing zoning district boundaries, or protect specific sites within a zoning district, without changing the density and use regulations in the underlying district. [279]

Overlay districts can be designed to protect specific resources—plant and animal habitats, ridgelines, trees, historic or scenic districts, night skies. As in the CAOD, overlays can counter the fragmenting effects of traditional zoning by crossing district boundaries. Overlays are probably most commonly used to protect water resources: wetlands, stream corridors, shorelines, lakes, watersheds. Overlays are also used to direct development to appropriate areas of a community. While overlay zones in general have been upheld,[280] the specific regulations must address a purpose encompassed within the police power or otherwise within the authority of the

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276 Metropolitan Conservation Alliance, Conservation Area Overlay District: A Model Local Law, Technical Paper Series, No. 3 (2002).

277 *See* John R. Nolon, Open Ground: Effective Local Strategies for Protecting Natural Resources (Environmental Law Institute 2003) at 226-230.

278 Growing Smart Legislative Guidebook, *supra* note 14, at 8-24.

279 This is discussed in Blackwell, *Overlay Zoning, Performance Standards and Environmental Protection After Nollan,* in 1990 Zoning & Planning Law Handbook, Ch. 18 at 472, (Dennison, ed., Clark Boardman 1990).

280 *See, e.g.*, A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

governmental body imposing the regulation[281] and must meet the constitutional standards addressing a taking of private property,[282] equal protection and due process. Either as a single environmental protection overlay zone or in combination, overlays are being used to offer significant local natural resource protection.

[a] Environmental Protection Overlay District

Penfield, New York: Penfield adopted its Environmental Protection Overlay District (EPOD) ordinance[283] in 1981, in order to protect "sensitive or unique environmental areas" within the town.[284] The ordinance is implemented by development standards and an EPOD permit process that applies to defined activities within the overlay districts. The Purpose statements for the overlay districts and the development standards emphasize the preservation of ecological functions as well as of discrete resources. The ordinance is supplemented by the town's cluster and conservation development regulations and by an Open Space Plan to preserve natural resources from the effects of sprawl.

The ordinance protects five specific resources: wetlands, steep slopes, woodlands, floodplains, and watercourses. The regulations for each resource include a Purpose statement; a Delineation of District Boundaries; a description of Regulated Activities; and extensive Development Standard Permit Conditions. An EPOD development permit is required for any regulated activity undertaken within an overlay protection district. The wetland overlay regulations expressly do not supersede New York State wetlands regulations but provide "an additional level of local review."[285] Any activity that "impairs the natural function of wetlands whether the impairing activity is located within the wetland or not" is subject to regulation.[286] Steep slopes are defined as slopes of 15% or greater, and the development standards include the re-establishment of disturbed vegetation and groundcover and standards for required ramps and stabilization procedures during construction. The woodland regulations, which exclude active orchards, include tree harvesting and tree preservation standards. Trees of 8-inch caliper or greater must be preserved, and are considered required site improvements, which are the developer's responsibility for a year after construction. Watercourse protections apply to "all areas within 75 feet of the centerline of a natural or manmade watercourse."[287]

[b] Two-Zone Overlays

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[281] In Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), the Supreme Court upheld an ordinance that superimposed height districts and area districts on the use districts.

[282] In Allingham v. City of Seattle, 109 Wash. 2d 947, 749 P.2d 160 (Wash. 1988), the Washington Supreme Court invalidated Seattle's Greenbelt ordinance because it "deprived certain owners of all profitable uses of a substantial portion of their land." *Id.* at 952, 749 P.2d at 163. The ordinance required owners of property in the designated Greenhill area to preserve up to 50% of the lot in an undisturbed state. Two years later, the Washington Supreme Court "overruled" *Allingham* to the extent that the opinion looked only to one portion of the regulated parcel of property in determining whether an unconstitutional taking had occurred. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 335, 787 P.2d 907, 915, *cert. denied*, 111 S. Ct. 284 (1990).

[283] Penfield, New York, Town Code Ch. 29 Art III.

[284] *Id*. § 3-6.

[285] *Id*. § 3-11(C).

[286] *Id*. § 3-11(C)(5).

[287] *Id*. § 3-15(B)(1).

Overlays may be used to establish two related zones of protection for identified natural resources: in the first zone, land disturbance is prohibited to the greatest extent possible; in the second, some development is permitted under specified conditions. This two-zone division can be used as the basis for density transfers, either on a single property or through a transfer of development rights program, which could allow density transfers from a restricted property to a property without environmental constraints.

Long Grove, Illinois: Large-lot zoning can be a simple way of protecting open space and related natural resources, although it is often criticized as being potentially exclusionary and inducing sprawl. Long Grove's Conservancy Districts ordinance[288] establishes two districts for natural resource protection. The General Purpose section states that "[i]rrespective of other zoning classifications, certain soil types and configurations of terrain place definite and specific limitations on building construction, development and land utilization."[289] The ordinance is intended "to avoid all possible damage" to the village's ecology, and notes that "in the greater Chicago metropolitan area this type of ecological community is fast disappearing."[290]

A Lowland Conservancy District[291] protects wetlands, aquifer recharge areas, floodplains and flood-control areas and agricultural lands within floodplains, wildlife habitat, and recreational and aesthetic resources. These areas are intended to remain undisturbed. The soil types of the district are identified in the ordinance and are characterized as having "[l]imitations severe enough to question the economic feasibility of these soils for urban development."[292] Permitted uses include flood and wildlife management, wilderness areas, and nature trails. Disturbance of native vegetation and floodway alteration are prohibited.

The Upland Conservancy District[293] preserves woodlands, steep slopes, aquifer recharge areas and groundwater sources, and recreational and aesthetic resources. The Upland district is defined by three environmental characteristics: the presence of a quarter acre of canopy trees of listed species and dimensions; the presence of a quarter acre of slopes greater than 12%; or soil type. A Reasonable Use Limitation[294] permits disturbance of up to 40% of a protected area on a parcel. Subdivision or planned unit development is permitted with the approval of the Plan Commission. A three-acre minimum lot size is required where all three upland characteristics are present in a single development. The "building pad" for each lot is limited to 10,000 square feet. The building pad can be increased by 500 feet for each additional acre of lot size.

Portland, Oregon: Portland has applied to the relevant areas of the city a two-tiered set of overlays: Environmental Protection Zones,[295] in which development is severely limited, and Environmental Conservation Zones,[296] in which urban development is regulated to protect ecological resources and functions. The application of the Environmental Zones is guided by

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[288] Long Grove, Illinois, Village Code, Title 5, Chapter 10.
[289] *Id*. § 5-10-1.
[290] *Id*.
[291] *Id*. § 5-10-3.
[292] *Id*.
[293] *Id*. § 5-10-4.
[294] *Id*. § 5-10-4(E).
[295] Portland, Oregon, City Code § 33.430.015.
[296] *Id*. § 33.430.017.

detailed studies in which the city identified resources and functions that it wished to protect. Both types of zones include "resource areas" and "transition areas."[297] Transition areas buffer the protected resource and are "measured as the first 25 feet inward from an environmental zone boundary."[298] With specified exceptions, the regulations apply to development and land division and to changes of topography.

A development application within an Environmental Zone must comply with the standards of the ordinance and include an existing conditions site plan and a proposed development plan. Development Standards[299] require the calculation of a maximum disturbance area and specify setbacks for particular resources. An Environmental Review process[300] is established to allow for flexibility where a proposed development could "meet the purpose of these regulations" but in order to do so would require some modification of the development standards or of the resource boundary.

Natural Resource Management Plans are described by the ordinance as "an alternative to case-by-case environmental reviews": "These plans provide the means to evaluate the cumulative effects of development and mitigation proposed at different times and in different places within the same large ecosystem."[301] The ordinance states that areas of multiple ownership are well suited to these plans, as are intermunicipal areas. Management plans "cover large ecosystems such as forests, creeks, sloughs, or watersheds," and "must address all resources and functional values conserved and protected by environmental zones within the plan boundaries."[302] The Natural Resource Management Plans must comply with the Environmental Zones ordinance and with Oregon's statewide planning goals and the Portland Comprehensive Plan. Where provisions conflict, the management plan supersedes the provisions of the Environmental Zones ordinance.[303]

[c] Environmentally Sensitive Lands Overlays

By designating areas as sensitive lands, a number of communities across the country are attempting to preserve highly diverse ecosystems and resources. In Minnesota—where the state Department of Natural Resources encourages communities to adopt an ecosystem approach to land use planning[304]—the city of St. Cloud requires developers to participate in a team planning process, based on the city's inventory of sensitive features, before a preliminary plat is submitted. Scottsdale, Arizona, defines sensitive resources in terms of landform classes and has adopted development and design standards to protect them. Park City, Utah, requires developers to provide a professional analysis of sensitive features on a site where development is proposed, and establishes standards for construction and post-construction resource protection. Iowa City, Iowa, uses federal, state, and local definitions to identify sensitive resources, and incorporates resource protections into site plan review.

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297 *Id*. § 33.430.050.
298 *Id*.
299 *Id*. § 33.430.140.
300 *Id*. § 33.430.210.
301 *Id*. § 33.430.310.
302 *Id*. § 33.430.320.
303 *Id*. § 33.430.330.
304 *See* Minnesota Division of Ecological Services, http://www.dnr.state.mn.us.

St. Cloud, Minnesota: The Environmentally Sensitive Areas (ESA) ordinance[305] of St. Cloud emphasizes the preservation of biodiversity and the prevention of landscape fragmentation.[306] It defines environmentally sensitive areas as "areas that contain native vegetation and natural features and/or natural resources."[307] It gives comprehensive protection to "natural communities"—"naturally-occurring associations of plants and animals whose existence and extent are determined by factors such as soil composition, hydrology, climate, solar conditions and a site's unique history."[308] The ordinance states that "further fragmentation, disturbance and development will adversely affect and may destroy" these communities and their natural processes.[309]

The ESA ordinance allows the city to regulate subdivision or construction within an ESA. A Hierarchy of Protection gives first priority to the preservation of "rare species, riparian and wildlife corridors and complexes" of the ESA.[310] Natural Heritage Areas are to be undeveloped.[311] In High-Priority Natural Resource Areas, the goal is to avoid "any deterioration" of resources.[312] The Medium-Priority designation allows "minor encroachment."[313] In Low Priority Areas, design that enhances "the general ambience and character of the natural resource area" is the goal.[314] Prioritization is determined by factors including the amount of human disturbance to the ecosystem, biodiversity, size, and environmental function. The city's Planning Office makes a preliminary designation of an ESA. The final determination of boundaries is made in the site planning process by an Environment and Development Team consisting of the developer and another person of the developer's choice; three city representatives; and two volunteers with specified scientific credentials.

Development Guidelines[315] include the maintenance of wildlife and riparian corridors; ensuring that undeveloped ESAs and their buffer areas are large enough to be sustainable and to prevent fragmentation; and minimizing construction impacts on ESAs. Appendices describe environmentally sensitive resources, the rationale for their protection, and best management practices for their preservation. The ordinance emphasizes scientific analysis of natural communities, and sets out ecological interrelationships among Native Prairies, Forests and Woodlands, Sensitive Geological and Hydrological Features, Rare Species Sites, Riparian Corridors, Wetlands, and Wildlife Corridors. Incentives offered by the ordinance include reduced sidewalk, street, and setback requirements; the donation of an ESA or its protection through a conservation easement in lieu of park dedication; increased density allowances; and clustering of development outside the ESA.

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[305] St. Cloud, Minnesota, Environmentally Sensitive Areas Ordinance, Ordinance No. 1871.
[306] The adoption of the ordinance is described by the Minnesota Department of Natural Resources at http://www/dnr.state.mn.us/ecological_services/index.html.
[307] St. Cloud Environmentally Sensitive Areas Ordinance § 4.1.
[308] *Id*. § 2.
[309] *Id*.
[310] *Id*. § 4.1.
[311] *Id*. § 4.1.1.
[312] *Id*. § 4.1-2.1.
[313] *Id*. § 4.1-2.2.
[314] *Id*. § 4.1-2.3.
[315] *Id*. § 4.2.

Scottsdale, Arizona: Scottsdale's Environmentally Sensitive Lands ordinance[316] regulates public and private development in a 134-mile area of desert and mountains. To protect the fragile environment of the Sonoran Desert, the city has adopted floodplain and native plant ordinances, open space and conservation districts, a foothills overlay, and a comprehensive plan that includes "Character Areas"—designated areas where the city will "promote preferred design concepts" instead of relying only on regulation of the layout of development.[317]

The Environmentally Sensitive Lands ordinance is intended to protect against natural hazards, including floods, rockslides, and subsidence; to protect and preserve significant natural and visual resources—major boulder outcrops; ridges; wildlife habitat and corridors; unique vegetation; washes and riparian habitat—and to "conserve the character of the natural desert landscape."[318] The visibility of development and the preservation of views are recurring considerations in the regulations. The ordinance sets out three "landform classes": lower desert; upper desert; and hillside landforms.[319] In the first two classes, the intensity of development is governed by the underlying zoning classifications. In the hillside landform class—areas with slopes of 15% or greater—the ESL itself restricts intensity of development.

Natural Area Open Space (NAOS) regulations[320] require permanently maintained open space areas to be included as part of development approval in each landform class. NAOS requirements depend upon landform category and slope. A minimum of 70% of required open space must be undeveloped; a maximum of 30% may be re-vegetated. There are density incentives for increased open space, and in master-planned developments excess open space for specific sites may be credited against requirements for other sites. Construction "envelopes" are required for NAOS on individual lots.[321] All impervious surfaces and improved open space must be within the construction envelope. On-lot NAOS is to be designed to create "continuous areas of meaningful open space."[322] The NAOS "shall be permanently preserved in its natural condition to be self-sustaining."[323] Pruning or landscaping within the NAOS area is limited to removing man-made debris or invasive non-native plants and weeds and to creating "a defensible space" to protect homes from fire in areas where wild lands interface or intermix with development.[324] The ordinance also includes a cluster development option. Site and Structural Development Design Standards set out preferred building materials and landscaping requirements. Non-indigenous plants are limited to enclosed yards, and plants having a potential height greater than 20 feet are prohibited.

Park City, Utah: Park City's Sensitive Areas Overlay Zone ordinance[325] restricts or prohibits development in order to protect steep slopes, ridgelines, wetlands, stream corridors, and wildlife

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316 Scottsdale, Arizona, Code of Ordinances §§ 6.1010-6.1110.
317 *See* City of Scottsdale, Desert Foothills Background Report, at http://www.ci.scottsdale.az.us.
318 Scottsdale, Arizona, Code of Ordinances § 6.1011.
319 *Id*. § 6.1021H(1) – (3).
320 *Id*. § 6.1060.
321 *Id*. § 6.1070.
322 *Id*. § 6.1070(A)(6).
323 *Id*. § 6.1100(B)(1).
324 *Id*. § 6.1100(B)(3), (B)(6).
325 Park City, Utah, Land Management Code, Title 15, Chapter 2.21.

and wildlife habitat. The ordinance encourages the clustering of development and "the preservation of large expanses of open space and wildlife habitat."[326]

Applicants must identify sensitive areas in a proposed plan for development and provide a professional analysis of slope and topography; ridgeline areas; vegetative cover; entry corridors and viewpoints; wetlands; stream corridors; and wildlife habitat. The city may also require a visual assessment; a soil report and a geotechnical report; additional slope information; a fire protection report; a hydrological report and a wetland/stream corridor evaluation; or a wildlife habitat report that describes wildlife corridors, nesting sites, areas of high insect diversity, seasonal patterns of wildlife use of the property; and "the general ecological functions provided by the site and its features."[327]

The Community Development Department delineates all sensitive areas on the parcel. The ordinance sets out specific development standards for each resource. Open space requirements and density transfers are established for each protected resource. On the recommendation of the Community Development Department, the Planning Commission may grant up to a 20% increase in density transfers in return for the preservation of an approved open space area, public access to trails, or mitigation or restoration measures. Very steep slopes—slopes of 40% or greater—and ridgelines must remain as 100% open space, but limited density transfers are allowed to other areas of the property. The Wildlife and Wildlife Habitat Protection regulations include standards regarding the timing of construction to minimize the disturbance of valued species on site or in adjacent areas. Development plans shall "to the maximum extent feasible" preserve connections between on-site and off-site natural areas, and shall "to the extent reasonably feasible" create connections to adjacent natural areas to preserve and enhance the movement of wildlife.[328]

Iowa City, Iowa: Iowa City's Sensitive Area ordinance[329] provides both for overlay zoning of environmentally sensitive areas and for resource protection through site plan regulations. Sensitive features are defined as: federally defined wetlands, drainageways, and hydric soils; FEMA- or city-defined floodways; slopes greater than 18%; 2-acre or larger woodlands; city-designated prairie remnants; and state-defined archeologicalsites.[330]

A Sensitive Area Site Plan[331] is required for development on property containing wetlands, fully hydric soils, or stream corridors; one-acre or larger prairie remnants; woodlands; archeological sites; or steep slopes. An approved sensitive areas site plan must be recorded, to give notice that environmental limitations apply to the property. A Sensitive Area Overlay rezoning[332] is required when development will disturb a wetlands or wetland buffer or will disturb designated percentages of woodlands or steep slopes. The construction of new single-

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[326] *Id*. § 15.2.21-1(B).
[327] *Id*. § 15.2.21-3(B)(8)(e).
[328] *Id*. § 15.2.21-9(B)(1)(c) - (d).
[329] Iowa City, Iowa, Code § 14-6K-1.
[330] *Id*. § 14-6K-1(C)(1).
[331] *Id*. § 14-6K-1(F)(1).
[332] *Id*. § 14-6K-1(C)(3)(a).

family or duplex homes is exempt from the regulations provided that there is no encroachment on a jurisdictional wetland or on a protected sensitive area.[333]

The ordinance sets out the ecological attributes of each protected resource; regulates the delineation of the protected resource; and establishes buffer requirements, design standards, and mitigation standards. Buffers of varying width are required for wetlands, stream corridors, and slopes of 40% or greater. Foreign or invasive native plant species may not be planted in wetland buffers. Stream corridors, together with wetlands containing federally or state-defined endangered or threatened species or wetlands with "diverse plant associations of infrequent occurrence," are no-build areas. With limited exceptions, slopes greater than 40% must remain undisturbed. Buffers are required for retained woodland areas, and where the removal of woodland is approved, replacement trees must be planted. Prairie remnants that are found in association with other protected resources "will be treated as environmental assets, and will be considered no-build areas to the extent possible," to be used for buffers, filter strips, or open space.[334]

The Iowa City ordinance includes Sensitive Area Development Plan Guidelines[335] that incorporate new urbanist principles into the protection of natural resources, encouraging flexible design options, pedestrian and bicycle access, and neighborhood-scale mixed uses. Street design guidelines discourage the use of cul-de-sacs and encourage narrow streets, alleys, and off-site parking clusters. The ordinance encourages the incorporation of sensitive areas and buffers into dedicated open space or commonly-held private open space.

[4] Performance Standards

Traditional Euclidean zoning separates "incompatible" land uses by creating zones in which permitted uses are specifically listed and bulk and density are limited. Performance standards attempt to prevent incompatible development more directly by limiting the external impacts of development rather than relying on the strict separation of land uses. Performance standards may be used in lieu of or in addition to traditional zoning. Performance standards are frequently used in industrial areas to limit the noise, odor, smoke or other particulates, vibrations, noxious matters, glare, heat, or other hazards generated by the industrial use of land or buildings.[336] In court cases that directly address the legitimacy of performance standards, *per se*, the standards have been upheld.[337]

Performance standards need not be confined to industrial districts and can be established to protect a site and the community surrounding it from harmful impacts of land-disturbing

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[333] *Id*. § 14-6K-1(D)(3).
[334] *Id*. § 14-6K-1(L).
[335] *Id*. § 14-6K-1(N).
[336] Zoning and Land Use Controls § 40.01[1] [c] (Matthew Bender). *See, e.g.*, N.Y. City Zoning Resolution, eff. Dec. 1961, as amended, § 42-20 *et seq.*
[337] Blackwell, *Overlay Zoning Performance Standards and Environmental Protection After Nollan*, 1990 Zoning & Planning Law Handbook, Ch. 18 at 483–89 (Dennison, ed., Clark Boardman 1990). *See, e.g.*, State v. Zack, 138 Ariz. 266, 674 P.2d 329 (Ct. App. 1983); International Harvester Co. v. Zoning Bd. of Appeals, 43 Ill. App. 2d 440, 193 N.E.2d 856 (1963); DeCoals, Inc. v. Board of Zoning Appeals of Westover, 168 W. Va. 339, 284 S.E.2d 856 (1981).

activities. Standards may be adopted to protect a site during the construction process as well as after construction is completed. Ordinances that protect multiple resources may establish environmental performance standards to regulate land-disturbing activity in sensitive areas within defined overlay zones. These standards might be designed to protect a specific resource or more broadly to limit the disturbance of open space, of vegetative cover, or of water resources.[338] Another type of ordinance relies on performance standards to regulate development within designated distances of a protected resource. Instead of relying on use classifications, these regulations may permit any type of development that meets the performance standard.[339]

Sanibel Island, Florida: Sanibel's City Plan was originally adopted in 1976 and contains extensive policies to protect coastal, open space, water, and scenic and historic resources.[340] An Island-Wide Beach Management Plan was adopted in 1995 and discusses causes of erosion, erosion control methods, beach and shoreline protections, and storm effects.[341] The city's Vision Statement sees Sanibel as a "sanctuary"—a small community that values and, as a resort area, depends on its natural resources and is trying to maintain "a tenuous balance" between development and preservation.[342]

The Sanibel Code of Ordinances relies on environmental performance standards to regulate development in defined ecological zones: gulf beach, upland and lowland wetland, mid-island ridge, mangrove forest, and bay beach zones.[343] A development permit is required for projects in each zone, and standards are established to protect geology, hydrology, vegetation, landscaping, and wildlife within each zone. The city is particularly concerned to protect native and indigenous plants and requires that 75% of plants installed in these zones be native species and that exotic species be removed in some circumstances. Turf restrictions are included. The Site Preparation Standards of the city code aim to minimize impermeable surfaces—driveways and parking areas, for example, are to be constructed of shell and sand where possible.[344]

Fort Collins, Colorado: The Fort Collins Natural Habitats and Features ordinance[345] uses performance standards to regulate development within 500 feet of an area or feature identified on the city's inventory map of natural habitats and features.[346] Natural Communities or Habitats as identified by the ordinance include aquatic resources; wetland and wet meadow; native grassland; riparian forest and shrublands; urban plains forest; and foothills forest. Special Features include native plant community remnants; potential habitats of rare or endangered plants or animals; nesting and migration concentration areas for birds, insects, and animals; significant geological or paleontological areas; and irrigation ditches that serve as wildlife corridors.

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338 *See* Edward H. Ziegler, Jr., 2 Rathkopf's The Law of Zoning and Planning (West 2003) at § 21:67.
339 *Id*.
340 Sanibel Plan, adopted by Ordinance No. 97-16.
341 City of Sanibel Island Wide Beach Management Plan, adopted by Resolution No. 95-111.
342 City of Sanibel Vision Statement, http://www.ci.sanibel.fl.us/planning/plan/VISION.htm.
343 City of Sanibel, Florida, Code of Ordinances Chapter 126 Article XIII.
344 *Id*. § 86-42.
345 City of Fort Collins, Colorado, Code § 3.4.1.
346 *Id*. § 3.4.1(A).

General Standards require that "to the maximum extent feasible" a development plan shall direct development away from protected resources and minimize disturbance through buffer zones, and that mitigation or restoration measures shall be used where disturbance occurs.[347] Boundaries of protected areas are proposed by the applicant and established by the city through an ecological characterization study prepared for the applicant by a qualified professional. The study must show the boundaries of protected resources and describe their ecological functions and any ecological issues related to the timing of development on the site. Wetland boundaries are defined under federal and state guidelines. Specific performance standards—ranging from 25 feet for woodlots to 2,640 feet for bald eagle nesting sites—are established for buffer zones for each type of resource.[348] Buffer zones are to remain undisturbed, although the city may allow limited disturbance for mitigation or restoration purposes or to provide public access or passive recreation features. The ordinance emphasizes the importance of maintaining connectivity of wildlife habitat, as well as compatibility with public natural areas, requiring setbacks or open space "to provide a transition between the development" and publicly-owned natural areas.[349]

Construction standards include a limits of development (LOD) line around the development site "to preserve significant ecological characteristics of the affected natural habitat or feature that could not reasonably be restored" if disturbed by the construction process.[350] Barrier fencing indicating the LOD is required, and the timing of construction must minimize disturbance of protected species. Although prairie-dog colonies of 50 acres or greater are classified as Special Features by the ordinance, prairie dogs on a construction site must be "relocated or eradicated by the developer using city-approved methods."[351]

[5] Natural Resources Management Plan

Instead of designating specific areas for protection, this ordinance of the city of Apple Valley, Minnesota, regulates impacts on trees, soils and slopes, and wetlands on any property where development is proposed. Its plan for protecting natural resources could be applied to any type of resource, but here is used to protect basic ecological functions.

Apple Valley, Minnesota: Apple Valley's first comprehensive plan, in 1972, "established a 'new town' concept consisting of separate residential neighborhoods" surrounding a downtown core—"a significant departure from typical suburban planning."[352] Under Minnesota's State Environmental Protection Act,[353] local governments may adopt ordinances regulating environmental impacts of development. The city's Natural Resources Management ordinance[354]

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[347] *Id*. § 3.4.1(C).
[348] *Id*. § 3.4.1(E).
[349] *Id*. § 3.4.1(L).
[350] *Id*. § 3.4.1(N).
[351] *Id*.
[352] City of Apple Valley, Minnesota, Comprehensive Planning in Apple Valley: A Citizen's Guide at 4, available at http://www.cityofapplevalley.org.
[353] M.S.A. § 116D.04.
[354] Apple Valley, Minnesota, City Code Title XV Chapter 152.

was adopted "to reasonably regulate the amount of tree removal, soil erosion, and impact on wetlands on any property where development occurs."[355]

The ordinance requires a developer to obtain a Natural Resources Management Permit[356] for any new building construction or new development in any zoning district; for any project requiring a building permit which will expand an existing building or impervious surface that directly affects natural resources; or for any land-disturbing activity that will "directly or indirectly" affect natural resources. Projects involving more than five acres must be approved by the City Council. Smaller projects may be approved by city staff.

A Natural Resources Management Plan (NRMP)[357] must be submitted with the permit application. The NRMP must identify water bodies and wetland buffer zones, topographical features, and sewer and stormwater facilities on or adjacent to the property. An Erosion and Sediment Control Component (ESCC)[358] requires the identification of permanent erosion control methods on the property and the use of best management practices in controlling erosion during construction. The Tree Preservation Component (TPC)[359] requires an inventory of "significant trees"—deciduous trees eight inches in diameter or greater and coniferous trees six inches or greater in diameter. The developer must specify which trees will be removed and must specifically identify trees to be preserved and replacement trees by number, type, size, and location. The Drainage and Grading Component (DGC)[360] includes requirements for contour plans and soil borings and the prevention of stormwater runoff.

A separate section of the ordinance sets out Tree Preservation Requirements[361] that establish standards for tree removal and replacement trees. The ordinance also creates the position of City Forester; requires a license for those who do tree work; establishes minimum heights for tree limbs on public streets and sidewalks; and sets out Shade Tree Disease Regulations, in an effort to combat Dutch Elm Disease and oak wilt.[362] A final section of the ordinance requires wetland buffer zones on "all public and private property which abuts any water body.[363] Buffer zones must be shown on the NRMP, and "shall be maintained in a natural condition indefinitely." The alteration of vegetation or topography, the construction of any structure, and the dumping of any foreign material are prohibited in buffer areas. Any proposed land-disturbing activity outside a buffer area that "may impact the buffer zone and/or wetland" must be approved by the city.

[6] Natural Features Impact Review Regulations

Subdivision regulations can contribute to the protection of natural resources that are identified in citywide plans. Ann Arbor, Michigan, has made extensive studies of the city's

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[355] Citizen's Guide, *supra* Note 353, at 6.
[356] Apple Valley, Minnesota, City Code § 152.15.
[357] *Id*. § 152.16.
[358] *Id*. § 152.16(A)(2).
[359] *Id*. § 152.16(A)(3).
[360] *Id*. § 152.16(A)(4).
[361] *Id*. § 152.22.
[362] *Id*. §§ 152.40 – 152.45.
[363] *Id*. § 152.57.

natural resources and has incorporated review of impacts of development on those resources into its subdivision regulations.

Ann Arbor, Michigan: Ann Arbor recognizes that "[t]he cumulative loss of natural features can rapidly result in the permanent loss of local ecosystems, and their biodiversity," and that "[i]n a fragmented, urban landscape … natural areas cannot survive without active stewardship."[364] Watersheds; wetlands, ponds, and lakes; floodways and floodplains; groundwater recharge areas; land forms and steep slopes; woodlands and savannas; landmark trees; native plant and animal ecosystems; and greenway linkages between natural features have been identified by the city as resources to be protected.

Natural Features provisions are incorporated in the city's Subdivision and Land Use Control ordinance.[365] The city's most comprehensive ecological analysis is found in the Guidelines for the Protection and Mitigation of Natural Features, which are included as an appendix to the Land Development Regulations.[366] The Guidelines do not establish mandatory protections, but provide a comprehensive basis for planning and review of development decisions and establish an ecological framework for the city's growth. The Guidelines are meant "to assist petitioners, reviewers, decision makers, and the general public in understanding how natural features may be identified, evaluated, protected, and mitigated"[367] in the development review process. The Guidelines examine the ecological functions of natural features, the city's standards for identification of resources, and its priorities for protection. The ecological history of the resources is discussed. Throughout this scientific, historical, and practical analysis, the Guidelines emphasize the preservation of ecosystem functions and of large interrelated resource areas.

The Land Development Regulations require a site analysis to describe "all natural features on the site and within the area 50 feet beyond the property line," including endangered species habitat; 100-year floodplains; landmark trees; steep slopes; watercourses; wetlands; and woodlands.[368] Site plans, PUD site plans, and final preliminary plats require a Natural Features Statement of Impact,[369] which must include the site inventory; a protection plan; and—where natural features will be disturbed—a statement of alternative plans that were considered; justification for the proposed plan; and a mitigation plan. The ordinance establishes required mitigation[370] for wetlands; habitat; floodplains; landmark trees and woodlands; steep slopes; and watercourses. For all features, native plant species must be used in mitigation and must approximate the undisturbed site conditions within three years of the disturbance. Alternative mitigation measures that provide "an overall ecological value to the site or the city that is at least as beneficial as the required mitigation" may be approved by the city.[371] The ordinance also includes construction standards to protect natural features during the development process.

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[364] Ann Arbor, Michigan, Draft Natural Features Master Plan (2003) at 11.
[365] Ann Arbor, Michigan, Code of Ordinances Chapter 57.
[366] *Id*. § 1.1 and Attachment A.
[367] *Id*. § 1.1.
[368] *Id*. § 1.3(3).
[369] *Id*. § 5:126.
[370] *Id*. § 5:127.
[371] *Id*. 5:127(4).

[7] Local Implementation of Regional and State Plans

Brookhaven, New York: The Pine Barrens region of central Long Island is a fragile ecosystem protected by state law in one of the most densely populated areas of New York. The town of Brookhaven has adopted development standards and a program of transfer of development rights to protect the natural resources of the Pine Barrens within its jurisdiction. The Brookhaven ordinance[372] implements the goals of the Central Pine Barrens Comprehensive Land Use Plan and the state's Environmental Conservation Law.[373] It expressly supersedes any conflicting provisions of the state's Town Law.[374] A goal of the Central Pine Barrens Plan is to preserve "the functional integrity of the Pine Barrens ecosystem" and its "significant natural resources, including plant and animal communities."[375] A Core Preservation area is to be maintained "in a natural state."[376] A Compatible Growth Area preserves "the essential character of the existing Pine Barrens environment" while allowing "appropriate growth consistent with the natural resource goals of the Plan."[377] The uses permitted in the Compatible Growth Area are those of the underlying zoning classifications. Under the town's transfer of development rights program, development is prohibited in the Core Preservation Area, while development credits allow compatible development in receiving districts of non-Core areas.[378] The ordinance creates Residential Overlay Districts and Planned Development Districts and encourages the use of clustering and zoning incentives to promote appropriate development.

The Brookhaven ordinance establishes standards applicable to all development within the Central Pine Barrens area.[379] The maintenance of unfragmented open space is a primary aim of the ordinance: "Subdivision and site plan design shall support the preservation of natural vegetation in large unbroken blocks that allow contiguous open spaces to be established when adjacent parcels are developed."[380] The ordinance identifies ecological communities and native species of pine barrens vegetation, and limits the use of fertilizer-dependent vegetation, including turf, to 15% of an entire development project site.[381] Development guidelines,[382] which are "advisory in nature," concern wellhead protection, aquifer recharge areas, ponds, stormwater management, plant and animal habitats, steep slopes, agricultural and horticultural best management practices, and cultural resources, including scenic corridors, roadside design, and historical and archeological areas.

Tumwater, Washington: Washington's Growth Management Act (GMA)[383] and the state's Administrative Code[384] define critical environmental areas that require protection by counties and cities: wetlands, aquifer recharge areas, fish and wildlife habitats, flood-prone areas, and

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372 Brookhaven, New York, Code of Ordinances Chapter 85 Article XXXVII.
373 *Id*. § 85-443.
374 *Id*.
375 *Id*. § 85-443(B)(1)(a).
376 *Id*. § 85-443(B)(2).
377 *Id*. § 85-443(B)(3).
378 *Id*. § 85-450.
379 *Id*. § 85-448.
380 *Id*. § 85-448(E)(2).
381 *Id*. § 85-448(E)(3).
382 *Id*. § 85-449.
383 R.C.W. § 36.70A.170.
384 W.A.C. § 197-11-908.

geologically hazardous areas. In planning to protect critical areas, local governments are required to use the best available science.[385] The Thurston County Code also regulates development under the GMA.[386] Tumwater's local natural resource protection ordinance implements state policies to protect specific resources in an urbanized environment.

The Environment title[387] of the Tumwater City Code adopts the regulations of the state Environmental Policy Act by reference,[388] and sets out standards for required protection of critical areas along with tree and vegetation protections, right to farm and right to mine regulations, and a commute trip reduction program for specified public and private employers at single work sites within the city. The ordinance requires environmental review of actions within critical areas under the provisions of Washington's Administrative Code.[389] Approval through the environmental review process and/or through the issuance of construction permits is required for development proposals in the critical areas. Performance standards are set out for aquifer recharge and wellhead protection areas and for wetlands.

Protected habitats within the city include "areas with which endangered, threatened, and sensitive species have a primary association;" some naturally occurring ponds; state waters and their wetlands; and priority habitats identified by the state.[390] A habitat protection plan must be submitted by the applicant for approval of proposed development within these areas.[391] The plan must include mitigation measures, to be proposed by the applicant. Buffer zones and the use of indigenous plant species, the preservation of "critically important" trees and plants, limitations on access to the habitat area, and seasonal limitations on construction activities are possible mitigation measures specified in the ordinance. "To retain and protect adequate urban wildlife habitats," the ordinance provides that buffers will be established on a case-by-case basis as defined by the habitat protection plan.[392]

[8] Comprehensive Approach

Sun Prairie, Wisconsin: The Natural Resource Protection regulations of Sun Prairie, Wisconsin,[393] explicitly recognize interrelationships among natural resources and also recognize the interrelationship of development and conservation decisions in planning to protect natural resources. The city is facing very rapid growth as a suburb of the state capital, and is close enough to its rural past to have a sizeable area still open for development. Sun Prairie's ordinance identifies and defines nine discrete resources. The protections are mandatory. The natural resource regulations are specifically integrated with density and intensity standards of the city's zoning code. The natural resource regulations are also integrated with the natural resource and development goals of the city's master plan, and with intermunicipal and regional plans.

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385 R.C.W.36.70A.172, W.A.C. § 365-195-900.
386 Thurston County, Washington, Code Title 17 (Environment) and Title 22 (Urban Growth Area Zoning).
387 Tumwater, Washington, Code of Ordinances Title 16.
388 *Id*. § 16.04.020.
389 W.A.C. § 197-11-908.
390 Tumwater, Washington, City Code § 16.32.050.
391 *Id*. § 16.32.090.
392 *Id*. § 16.32.060.
393 Sun Prairie, Wisconsin, Code of Ordinances § 17.28. The regulations are printed in § 3.08, *infra*.

The protection of open space corridors and of ecological functions is a goal of the city's planning policies.

Sun Prairie has created an integrated master plan, zoning and subdivision regulations, an open space plan, an extraterritorial zoning ordinance, a peripheral area plan with neighboring towns, and an intergovernmental boundary agreement with Madison establishing permanent open space separation between the two cities.[394] Under the Smart Growth for Wisconsin Act (1999), Wisconsin communities must adopt comprehensive plans by 2010.[395] The Act includes natural resource protection as a required element of the comprehensive plan. Additionally, the Wisconsin Department of Natural Resources has adopted an "ecological landscape" approach in its strategic plan for the state.[396] An element of the plan is to "[m]aintain and restore terrestrial, wetland and aquatic ecosystems that support diverse flora and fauna, and that provide landscape scale ecosystem functions from flood control to groundwater recharge."[397] In a regional context, the Sun Prairie plan references the Dane County Land Use and Transportation Plan (1997), which has among its goals the promotion of design "that preserves environmental functions and protects important environmental, cultural, and historic resources" and the development of "a countywide system of open space corridors as a framework to protect the natural environment and scenic values."[398]

The natural resource features element of the Sun Prairie Master Plan includes 13 objectives. The first is:

> Preserve environmental corridor features including waterways, floodplains, wetlands, groundwater recharge areas, steep slopes (greater than 12%), wildlife habitat, scenic vistas, and mature woodlands through the enforcement of the City's adopted natural resource protection zoning standards and through the use of the City's Land Division Ordinance and Official Map.[399]

Other objectives include the protection of greenspace corridors between Sun Prairie and Madison; the protection of agricultural lands; the encouragement of compact mixed-use development which makes use of existing infrastructure; cooperation with neighboring municipalities to encourage "an orderly, efficient and sustainable development pattern that preserves natural resources and minimizes conflicts between urban and rural land uses;" and the encouragement of transportation improvements that "minimize impacts on environmental corridors."[400] Environmental corridors are defined by the Master Plan as "continuous systems of open space in urban areas" that include environmentally sensitive lands and resources that must be protected from the impacts of development.[401]

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394 City of Sun Prairie, Wisconsin, Master Plan 2020, Local Planning Framework, at 6.
395 Act 9, Wis. Statutes § 66.1027.
396 Wisconsin Department of Natural Resources, http://www.dnr.state.wi.us/aboutdnr/plans.
397 Wisconsin DNR Strategic Plan, Goal II, Strategy D.
398 City of Sun Prairie Master Plan 2020 at 4.
399 *Id*. at 52.
400 *Id*. at 52-53.
401 *Id*. at 39.

Sun Prairie's Natural Resource Protection ordinance[402] contains overlays protecting nine discrete resources: floodplains; wetlands; shorelands; drainageways; woodlands; steep slopes; ridgetops; prairies; and state-identified historic resources. A Purpose statement emphasizes the overlays' interrelationship with the density and intensity standards, mitigation standards, and other development standards of the zoning ordinance.[403] The overlay regulations parallel one another in a four-part format: the resource is defined; the purpose of each regulation is set out; the required method of identifying the resource is described; and the mandatory requirements for protection are given.

The Ridgetops overlay[404] illustrates the ordinance's emphasis on the interrelationships of natural resources. Ridgetops are defined as areas that are higher than steep slopes and that are found within 100 feet of steep slopes on the county's environmental corridor maps. The Purpose section of the overlay describes the relationship between the exposed position of ridgetops above steep slopes and the potential for erosion damage caused by wind or water where sites are disrupted.[405] The overlay requires a detailed site analysis for any development proposed on a property containing a ridgetop that is depicted on the city's zoning map.

The process of site analysis is described in a separate section[406] of the city's Zoning Code and applies to each protected resource. All natural resource areas requiring protection under the ordinance must be depicted on a map of a property where development is proposed. The ordinance states that "[p]articular care as to clarity shall be taken in areas where different resource types overlap with one another."[407] The ordinance limits site disruption to "development pads," which must be shown on the site analysis map and on recorded subdivision plats and certified survey maps. The regulations for development pads require the replacement of trees greater than three-inch caliper "whose canopies are located adjacent to disturbed areas" and which die within five years of the site's disruption. The use of barriers outlining the development pad "is strongly recommended" to reduce soil compaction and to protect vegetation during construction.

The Natural Resource Protection overlays interact with the Density and Intensity Regulations of the Zoning Code.[408] These regulations define the development potential of any site as being determined by such factors as site area; proportion of the site not containing sensitive resources; zoning district; and proposed uses. The Rationale section of the regulations notes that many of the goals of the Master Plan "are extremely difficult to address using conventional zoning techniques."[409] The density and intensity regulations are intended to achieve "a very high degree of site design flexibility" and to avoid "the needless destruction of sensitive natural resources."[410] For residential development, the regulations adopt maximum gross densities (MGDs) and minimum greenspace ratios (GSRs), in place of minimum lot area

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[402] *See* § 3.08, *infra*.
[403] *Id*. § 17.28.010.
[404] *Id*. § 17.28.090.
[405] *Id*. § 17.28.090(B).
[406] *Id*. § 17.28.120.
[407] *Id*. § 17.28.120(B)(3).
[408] *Id*. § 17.20.
[409] *Id*. § 17.20.010(B).
[410] *Id*.

requirements. For non-residential development, the regulations use minimum required landscape surface ratios (LSRs) together with maximum permitted floor area ratios (FARs). The Rationale sections explain that the density incentive is designed "to result in a consistent community character of development" within each district and "to at least partially compensate for potential per-unit price reductions" in residential projects or "potential per square foot price reductions" in non-residential projects that reduce lot size or floor area to provide significant required green space."[411] A Natural Resources Site Evaluation[412] is required for both residential and non-residential projects, which includes calculations regarding the gross site area, the required resource protection area, and the net developable area of the site.

Sun Prairie has implemented its goals for natural resource protection and flexible development through a downtown revitalization project, several traditional neighborhood development projects, and an ambitious plan for development of the largest open area of the city.[413]

§ 3.05 Local Land Acquisition

[1] Introduction

Public acquisition of private land is sometimes necessary to achieve the resource preservation and environmental protection objectives of local governments. For a variety of political, resource, and legal reasons, land use and environmental regulation may not be sufficient to protect critical resources and ensure the quality of community life. This section explores the legal interests that may be acquired, the acquisition methods used, and the sources of financing for land acquisition.

Assuming that the requisite public need can be evidenced, government agencies may exercise their powers of eminent domain to acquire land for public recreation or to preserve natural resources.[414] Colorado statutes, for example, authorize any town to acquire land or an interest in land in order to preserve open space, sites, and vistas of recreational, historic, aesthetic, or other public interest.[415] Given the political unpopularity of condemnation, in most instances government agencies attempt to acquire land through voluntary agreement with the owners. Colorado provides incentives in the form of tax credits to encourage private owners to donate their property to a governmental entity or non-profit organization.

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[411] *Id*.§ 17.20.060.

[412] *Id*. § 17.20.030.

[413] The city describes its development initiatives and community visioning and planning process in detail on the city web site, http://www.sun-prairie.com.

[414] *See, e.g*, Perati v. United States, 352 F.2d 788 (9th Cir. 1965) (upholding condemnation of land for inclusion in Yosemite National Park), *cert. denied*, 383 U.S. 957 (1966); United States v. 0.16 of an Acre of Land, 517 F. Supp. 1115 (E.D.N.Y. 1981) (condemnation of subdivided parcel within boundaries of Fire Island National Seashore by Secretary of the Interior was authorized by Fire Island National Seashore Act, one purpose of which is to conserve and preserve relatively unspoiled beaches and dunes for the use of future generations); Pastan v. City of Melrose, 601 F. Supp. 201 (D. Mass. 1985) (taking of land by town for purpose of creating public park was constitutionally acceptable, even where ulterior motive of town was to block condominium development).

[415] Colo. Rev. Stat. § 31-25-301.

[2] Types of Interests Acquired

The ownership interest which the agency acquires may be tailored to reflect certain desires of the owner while protecting the public's interest in the land. The most common acquisitions involve the entire fee interest or a partial interest in the form of an easement. More innovative programs such as the purchase of development rights are also possible.[416]

[a] Fee Simple

The simplest acquisition is the agency's purchase of the owner's entire fee interest in the property. While this may be the most expensive approach, it affords the agency full discretion as to the future use of the property including the right to provide appropriate public use and access.

[i] Fee Subject to Life Estate

In the event the owner is interested in long-term protection of the land, but does not wish to leave immediately, the agency may acquire the fee subject to a life estate. The terms of such a life estate, which are negotiated to fit each transaction, generally allow the owner to remain until his or her death, but preclude changes to the property that would impair the public values sought to be protected.

Life estates have traditionally been included in a donor's will to provide for a charity to receive the property after a life estate enjoyed by the donor's spouse. Life tenants often have certain statutory or common law rights which should be examined, and, under state law, may be more difficult to terminate for noncompliance than a leasehold interest. Nevertheless, life estates are a common technique used by donors who wish to make an immediate gift of property yet retain the right to use and enjoy it during their lifetimes.

[ii] Sale and Leaseback

A governmental agency may agree to lease the land it purchases back to the previous owner. The lease can be structured to protect the public's interest in the property while leaving many of the maintenance responsibilities with the lessee.

Under both life estates and leases, maintenance responsibilities, such as obtaining property and liability insurance, making routine and structural repairs, paying real property taxes, being responsible for environmental or other damages, as well as limits on developing and improving the property should be specified. Leases have the advantage of being the more familiar technique where the rights and responsibilities of the two parties are more readily understood.

[b] Conservation Easements

Acquisition of full fee title by an agency has several consequences beyond the initial cost and the agency's assumption of the expenses of maintenance and operation. Such acquisition also withdraws the land from its traditional economic use and, generally, removes it from the local tax rolls. As a result, agencies are sensitive to situations in which the public interest can be

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[416] *See* McMahon and McQueen, Land Conservation Financing (Island Press 2003).

met through the acquisition of a conservation easement — a partial interest in the land which allows the owner to retain fee title and continue to use the land subject to restrictions which protect the public's interest. For a more detailed discussion of conservation easements, *see* § 3.06 *infra.* It is increasingly common for programs designed to protect agricultural land, forest land, and scenic areas to rely heavily on the acquisition of easements.

[c] Development Rights

As noted in Section 3.02[2][g] above, some preservation programs sever from the other incidents of owning fee title the right to undertake some or all of the development which might otherwise occur on a parcel of land. Such "development rights" may then be sold to private buyers for use on designated receiving sites or to a government agency acting as a bank — buying the rights at a fixed price (to provide a market for them), with the hope of reselling them to developers. However, some programs do not provide for the transfer of the rights; they are instead purchased by government agencies and, in effect, extinguished. The result is quite similar to that of purchasing an easement that precludes development.

[3] Level of Government

Preservation-oriented acquisition may be carried out by any level of government— federal, state or local (either county or municipal). Federal acquisition may be attractive because of the source of funding, but the agencies involved generally must operate within detailed acquisition criteria and obtain congressional authorization, which may be difficult and time-consuming. Acquisition by state agencies may also be hampered by complicated procedural requirements which entail delays that sellers may not be willing to accept. Local governments may have the ability to be more flexible and act quickly, but may depend on at least partial funding from higher levels of government.

[4] Financing

There are several methods that local governments may use to raise the funds needed for land acquisition, where authorized by state statute. The following illustrate various approaches taken under state enabling laws:

- Annual appropriations: Localities may appropriate revenues derived from local property taxes to acquire interests in open lands as part of the local budgeting process.
- Multi-year appropriations: Municipalities may ask their voters to approve a multi-year appropriation of a specified increase in the local property tax rate for the purpose of acquiring interests.
- Bonds: Municipal bonds may be issued and the proceeds used for the acquisition of interests in open lands. The issuance of municipal bonds may be subject to a referendum requirement or the local legislature, itself, may take the initiative to place the bond resolution on the ballot.
- Real estate transfer tax: State legislatures may authorize local government to impose a tax on the transfer of title to real property within the local jurisdiction. Authorization for this tax may be subject to referendum.

- Reduced tax assessment: Local governments may lease development rights from the owners in exchange for a reduction in property tax assessments during the lease's term. The landowner may agree to a limited-term lease of the land's development rights, a conservation easement for that term may be imposed on the land for that term, and during that term a reduced tax assessment may applied lowering the taxes that must be paid by the owner.
- Land purchase installment obligations: Local governments may adopt a resolution that authorizes them to incur debt by purchasing the title to open lands or their development rights directly from landowners on an installment basis. The landowner becomes the creditor of the municipality which now owns the land or its development rights. The value of the interest acquired by the municipality may be paid to the landowner over a period of up to 30 years. All interest payments to the landowner are tax exempt. The payment of the principal may be deferred until the end of the installment period which defers the payment of any capital gains tax due. Installment purchase obligations owned by landowners can be devised to the owners' heirs or sold to municipal bond investors.

States may also provide funding for local acquisition through a variety of devices. The Trust for Public Land estimates that in 2003 voters across the country approved $1.3 billion for land conservation. Ninety-nine measures in 23 states were approved. Seventy-seven percent of the measures proposed were approved—surpassing the previous high rate of 70 percent in the period 1998-2002.[417]

States have looked to a variety of funding sources beyond direct annual budget appropriations.[418] Some, such as the issuance of general obligation bonds, provide substantial infusions of funds but are not permanent sources of funding. Other sources of funds, such as real estate transfer taxes, mortgage taxes, entrance fees, lottery proceeds, state sales taxes or special sales taxes on sporting goods, may provide lesser amounts of money but do so on a continuing basis. Some states are exploring methods for using such funding streams to create a trust fund which will generate an assured flow of funds for the future. As state financial assistance has become more difficult to obtain, more localities are developing their own funding for open space preservation using the techniques described above.

The following list illustrates the wide variety of revenue sources employed by a sampling of states:

- Connecticut's Protected Open Space and Watershed Land Acquisition Grant Program offers matching-fund grants to communities and non-profit land conservation organizations for the acquisition of open space and watershed lands.[419] The state has set conservation acquisition goals for the state as a whole, and requires that when the state conveys open space lands the recipient must execute a conservation easement limiting the land's development.[420]

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[417] Trust for Public Land, Land Vote 2003, available at http://www.tpl.org.
[418] *See generally*, the National Conference of State Legislatures' table of state incentive-based growth management laws: http://www.ncsl.org.
[419] Conn. Gen. Stat. Ann. § 7-131-d.
[420] Public Act 99-235.

- The Florida legislature has created a number of programs to preserve natural areas that are subject to development pressure. The Florida Preservation 2000 Trust Fund uses the proceeds of state revenue bond s to acquire title or development rights for open space and natural resource protection.[421] The Florida Forever Program is a 10-year, $300 million annual bond-funded program designed to purchase environmentally significant lands and water resource development projects. Bond proceeds are deposited in the Florida Forever Trust Fund, 24% of which is allocated each year to the Florida Communities Trust for grants to local governments and nonprofit environmental organizations for open space acquisition.[422]
- Iowa's Resource Enhancement and Protection Act uses general legislative appropriations for wetland acquisitions.[423] The Iowa legislature has authorized the use of conservation easements, strengthened their enforceability, and expanded eligible purposes of easements to include agricultural land and open space preservation.[424]
- Maine statutes establish the Land for Maine's Future Fund.[425] The fund's revenues consist of proceeds from the sale of bonds and contributions from private and public sources to purchase lands for the conservation of biodiversity and open space. The Public Access to Maine's Water Fund is authorized to acquire lands with conservation values and also to receive monies from the Land for Maine's Future bonds.[426] The state authorizes conservation easements to protect natural, scenic, or open space preservation.[427] In addition, a tax reduction of 20% to 30% is permitted for the conservation of land defined as "open space" under a program entitled Forever Wild Open Space.[428]
- Maryland's Rural Legacy Program was established by the state legislature to enhance the protection of natural resources while maintaining the viability of agricultural and forest lands.[429] State funds are provided to local governments and land trusts to purchase land and development rights from willing sellers. Funding sources include a portion of the state's property transfer tax, general obligation bonds, and zero-coupon bonds. Maryland also has a Greenprint Program[430] which is a $35 million program designed to protect green infrastructure lands critical to the state's long-term ecological health.
- Massachusetts' Community Preservation Act authorizes towns and cities to establish a Community Preservation Fund by referendum.[431] The fund is to be used for the preservation of open space and scenic and historic resources and for the creation of affordable housing. The referendum approves a community-wide property-tax surcharge of up to 3%, and qualifies the community for state matching funds.

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[421] Fla. Stat. Ann. § 259.101, § 375.045.
[422] Ch. 99-247.
[423] Iowa Code Ann. §§ 455A.15 *et seq.*
[424] Iowa Code Ann. §§ 457A.1-.2.
[425] Me. Rev. Stat. Ann. 5 §§ 6200 *et seq.*
[426] Me. Rev. Stat. Ann. 5 §§ 6203A, 6207, 6209.
[427] Me. Rev. Stat. Ann. 33 § 476 *et seq.*
[428] Me. Rev. Stat. Ann. 36 § 1106-A.
[429] Md. Code Ann., Nat. Res. § 5-9A-01.
[430] Md. Code Ann., Nat. Res. § 5-15A-01.
[431] Mass. Ann. Laws ch. 44B § 2.

- The Michigan Natural Resources Trust Fund Act is used in part to acquire land that is of scenic beauty or that is environmentally important.[432]
- Oregon's Natural Heritage Program protects natural areas through the voluntary cooperation of private landowners and public land managers.[433] Lands designated as natural areas receive a property tax exemption. Conservation easements are authorized by statute.[434]
- Rhode Island's Natural Heritage Preservation Program saves open land of scenic, natural, ecological, educational or agricultural value. The fund, which receives monies from the federal government, gifts, bequests and bond revenues, provides zero interest loans to municipalities and conservation organizations.[435]

§ 3.06 Conservation Easements

[1] Definition of Conservation Easement

A conservation easement is a legal agreement between a property owner and a land trust or other qualified private organization or governmental unit. Its purpose is to preserve the property's natural resource or other public values inherent in the land. The easement operates like a restrictive covenant burdening the use of the owner's land. The covenant is enforceable by the land trust or other qualified organization. The effect of a conservation easement is to limit activities on the land that compromise conservation values.[436] The terms of the agreement vary depending upon the nature of the property, the desires of the owner and the interest of the organization that will hold the easement.[437]

Arizona statutes authorize conservation easements for the purpose of preserving historical, architectural, archaeological, cultural, aspects of real property or for open space and wildlife preservation.[438] In Texas, through statutorily authorized conservation easements, more than 13 million private acres are under active written Parks and Wildlife Department wildlife management plans that emphasize an ecosystem approach to conservation.[439]

In Wisconsin, more than 50 land trusts protect over 100,000 acres of land within the state. The Gathering Waters Conservancy is an umbrella organization that assists the state's land trusts

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[432] Mich. Comp. Laws Ann. §§ 318.504 *et seq.*
[433] Or. Rev. Stat. §§ 273.563-.591.
[434] Or. Rev. Stat. § 307.550.
[435] R.I. Gen. Laws § 2-18.1-3.
[436] The Uniform Conservation Easement Act (reprinted in § 3.09 *infra*) contains a more lengthy definition: "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects or real property." Unif. Conservation Easement Act § 1(1). For a detailed discussion of conservation easements, *see* Powell on Real Property, Ch. 34A (Matthew Bender).
[437] *See* Lind, The Conservation Easement Stewardship Guide: Designing, Monitoring and Enforcing Easements (Land Trust Alliance 1991).
[438] Ariz. Rev. Stat. Ann. § 33-271 *et seq.*
[439] Tex. Nat. Res. Code Ann. §§ 183.001 *et seq.*

and communities in preserving land and water resources.[440] The town of Dunn, in Dane County, has implemented land preservation efforts for more than 25 years, and in 1997, working with the Dane County Natural Heritage Land Trust, initiated the first purchase of development rights project for land conservation in Wisconsin.[441] The ordinance creating the town's Land Trust Commission and Rural Preservation Program states that the commission "shall maintain contact with public and private agencies to maximize the resources and coordinate efforts to preserve the rural character of the town."[442] One member of the seven-member commission must be a representative of a county non-profit conservation organization.[443] The ordinance authorizes the town's board of supervisors to preserve land through the purchase of conservation easements, purchase of title, payments to non-profit organizations, and voluntary conveyances. The town's program has protected more than 1,700 acres of land.[444]

[2] Statutory Requirements for Conservation Easements

Under the common law, easements held by conservation organizations were often characterized as easements in gross (*i.e.*, easements that run to the benefit of a person rather than adjacent real property) and as such were not favored. As a result, conservation organizations had to hold title to adjacent parcels in order to ensure the enforceability of the easement.

As the public benefit available through conservation easements became increasingly evident, states began to address the problems created by the common law. Thus, several states have enacted laws specifically allowing the perpetual enforceability of conservation easements provided that statutory requirements are met.[445] These requirements generally relate to the nature of the organization that will hold and enforce the easement, the nature of the rights conferred in the easement and the public benefit to be achieved. The statutory requirements must be considered when the easement is negotiated and must be reflected in the document.

[3] Tax Planning for Individuals Considering Conservation-Oriented Donations

Donating an interest in property for land preservation purposes—whether a full fee interest, a conservation easement, or a remainder interest—may result in federal or state income tax deductions, estate tax savings, or real property tax reductions. This section gives a brief overview of the more pertinent tax considerations; a definitive presentation of the relevant tax issues is beyond the scope of this chapter and individuals are advised to consult an attorney or accountant who specializes in such tax matters. There are a number of techniques for preserving land while providing an economic benefit to the owner.[446] Those mentioned in this section are among the most common.

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[440] Gathering Waters Conservancy, http://www.gatheringwaters.org.
[441] Town of Dunn, Wisconsin, Ordinance No. 4-3.
[442] *Id*. § 2(B)(1).
[443] *Id*. § 2(C).
[444] Town of Dunn, http://www.town.dunn.wi.us.
[445] *See, e.g.*, Cal. Civ. Code §§ 815-816; N.Y. E.C.L. §§ 49-0301 to -0311.
[446] *See generally*, Small, Preserving Family Lands: Book I—Essential Tax Strategies for the Landowner (3d ed. Landowner Planning Center 1998), Small, Preserving Family Lands: Book II—More Planning Strategies for the Future (Landowner Planning Center 1999).

[a] The Donation of Conservation Easements

The Internal Revenue Code (I.R.C.) and regulations promulgated thereunder have established standards for determining when gifts of partial interests in land, such as conservation easements, may qualify for deductions as charitable contributions under I.R.C. § 170. Section 170 generally allows a deduction for a charitable contribution only if the donor contributes the entire interest in the property. A deduction, however, may be allowed for the donation of a "qualified conservation contribution," that is "a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes."[447]

One type of qualified real property interest is a "perpetual conservation restriction," a restriction "granted in perpetuity on the use which may be made of real property—including an easement or other interest in real property that under state law has attributes similar to an easement (*e.g.*, a restrictive covenant or equitable servitude)."[448] The term "conservation purposes" is defined to mean:

(i) The preservation of land areas for outdoor recreation by, or the education of, the general public, ...
(ii) The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, ...
(iii) The preservation of certain open space (including farmland and forest land), or
(iv) The preservation of a historically important land area or a certified historic structure.[449]

The Regulations provide explanations of each of these definitions, which should be studied with care when the easement terms are being negotiated and the easement drafted if the grantor intends to claim a charitable contribution.[450] A contribution must be "exclusively for conservation purposes"[451] and be enforceable in perpetuity.[452] If future changes in conditions make the use of the property for conservation purposes "impossible or impractical," the property may be sold or exchanged if the proceeds are used in a manner "consistent with the conservation purposes of the original contribution."[453] In the event of the extinguishment of an easement, the holder of the easement must be entitled to receive a portion of the proceeds from any subsequent sale, exchange or involuntary conversion "at least equal to that proportionate value" of the perpetual conservation restriction, unless state law provides to the contrary.[454] The donee of the easement must be a "qualified organization," meaning generally a governmental unit, a public charity, or a supporting organization of a public charity, which has "a commitment to protect the conservation purposes of the donation," and "the resources to enforce the restrictions."[455]

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[447] Treas. Reg. § 1.170A-14(a).
[448] Treas. Reg. § 1.170A-14(b)(2). For discussion and analysis of easements, restrictive covenants and equitable servitudes, *see* Backman & Thomas, A Practical Guide to Disputes Between Adjoining Landowners, chs. 1 to 4 (Matthew Bender).
[449] Treas. Reg. § 1.170A-14(d)(1).
450 Treas. Reg. § 1.170A-14(d)(2)–(5).
[451] Treas. Reg. § 1.170A-14(e).
[452] Treas. Reg. § 1.170A-14(g). For state law purposes, the required term of an easement is less standard. Some states set minimum terms or allow the parties to the easement to do so.
[453] Treas. Reg. §§ 1.170A-14(c)(2), 1.170A-14(g)(6).
[454] Treas. Reg. § 1.170A-14(g)(6)(ii).
[455] Treas. Reg. § 1.170A-14(c).

Moreover, the donor must prohibit the donee from transferring the easement unless the subsequent transferee agrees that the conservation purposes of the original contribution will continue to be carried out. Any subsequent transferee must also be a "qualified organization."[456]

[b] Deductibility under the Internal Revenue Code

The donation of property, or the sale of property at less than market value, to a qualifying charitable organization may give rise to a federal income tax deduction.[457] The total amount of the deduction depends on the nature of the gift but will generally be based on the fair market value of the property less any proceeds or gain by the taxpayer at the time of the donation.[458] The amount of the deduction any individual can take, however, is limited each year to a percentage of adjusted gross income. Currently, the deduction can go up to 30% of the owner's adjusted gross income in any one year and the excess can be carried over to five subsequent years.[459]

The donation to a qualified organization of certain partial interests in property, such as a remainder interest in a personal residence or farm or an easement in perpetuity exclusively for conservation purposes, can also be deducted from federal incomes taxes,[460] subject to the limitations discussed above. The value of a remainder interest is based on the current market value of the property, reduced by the currently estimated value of the delay in obtaining the property.[461] The value of the easement contribution is the fair market value of the easement—generally determined by the difference between the fair market value of the property before the donation and the fair market value of the property with the restriction.[462] To obtain a deduction for property valued at greater than $5,000, the taxpayer must obtain an appraisal that meets Internal Revenue Service standards.[463] State income tax laws may include similar deductions and limits.

There are possible gift tax implications if the transfer falls short of the requirements for conservation easements, under I.R.C. § 170(h); in such cases the exemption to the gift tax calculation for gifts to charitable organizations may not apply.

[c] Estate Planning Considerations

The estate tax deduction for a charitable contribution is not subject to percentage limitations (unlike an income tax charitable deduction),[464] and the requirements for deducting the donation of easements for estate taxes are not as stringent as the requirements for income tax

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[456] Treas. Reg. § 1.170A-14(c)(2).
[457] *See* Small, The Federal Tax Law of Conservation Easements (Land Trust Alliance 1994; Supplement 1996).
[458] Treas. Reg. § 1.170A-1(c).
[459] I.R.C. § 170(b)(1)(C), Treas. Reg. § 1.170A-8(d).
[460] I.R.C. §§ 170(f)(3)(B) and 170(h)(2).
[461] Treas. Reg. § 1.170A-12.
[462] Treas. Reg. § 1.170A-14(h)(3).
[463] Treas. Reg. § 1.170A-13(c)(3) to (6). S*ee* Clemens v. Commissioner, 64 TCM (CCH) 351 (1992) (U.S. Tax Court reduced appraised value of donated conservation easement from $910,000 to $703,000).
[464] I.R.C. § 2055 *et seq.*

deductions.[465] The amount of the deduction, however, is limited to the amount actually received by the charitable organization which may be affected by state estate taxes.[466] If the gift is made by will, care must be taken that the proposed donee will accept the gift and will be a qualifying charitable organization at the time that the gift vests.

When undertaking estate planning involving the use of a conservation easement, consideration should be given to the impact of I.R.C. § 2703. This section relates to the valuation of property for estate tax purposes and provides, in part, that the value of the property may not take into account restrictions on its use. The provisions of this section are not intended to apply to conservation easements qualified under § 170(h) of the Internal Revenue Code.[467] It should also be noted that I.R.C. § 2703(b) provides an exception if the restriction was imposed as part of a bona fide business arrangement. The section thus appears not to apply if the easement is sold rather than donated. The advice of a specialist should be sought for the most current status of the regulations.

[d] Impact of Grant of Easement on Local Real Property Taxes

The value of real property for tax assessment purposes is generally based on its highest and best use. Many states have legislation providing for reduced assessments for real property tax purposes when land is encumbered by a conservation easement.[468] In addition, there are a number of state court decisions holding that the easements lower the value of the property.[469] Even in those states providing for reduced assessment, however, the reduction is not necessarily liberally given by the local assessor, and there is a great deal of variation among local assessors in determining such easement's impact.[470] The uncertainty in this area is compounded by the fact that properties burdened by easements are sometimes sold for an amount equal to or in excess of their fair market value prior to the easement.

§ 3.07 Land Trusts

[1] Introduction

Much land preservation is accomplished privately, by individuals who preserve the land they own, or by organizations, generally called land trusts, that preserve land within their communities. The activities undertaken by land trusts may vary from the preservation of a critical wetland, to the development of a community garden or park, to the preservation of

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[465] I.R.C. § 2055(f); Treas. Reg. § 20.2055-1(a)(2).
[466] I.R.C. § 2055(c). *See* Treas. Reg. § 20.2055-3(b).
[467] Treas. Reg. § 25.2703-1(a)(4).
[468] *See, e.g.*, Minn. Stat. § 273.117; N.J.S.A. § 13:8B-7; Or. Rev. Stat. § 271.785.
[469] *See* Christopher J. Kayser, *Before-and-After Valuation of Conservation Easements*, Real Eastate Taxation (Spring 2002); Daniel C. Stockford, *Property Tax Assessments of Conservation Easements*, 17 B.C. Envtl. Aff. L. Rev. 823 (1990).
[470] *See* Stockford, *supra* Note 34, at 826 (citing Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 Envtl. Aff. 481, 497 (1975), and a Massachusetts study finding that conservation restrictions in that state resulted in downward assessments ranging from 13% to 95% of the prior assessed value).

agricultural land. According to the Land Trust Alliance, a national organization that seeks to facilitate the land trust movement, there are over 1,200 land trusts in the United States.[471]

Colorado Open Lands, a land trust dedicated to promoting "innovative voluntary land preservation strategies," protected 5,400 acres in the state of Colorado through nine conservation easements established in 2002. In Gunnison County, the Puckett Ranch easement protects 800 acres that include agricultural lands, habitat for antelope, elk, and other wildlife, wetlands, and viewsheds. Gunnison County, Outdoors Colorado, and the Gunnison Ranchland Conservation Legacy worked with Colorado Open Lands on this project.[472]

The Lowcountry Open Land Trust, in South Carolina, monitors 25,000 acres of protected land that includes historic rice fields, tidal and saltwater marshes, maritime forests, upland and bottomland hardwood forest, a cypress-tupelo swamp, and a longleaf pine savannah. The Trust's goals, in addition to protecting open space and wildlife habitat, are to reduce nonpoint source pollution and to promote traditional land uses such as agriculture and sustainable forestry.[473]

The Arizona Open Land Trust has worked with Pima County and with local landowners on a number of preservation projects in the Sonoran Desert. Seven hundred and fifty acres were added to the county park system. Parcels in the Los Morteros area have been acquired by the Trust, protecting viewsheds, cultural resources, and habitat. In partnership, the county and the Trust have preserved 1,500 acres of historic ranchland as permanent open space and habitat, and 500 acres of a family farm as part of the implementation of the Sonoran Desert Conservation Plan.[474]

[2] Organization

Land trusts are generally organized as nonprofit corporations under state nonprofit corporation laws. Because of the charitable nature of their activities, many land trusts seek and obtain recognition of their status as tax-exempt entities, donations to which are deductible as charitable contributions.[475] When organizing and incorporating a land trust, it is important to determine whether the corporation will seek recognition as a tax-exempt entity and, if so, to draft the certificate of incorporation in a manner that complies not only with state law, but also with the I.R.C. requirements relating to tax-exempt entities.[476]

[3] Common Activities

Land trusts generally pursue their corporate purposes through direct involvement in real estate transactions. In some instances, they provide assistance to private landowners who desire

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[471] The Land Trust Alliance (headquartered at 1331 H Street, N.W. Suite 400, Washington, D.C. 20005) maintains a national directory of land trusts which includes information on the methods and accomplishments of the organizations listed. Links to local land trusts are available at the Alliance's web site, http://www.lta.org.

[472] Colorado Open Lands, http://www.coloradoopenlands.org.

[473] Lowcountry Open Land Trust, http://www.lolt.org.

[474] Arizona Open Land Trust, http://www.aolt.org/PROJECTS/index.html.

[475] *See generally* I.R.C. §§ 501(c)(3) and 170 and related regulations.

[476] *See* Land Trust Alliance, Starting a Land Trust: A Guide to Forming a Land Conservation Organization (Land Trust Alliance, Washington D.C. 1990).

to preserve their land; in others, they acquire an interest in property. The land trust may intend to hold the interest in perpetuity or to convey it to a governmental agency or to another third party with appropriate protection (e.g. to a private party subject to an easement).

Acquiring interests which are to be conveyed to governmental entities ("pre-acquisition") is a key activity of many of the larger, more sophisticated land trusts. Playing the role of third party intermediaries, these land trusts provide many benefits to the governmental agencies with which they work. Perhaps most importantly, the land trusts can often act more quickly than can governmental agencies, allowing them to compete more effectively in an active private market. Moreover, they can sometimes use their tax-exempt status and knowledge of federal and state tax laws to acquire property at a lower price, while affording the seller an equivalent benefit through "bargain sales" (in which the seller receives a combination of direct financial compensation and the tax benefit of a deduction for the charitable donation of a portion of the property's value) or similar complex transactions.

Although there are many potential difficulties in the relationship between the land trust and the governmental agency, including differing appraisal standards and the ability of the agency to make a timely commitment to the eventual acquisition of the land, agencies at all levels of government are increasingly availing themselves of the skills and resources available from the land trust community. While land trusts, like government agencies, generally acquire full fee title or easements, land trusts are more likely than governmental agencies to undertake preservation transactions that are more complex or involve unusual interests in land. For example, while a governmental agency may be unwilling to acquire a partial interest in land, a land trust may be willing to do so as a means of acquiring some measure of knowledge and control regarding an important parcel. Similarly, a land trust is more likely to acquire fee title subject to a life estate or enter into other arrangements that require the development of a long-term working relationship with a private party. A land trust is also more likely to buy an option which will give it time to raise the money needed to complete a transaction, or a right of first refusal through which it will receive notice when a property is to be sold and an opportunity to match the price offered.

In some instances, land trusts have become involved in the limited development of land. This may occur when the owner is not willing to sell the entire property, but is willing to work with a land trust to seek local zoning approval for a development plan in which the most critical portion of the property is kept free from development. Alternatively, limited development of land may occur when the land trust cannot afford to retain an entire property, but must sell a portion in order to finance the acquisition and long-term maintenance of the remainder. The willingness to become involved in the development process also distinguishes land trusts from most government agencies that are charged with a mission of acquiring and conserving land.

[4] Considerations Relating to Fee Acquisitions

There are a host of legal and practical considerations that land trusts, like any property owner, should take into account prior to acquiring property. Three of these are mentioned below.

[a] Potential Liability for Hazardous Waste

Owners of property contaminated with toxic waste may be held liable for damages resulting from the waste and for its removal, even if they were not responsible for producing the waste.[477] Therefore, it is essential that a land trust considering the acquisition of property be thoroughly familiar with applicable state and federal laws and consider the necessity of requesting environmental audits or other background research on property to be acquired.[478]

[b] Tax Consequences

The acquisition of property by a land trust may have different tax consequences for both the land trust and the community than would purchase by an ordinary buyer. First, the land trust may be eligible for special treatment regarding the taxes otherwise applicable to the transfer. When a land trust is involved on either side of a sale of land, it is important for its counsel to determine whether there are any special exceptions or exemptions available under applicable state and local law relating to property transfer or gains taxes, mortgage recording taxes and the like. Such special treatment is most often available for those land trusts that come within the statutory definitions of charitable, scientific or educational organizations.

Land owned by land trusts may also qualify for exemption from local real property taxes. This may depend upon the use actually made of the property as well as the status of the owning entity.[479] Some communities have objected to the acquisition of property by land trusts, because such ownership not only removes the land from the tax rolls but may also preclude the possibility of future increases in the tax base through development of the property. There are, however, many factors to be taken into account in evaluating the economic impact of such acquisition, including whether the proposed use of the land trust property will actually result in an overall enhancement of the local fiscal situation.[480]

[c] Liability for Personal Injury Claims

Land trusts generally are subject to personal injury liability claims in the same manner as other property owners and should undertake similar precautions.[481] Thus, risks should be carefully analyzed and dangerous conditions remedied. If that is not possible, the public should

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[477] *See* Chs. 7, 31 *infra.*

[478] At least two courts have found that merely owning an easement does not create liability under the federal Superfund law (CERCLA). Long Beach Unified School District v. Godwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994); Grand Trunk Western Railroad Company v. Acme Belt Recoating, Inc. 859 F. Supp. 1125 (W.D. Mich. 1994). However, state hazardous waste laws could still result in liability to easement holders.

[479] *See* Real Estate Transactions: Real Estate Tax Appeals Ch. 16 (Matthew Bender), for a discussion of real property tax exemptions for nonprofit organizations.

[480] *See* American Farmland Trust, Alternatives for Future Urban Growth in California's Central Valley: The Bottom Line for Agriculture and Taxpayers (1995), which found that the cumulative 1992-2040 difference in the cost of taxpayer-financed services between low density urban sprawl and compact development would be in the range of $29 billion.

[481] Easements that open land to public use may also subject the land trust which holds them to some exposure to liability claims, while easements that merely preclude development should entail little or no exposure.

be adequately warned and discouraged from using the dangerous area. Adequate insurance is also essential.

> Most states have enacted recreational use statutes which afford some protection to private owners who allow free public recreational use of their land. It is imperative that the laws of the state(s) in which the land trust owns property be studied with care to determine the type and extent of exposure to liability which it may have as a result of owning property which is open to public use.

[5] Special Concerns Regarding Easement Acquisitions

[a] Clear Definition of Purpose

As noted above, the creation of an easement involves the splitting of the bundle of rights which represents the ownership of land. While this affords a technique which is highly flexible, it also makes each easement transaction more complex, as the rights to be left with the owner and those to be acquired by the land trust must be negotiated. Therefore, the purpose or purposes to be achieved by the easement must be carefully and clearly defined. This is important not only to establish the on-going relationship between the parties, but also to ensure that the easement complies with any state law requirements relating to its enforceability and to the requirements of the I.R.C., if a deduction for the contribution of the easement is to be sought.

[b] Monitoring and Enforcement Responsibility

Although the acquisition of an easement does not entail the assumption of all ownership responsibilities, it does impose certain operational responsibilities upon the land trust. Primary among them is the responsibility to monitor the property that is subject to the easement to ensure that the terms of the easement are being met. This responsibility has a dual dimension: (1) the land trust is typically charged in its documents of incorporation to act in furtherance of the public interest, and (2) where the donors of the easement are seeking to obtain federal tax deductions, the land trust must ensure that the applicable I.R.C. requirements are being satisfied. [482]

In order to carry out its monitoring responsibilities, the land trust must obtain documentation at the time of the grant of the easement establishing the condition of the property at that time. This allows future determinations as to what changes, if any, have been made.[483]

[c] Term and Termination

Even an easement which is intended to be perpetual may sometimes be terminated through, for example, condemnation, foreclosure of a pre-existing lien, or judicial

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[482] *See* Lind, The Conservation Easement and Stewardship Guide: Designing, Monitoring and Enforcing Easements (Land Trust Alliance 1991).

[483] The Internal Revenue Service requires that, prior to the donation of an easement, the donor make available to the donee "documentation sufficient to establish the condition of the property at the time of the gift," which may include USGS and other maps, aerial and on-site photographs. Treas. Reg. § 1.170A-14(g)(5)(i).

extinguishment as a result of changed conditions which prevent the initial purposes of the easement from being achieved.[484]

[6] Community Land Trusts

Community land trusts are often confused with the organizations that are more simply called land trusts (or sometimes "conservancy land trusts"). Although these two types of organizations may share certain features, they are not the same.[485] The potential uses made of the land by a community land trust are much broader than those of land held by a conservancy land trust. While a community land trust may also seek to protect special natural features or to provide community recreational facilities, it often makes the land available for more general community purposes, such as health care or child care facilities or affordable housing.

The community land trust retains title to the property that it acquires, removing the land from the speculative real estate market. The community land trust may lease the land on a long-term basis to the government or a community group to construct or operate community facilities. Alternatively, it may lease the land to private individuals for uses which the community land trust believes will benefit the community. The lessee typically pays a rent based on the value of the land for the actual use, not for the highest value that could be obtained on the open market.

For example, community land trusts sometimes acquire agricultural land which is then leased to farmers who could not have afforded to acquire it. The farmer is allowed to retain the lease — even bequeath it to his children — as long as the lessee farms the land. The community land trust may allow the lessee to acquire title to improvements, but the trust generally retains the right to acquire the improvements at the lessee's original cost less depreciation when the lease is terminated. The community land trust can then enter into a new lease with another lessee at a below market price, and make the improvements available at a price related to its cost rather than market value. Similar arrangements may be made with private individuals who need affordable housing, but cannot afford the cost of the land on the open market.

Through these arrangements, the community land trust is able to provide facilities that benefit the community at below market costs as property values rise over time. The lessees of the land are compensated for their contributions to equity, and are provided with assurance of their rights as long as the agreed-upon use is continued.

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[484] *See generally* Backman & Thomas, A Practical Guide to Disputes Between Adjoining Landowners—Easements § 1.05 (Matthew Bender).

[485] *See* Institute for Community Economics, The Community Land Trust Legal Manual (2002), available from ICE, 57 School Street, Springfield, MA 0115. *See generally*, the ICE website, http://www.iceclt.org. Community land trust web sites include the Burlington, Vermont, CLT, http://bclt.net; the Southside CLT, of South Providence, Rhode Island, http://users.ids.net/~sclt; and the Rondo CLT, of St. Paul, Minnesota, http://www.rondoclt.org.

PART B: FORMS

§ 3.08 Sun Prairie, Wisconsin, Natural Resource Protection Ordinance

Section 17.28.010 Purpose.

The purpose of this chapter is to set forth the requirements for the mandatory protection of natural and historic resources and permanently protected green space areas within the jurisdiction of this title (see Section 17.04.080). The provisions of this chapter interact closely with the provisions of Section 17.16.040 (uses permitted in other permanently protected green space areas), Section 17.16.160 (natural resource disruption and required mitigation standards), Section 17.20.030 (required natural resources site evaluation), and Sections 17.20.040 and 17.20.050 which provide residential and nonresidential development standards (including minimum required green space ratios (GSRs) and minimum required landscape surface ratios (LSRs). Section 17.20.060 provides a complete overview of the interrelationship between the above-listed sections. In part, the provisions of this chapter are designed to ensure the implementation of the city of Sun Prairie comprehensive plan, the environmental protection element of the Dane County regional development guide, and state of Wisconsin Statutes 62.231, 62.23(7)(em), and 87.30. (Prior code § 13-7-1)

Section 17.28.020 How to use this chapter.

This chapter contains the standards which govern the protection, disturbance, and mitigation of disruption of all natural and historic resources and other permanently protected green space areas. The provisions of this chapter are intended to supplement those of the city of Sun Prairie, Dane County, the state of Wisconsin, and the Federal Government of the United States which pertain to natural resource protection. Prior to using the provisions of this chapter to determine the permitted disruption of such areas, the requirements provided below should be reviewed. This chapter recognizes the important and diverse benefits which natural and historic resource features provide in terms of protecting the health, safety, and general welfare of the community. Each of the following sections is oriented to each natural resource type, and is designed to accomplish several objectives:

A. First, a definition of the natural or historic resource is provided;
B. Second, the specific purposes of the protective regulations governing each natural or historic resource type are provided;
C. Third, the required method of identifying and determining the boundaries of the natural or historic resource area is given;
D. Fourth, mandatory protection requirements are identified.

Note: Protection requirements for specific land uses and natural resource types designed to minimize disruption of natural resource functions are presented in Section 17.16.160. (Prior code § 13-7-2)

Section 17.28.030 Floodplains.

A. Definition. Floodplains are those areas designated as A-Zones or floodplains on the Flood Insurance Rate Map dated June 17, 2003. This is the official floodplain zoning map and has been approved by the Department of Natural Resources (DNR) and the Federal Emergency Management Agency (FEMA), and is on file in the office of the zoning administrator. These areas are also shown on the environmental corridors map for the city and its environs, prepared by the Dane County regional planning commission.
B. Purpose of Floodplain Protection Require-ments.17.28.030
1. The development and use of flood hazard area could adversely affect the public health, safety, and general welfare. Development of these areas is not essential to the orderly growth of this community and these lands are suitable for open space uses not requiring structures, filling, or storage of materials or equipment.
2. This section and related provisions of the ordinance codified in this title is adopted pursuant to the statutory authorization contained in Sections 62.23 and 87.30 of the Wisconsin Statutes.
C. Determination of Floodway and Floodway Fringe Boundaries. General floodplain boundaries are depicted on Sheet 2 of the Official Zoning Map. Upon the proposal of development activity on any property which contains a floodplain depicted on this Map and/or the Flood Insurance Rate Map (FIRM) identified in Subsection A of this section, the petitioner shall prepare a detailed site analysis per the requirements of Section 17.28.120. This analysis shall depict the location of all floodway and floodway fringe areas on the subject property as related to the provisions of subsection A of this section.
1. The Hydrology/Hydraulic Data Report for the Weybridge Plat, Sun Prairie Wisconsin, September 5, 2000 (including its text, maps, tables, charts and appendices), prepared by Mayo Corporation for Greenway Development, LLC, is adopted as part of Sheet 2 of the Official Zoning Map of the City of Sun Prairie.
2. The New Town Development Channel Modification Floodplain Study for Unnamed Tributary to Koshkonong Creek, dated October 26, 2001 (including its text, maps, tables, charts and appendices), prepared by Gannett Fleming, Inc. for Windfield Partnership for the Smith’ s Crossing (formerly "Project New Town") is adopted as part of Sheet 2 of the Official Zoning Map of the City of Sun Prairie.
D. Mandatory Floodplain Protection Requirements.
1. Greater Restrictions and Interpretation: If a provision of this title is required by a standard in CH. NR 116, Wis. Adm. Code, and the meaning of this chapter’ s provision is

unclear, the provisions shall be interpreted based on the NR 116 standards in effect on the date of the adoption of, or the latest amendments to, this chapter. If another chapter is more restrictive than the provisions contained in this chapter, that chapter' s provisions shall continue in full force and effect to the extent of the greater restrictions.

2. Compliance Warning and Disclaimer of Liability. The use of floodplains in the city shall be in full compliance with the terms of this chapter and other applicable local, state, and federal regulations. All permitted development shall require the pre-approval of a detailed site analysis per Section 17.28.120. All units of government are required to comply with this chapter and obtain all necessary permits unless specifically exempted by law.

The degree of flood protection provided by this chapter is considered reasonable for regulatory purposes and is based on engineering experience and scientific methods of study. Larger floods may occur or the flood height may be increased by man-made or natural causes such as ice jams or bridge openings restricted by debris. Therefore, this chapter does not imply that areas outside of the delineated floodplain or permitted land uses within the floodplain will be totally free from flooding and associated flood damage. Nor does this chapter create liability on the part of, or a cause of action against, the city or any officer or employee for any flood damage that may result from reliance on the chapter.

3. Procedure for Amendment and Appeals.

a. The zoning administrator shall furnish to the State Department of Natural Resources District Office within five days of filing, a copy of any appeal, or petition for a map or text amendment to this section. (See also Sections 17.44.020 and 17.44.030.)

b. The city shall decide such matters in conformity with the provisions of Section 62.23(7)(d)(2), Wisconsin Statutes, and Sections NR 116.11, NR 116.18 Wis. Adm. Code.

c. The State Department of Natural Resources District Office may take action according to Section 87.30, Wisconsin Statutes, if the city approves action of floodplain zoning matters which are contrary to the standards for use and development of floodplains in CH. NR 116, Wis. Adm. Code.

d. If mapped incorrectly as floodplain: the applicant must submit data to substantiate the correct designation, for local approval and DNR approval based on the requirements of CH. NR 116, Wis. Adm. Code; and, the city must formally amend Sheet 2 of the official zoning map by rezoning procedures following statutory requirements (see Section 17.44.030).

e. No amendment approved by the city council shall become effective until reviewed and approved by the Department of Natural Resources.

f. To remove flood insurance requirements, FEMA must first revise the Flood Insurance Rate Map or issue a letter of map amendment or revision.

4. Designation and Duties of the Zoning Administrator. In addition to Section 17.48.020, zoning administrator shall:

a. Review all development to assure compliance with the ordinance codified in this chapter, Chapter NR 116, Wis. Adm. Code, and other local, state and federal regulations;

b. Advise applicants of the chapter provisions and assist in preparing permit applications, appeals or petitions for rezoning;

c. Keep records of all official actions related to administration of this chapter;

d. Assure all notifications required by this chapter are completed;

e. In riverine situations, the zoning administrator shall:

i. Notify adjacent communities and the DNR District Office prior to any alteration or relocation of the watercourse,

ii. Submit copies of such notifications to FEMA,

iii. Assure that the flood carrying capacity is maintained within the altered or relocated portions of any watercourse.

5. Nonconforming Uses and Structures. All applications to repair, reconstruct, extend, alter or enlarge a nonconforming structure or use (including streams crossing such as bridges, culverts, etc.) shall be considered for their compliance with CH. NR 116, Wis. Adm. Code and Section 62.23(7)(h) Wisconsin Statutes, by the zoning administrator. All terms and conditions recommended by the DNR shall be considered for conditions included in any local permit issued.

6. Floodplain Development. Development that is permitted in the floodplain by Section 17.16.040, must meet the requirements of CH. NR 116, Wis. Adm. Code. In the case of road and/or bridges, utility lines, and related facilities the floodway development standards apply. (Ord. 2003-100 § 1, 2003; Ord. 66 § 2, 2002; prior code § 13-7-3)

Section 17.28.040 Wetlands.

A. Statutory Authorization. This chapter is adopted pursuant to the authorization in Sections 62.23, 62.231, 87.30 and 144.26, Wisconsin Statutes.

B. Findings of Fact.

1. Findings of Fact. Uncontrolled use of the shoreland-wetlands and the pollution of the navigable waters of the city would adversely affect the public health, safety, convenience, and general welfare and impair the tax base. The Legislature of Wisconsin has delegated responsibility to all municipalities to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control buildings sites, placement of structures and land uses; and preserve shore cover and natural beauty.

2. Purpose. To promote the public health, safety, convenience and general welfare, this chapter has been established to:

a. Further the maintenance of safe and healthful conditions;

b. Prevent and control water pollution by filtering or storage of sediments, nutrients, heavy metals or organic compounds that would otherwise drain into navigable waters and to maintain storm and flood water capacity;

c. Protect fish spawning grounds, fish, aquatic life and wildlife by preserving wetlands and other fish and aquatic habitat;

d. Prohibit certain uses detrimental to the shoreland-wetland area;

e. Preserve shore cover and natural beauty by restricting the removal of natural shoreland cover and controlling shoreland-wetland excavation, filling and other earth moving activities.

C. Title of Chapter. Shoreland-Wetland Zoning Ordinance Chapter for the City of Sun Prairie, Wisconsin.

D. Compliance. The use of wetlands, and the alteration of wetlands within the shoreland area of the city shall be in full compliance with the terms of this chapter and other applicable local, state or federal regulations. (However, see subsection M of this section, for the standards applicable to nonconforming uses.) All permitted development shall require the issuance of a zoning permit unless otherwise expressly excluded by a provision of this chapter.

E. Municipalities and State Agencies Regulated. Unless specifically exempted by law, all cities, villages, towns and counties are required to comply with this chapter and obtain all necessary permits. State agencies are required to comply if Section 13.48(13), Wisconsin Statutes, applies. The construction, reconstruction, maintenance and repair of state highways and bridges by the Wisconsin Department of Transportation are exempt when Section 30.12(4)(a), Wisconsin Statutes, applies.

[The extensive wetlands regulations are omitted here, but can be found at http://municipalcodes.lexisnexis.com/codes/sunprairie.]

Section 17.28.050 Shorelands.

A. Definition. "Shorelands" are the land margins of navigable waters which are identified as "lakes and other water bodies" as shown on environmental corridors maps for the city of Sun Prairie and its environs, prepared by the Dane County regional planning commission. Shorelands are all areas within seventy-five (75) feet of the ordinary high water mark of such features. Decorative water features shall not be considered "navigable waters" for the purposes of this section. This meaning of "shorelands" shall remain distinct from the meaning of the term as employed by the state of Wisconsin Statutes and the department of natural resources.
B. Purpose of Shoreland Protection Requirements. Shorelands serve to protect land/water margins from erosion due to site disruption. Because of regular contact with wave action, currents, and runoff, such areas are highly susceptible to continuous, and in some cases, rapid erosion. Shoreland protection also provides a natural vegetation buffer which serves to reduce water velocities and wave energy, and filters significant amounts of water-borne pollutants and sediments. Shorelands also promote infiltration and groundwater recharging, and provide a unique habitat at the land/water margin.
C. Determination of Shoreland Boundaries. General shoreland boundaries are depicted on Sheet 2 of the Official Zoning Map. Upon the proposal of development activity on any property which contains a shoreland depicted on the official zoning map, the petitioner shall prepare a detailed site analysis per the requirements of Section 17.28.120. This analysis shall depict the location of all shoreland areas on the subject property as related to the provisions of subsection A of this section.
D. Mandatory Shoreland Protection Requirements. Shorelands shall remain in an undisturbed state, except for the land uses permitted in Section 17.16.040 per the requirements of Section 17.16.160. (Prior code § 13-7-5)

Section 17.28.060 Drainageways.

A. Definition. "Drainageways" are non-navigable, above-ground watercourses, detention basins and/or their environs which are identified by the presence of one or more of the following:

1. All areas within seventy-five (75) feet of the ordinary high water mark of a "perennial stream" as shown on environmental corridors maps for the city and its environs, prepared by the Dane County regional planning commission;

2. All areas within fifty (50) feet of the ordinary high water mark of an "intermittent stream" or "open channel drainageway" as shown on environmental corridors maps for the city of Sun Prairie and its environs, prepared by the Dane County regional planning commission.

B. Purpose of Drainageway Protection Requirements. Drainageways serve in the transporting of surface runoff to downstream areas. As such, drainageways serve to carry surface waters, supplement floodplain, wetland, and shoreland water storage functions in heavy storm or melt events, filter water-borne pollutants and sediments, promote infiltration and groundwater recharging, and provide a unique habitat at the land/water margin. Drainageway protection requirements preserve each of these functions as well as greatly reducing the potential for soil erosion along drainageways by protecting vegetative groundcover in areas which are susceptible to variable runoff flows and moderate to rapid water movement.
C. Determination of Drainageway Boundaries. General drainageway boundaries are depicted on Sheet 2 of the Official Zoning Map. Upon the proposal of development activity on any property which contains a drainageway depicted on the official zoning map, the petitioner shall prepare a detailed site analysis per the requirements of Section 17.28.120. This analysis shall depict the location of all drainageway areas on the subject property as related to the provisions of subsection A of this section.
D. Mandatory Drainageway Protection Requirements. Drainageways shall remain in an undisturbed state except for the land uses permitted in Section 17.16.040 per the requirements in Section 17.16.160. Vegetation clearing to maintain drainageway functions is permitted with the written approval of the city engineer. All areas designated as drainageways shall be located within a public easement or dedication for maintenance purposes to preserve proper drainage flow. (Prior code § 13-7-6)

Section 17.28.070 Woodlands.

A. Definition. “Woodlands” are areas of trees whose combined canopies cover a minimum of eighty (80) percent of an area of one acre or more, as shown on environmental corridors maps for the city and its environs, prepared by the Dane County regional planning commission.
B. Purpose of Woodland Protection Requirements. Woodlands provide a wide variety of environmental functions. These include atmospheric benefits such as removing air-borne pollutants, carbon dioxide uptake, oxygen production, and evapotranspiration returns. Water quality benefits include substantial nutrient uptake rates (particularly for nitrogen and phosphorus) and surface runoff reduction in terms of both volumes and velocities. Woodlands provide unique wildlife habitats and food sources. Woodlands are excellent soil stabilizers, greatly reducing runoff-related soil erosion. Woodlands also serve to reduce wind velocities which further reduces soil erosion. Finally, under proper management techniques, woodlands serve as regenerative fuel sources.
C. Determination of Woodland Boundaries. General woodland boundaries are depicted on Sheet 2 of the official zoning map. Upon the proposal of development activity on any property which contains a woodland depicted on the official zoning map, the petitioner shall prepare a detailed site analysis per the requirements of Section 17.28.120. This analysis shall depict the location of all woodland areas on the subject property as related to the provisions of subsection A of this section.
D. Mandatory Woodland Protection Require-ments.

1. Woodlands shall remain in an undisturbed state except for the land uses permitted in Section 17.16.040 per the requirements of Section 17.16.160 and areas subject to the following mitigation requirements. Selective cutting operations are permitted as a special use in all

woodland areas (per the requirements of Section 17.16.080(F)). Clear cutting is permitted as a conditional use in all woodland areas (per the requirements of Section 17.16.080(G)).

2. Areas of the subject property which are proposed for inclusion within other permanently protected green space areas and which conform to the reforestation mitigation requirements of Section 17.32.080 may be substituted for woodlands subject to clear cutting. (Prior code § 13-7-7)

Section 17.28.080 Steep slopes.

A. Definition. "Steep slopes" are areas which contain a gradient of twelve (12) percent or greater, (equivalent to a ten (10) foot elevation change in a distance of eighty-three (83) feet or less), as shown on environmental corridors maps for the city and its environs, prepared by the Dane County regional planning commission.

B. Purpose of Steep Slope Protection Requirements. Steep slopes are particularly susceptible to damage resulting from site disruption, primarily related to soil erosion. Such damage is likely to spread to areas which were not originally disturbed. Such erosion reduces the productivity of the soil, results in exacerbated erosion downhill, and results in increased sedimentation in drainageways, wetlands, streams, ponds and lakes. Beyond adversely effecting the environmental functions of these resources areas, such sedimentation also increases flood hazards by reducing the flood water storage capacity of hydrological system components, thus elevating the flood level of the drainage system in effected areas. Beyond these threats to the public safety, disruption of steep slopes also increases the likelihood of slippage and slumping, unstable soil movements which may threaten adjacent properties, buildings, and public facilities such as roads and utilities.

C. Determination of Steep Slope Boundaries. General steep slope boundaries are depicted on Sheet 2 of the official zoning map. Upon the proposal of development activity on any property which contains a steep slope depicted on the official zoning map, the petitioner shall prepare a detailed site analysis per the requirements of Section 17.28.120. This analysis shall depict the location of all steep slope areas on the subject property as related to the provisions of subsection A of section.

D. Mandatory Steep Slope Protection Requirements. Steep slopes shall remain in an undisturbed state except for the land uses permitted in Section 17.16.040 per the requirements of Section 17.16.160. Steep slopes subject to the reforestation requirements of Section 17.32.080 may be removed from the steep slope natural resource classification and may be developed as woodlands to the extent permitted by the selective cutting provisions of Section 17.16.080(F) and the provisions of Section 17.16.160. (Prior code § 13-7-8)

Section 17.28.090 Ridgetops.

A. Definition. Ridgetops are areas which are located within one hundred (100) feet of, and at a higher elevation than, areas designated as steep slopes (see Section 17.28.080(A)), as shown on environmental corridors maps for the city and its environs, prepared by the Dane County regional planning commission.

B. Purpose of Ridgetop Protection Requirements. Because of their exposed position above steep slopes, ridgetops are susceptible to damage resulting from site disruption, primarily related to wind- and water-related soil erosion. Such damage is likely to spread to areas which were not

originally disturbed. Such erosion reduces the productivity of the soil, results in exacerbated erosion downhill, and results in increased sedimentation in drainageways, wetlands, streams, ponds and lakes. Beyond adversely effecting the environmental functions of these resources areas, such sedimentation also increases flood hazards by reducing the flood water storage capacity of hydrological system components and thus elevating the flood level of the drainage system in effected areas. Beyond these threats to the public safety, disruption of ridgetops also increases the likelihood of slippage and slumping, unstable soil movements which may threaten adjacent properties, buildings, and public facilities such as roads and utilities.

C. Determination of Ridgetop Boundaries. General ridgetop boundaries are depicted on Sheet 2 of the official zoning map. Upon the proposal of development activity on any property which contains a ridgetop depicted on the official zoning map, the petitioner shall prepare a detailed site analysis per the requirements of Section 17.28.120. This analysis shall depict the location of all ridgetop areas on the subject property as related to the provisions of subsection A of this section.

D. Mandatory Ridgetop Protection Requirements. Ridgetops shall remain in an undisturbed state except for the land uses permitted in Section 17.16.040 per the requirements of Section 17.16.160. Ridgetops subject to the reforestation requirements of Section 17.32.080 may be removed from the ridgetop natural resource classification and may be developed as woodlands to the extent permitted by the selective cutting provisions of Section 17.16.080(F) and the provisions of Section 17.16.160. (Prior code § 13-7-9)

Section 17.28.100 Prairies.

A. Definition. “Prairies” are areas of one acre or more which are dominated by the presence of native grasses, including but not limited to Big Bluestem, Little Bluestem, Foxtail Barley, Gama Grass, Indian Grass, Switch Grass, and Prairie Cordgrass. Prairies created as part of a prairie restoration process shall not be subject to the provisions of this section.

B. Purpose of Prairie Protection Requirements. Prairies provide a unique and rare habitat which is also an important remnant component of the midwestern heritage.

C. Determination of Prairie Boundaries. General prairie boundaries are depicted on Sheet 2 of the official zoning map. Upon the proposal of development activity on any property which contains a prairie depicted on the official zoning map, the petitioner shall prepare a detailed site analysis per the requirements of Section 17.28.120. This analysis shall depict the location of all prairie areas on the subject property as related to the provisions of subsection A of this section.

D. Mandatory Prairie Protection Requirements.

1. Prairies shall remain in an undisturbed state except for the land uses permitted in Section 17.16.040 per the requirements of Section 17.16.160, or unless subject to the following mitigation practices: (Section 17.28.100(D)(2)).

2. Disruption to prairie areas shall not be permitted unless an area equal in size is re-established in native prairie elsewhere on the same property, per the approval of the zoning administrator working in conjunction with the Wisconsin Department of Natural Resources. (Prior code § 13-7-10)

Section 17.28.110 Other permanently protected green space.

A. Definition. “Other permanently protected green space” includes all areas designated as permanently protected green space which do not contain protected natural resource areas. These

areas are typically required to provide permanent green space per the requirements of chapter 17.20 of this title.
B. Purpose of Protection Requirements for Other Permanently Protected Green Space. These areas are protected in order to meet the minimum green space ratio (GSR) requirements of Section 17.20.040 associated with various cluster residential development options.
C. Determination of Other Permanently Protected Green Space Boundaries. Boundaries of these areas shall be as depicted as required to fulfill the minimum green space ratio (GSR) requirements of this title per Chapter 17.20.
D. Mandatory Protection Requirements for Other Permanently Protected Green Space.

1. Other permanently protected green space areas shall remain in an undisturbed state except for the land uses permitted in Section 17.60.040 per the requirements of Section 17.16.160.

2. Other permanently protected green space areas shall be planted per the landscaping requirements of Section 17.32.070.

E. Dedicated Park Lands. Permanently protected green space areas dedicated and accepted as public open space, shall not be counted as part of the gross site area (GSA) of the subject property. Such areas shall be subtracted as a component of line (1)(b) in the calculations of Section 17.20.030 (C). (Prior code § 13-7-11)

Section 17.28.130 Historic preservation.

A. Definition. Any place, structure or object with a special character, historic, archeological or aesthetic interest or other significant value as identified by the placement of the place, structure or object on the National Register of Historic Places in Wisconsin or the State Register of Historic Place.
B. Purpose of Historic Preservation Requirements. For the purpose of promoting the health, safety and general welfare of the community such significant places, structures or objects and their significant characteristics shall be preserved.
C. Determination of Historic Preservation Boundaries. Only those places, structures or objects identified by their placement on the National Register of Historic Places in Wisconsin or the State Register of Historic Places shall qualify for protection under this section.
D. Mandatory Historic Preservation Requirements. Places, structures or objects identified by their placement on the National Register of Historic Places in Wisconsin or the State Register of Historic Places shall remain in an undisturbed state except for the facilitation of rehabilitation and restoration permitted by the Wisconsin Historic Building Code and administered by the Department of Industry, Labor and Human Relations (DILHR). (Prior code § 13-7-13)

§ 3.09 Uniform Conservation Easement Act
1981 Act
Available at: http://www.nccusl.org

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter requirements of the various states).

Section:

1. Definitions.
2. Creation, Conveyance, Acceptance and Duration.
3. Judicial Actions.
4. Validity.
5. Applicability.
6. Uniformity of Application and Construction.

§ 1. [Definitions]. As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

§ 2. [Creation, Conveyance, Acceptance and Duration].

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

§ 3. [Judicial Actions].

(a) An action affecting a conservation easement may be brought by:

(1) an owner of an interest in the real property burdened by the easement;

(2) a holder of the easement;

(3) a person having a third-party right of enforcement; or

(4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

§ 4. [Validity]. A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

§ 5. [Applicability].

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date unless retroactive application contravenes the constitution or laws of this State or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

§ 6. [Uniformity of Application and Construction]. This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.

§ 3.10 Michigan Conservation Easement Act

Natural Resources And Environmental Protection Act

Act 451 of 1994

Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Protection Act (NREPA) - MCL §§ 324.2140 *et seq*.

324.2140 Definitions.
Sec. 2140.

As used in this subpart:
(a) "Conservation easement" means an interest in land that provides limitation on the use of land or a body of water or requires or prohibits certain acts on or with respect to the land or body of water, whether or not the interest is stated in the form of a restriction, easement, covenant, or condition in a deed, will, or other instrument executed by or on behalf of the owner of the land or body of water or in an order of taking, which interest is appropriate to retaining or maintaining the land or body of water, including improvements on the land or body of water, predominantly in its natural, scenic, or open condition, or in an agricultural, farming, open space, or forest use, or similar use or condition.
(b) "Historic preservation easement" means an interest in land that provides a limitation on the use of a structure or site that is listed as a national historic landmark under chapter 593, 49 Stat. 593, 16 U.S.C. 461 to 467, commonly known as the historic sites, buildings, and antiquities act; is listed on the national register of historic places pursuant to the national historic preservation act of 1966, Public Law 89-665, 16 U.S.C. 470 to 470a, 470b, and 470c to 470x-6; is listed on the state register of historic sites pursuant to Act No. 10 of the Public Acts of 1955, being sections 399.151 to 399.152 of the Michigan Compiled Laws; or is recognized under a locally established historic district created pursuant to the local historic districts act, Act No. 169 of the Public Acts of 1970, being sections 399.201 to 399.215 of the Michigan Compiled Laws, or requires or prohibits certain acts on or with respect to the structure or site, whether or not the interest is stated in the form of a restriction, easement, covenant, or condition in a deed, will, or other instrument executed by or on behalf of the owner of the structure or site or in an order of taking, if the interest is appropriate to the preservation or restoration of the structure or site.

History: Add. 1995, Act 60, Imd. Eff. May 24, 1995.

324.2141 Conservation easement; enforcement; recordation.
Sec. 2141.

A conservation easement granted to a governmental entity or to a charitable or educational association, corporation, trust, or other legal entity is enforceable against the owner of the land or body of water subject to the easement despite a lack of privity of estate or contract, a lack of benefit running to particular land or a body of water, or the fact that the benefit may be assigned to another governmental entity or legal entity, including a conservation easement executed before March 31, 1981. The easement shall be recorded with the register of deeds in the county in which the land is located to be effective against a bona fide purchaser for value without actual notice.

History: Add. 1995, Act 60, Imd. Eff. May 24, 1995 .

324.2142 Historic preservation easement; enforcement; recordation.
Sec. 2142.

A historic preservation easement granted to a governmental entity or to a charitable or educational association, corporation, trust, or other legal entity whose purposes include the preservation or restoration of structures or sites described in section 2140(b) is enforceable against the owner of the structure or site subject to the easement despite a lack of privity of estate or contract, a lack of benefit running to the particular structure or site, or the fact that the benefit may be assigned to another governmental entity or legal entity whose purposes include the preservation or restoration of structures or sites described in section 2140(b), including a historic preservation easement executed before March 31, 1981. The easement shall be recorded with the register of deeds in the county in which the land is located to be effective against a bona fide purchaser for value without actual notice.

History: Add. 1995, Act 60, Imd. Eff. May 24, 1995.

324.2143 Enforceability of restriction, easement, covenant, or condition.
Sec. 2143.

This subpart does not render unenforceable a restriction, easement, covenant, or condition that does not have the benefit of this subpart.

History: Add. 1995, Act 60, Imd. Eff. May 24, 1995.

Popular Name: Act 451

§ 3.11 Raisin Valley Land Trust Conservation Easement Act

RAISIN VALLEY LAND TRUST CONSERVATION EASEMENT
Raisin Valley Land Trust, Manchester, Michigan
Available at http://www.rvlt.org

CONSERVATION EASEMENT

DATE: (INSERT DATE)

DONOR/OWNER: (INSERT DONOR'S NAME, MARITAL STATUS AND ADDRESS)

DONEE/CONSERVANCY: Raisin Valley Land Trust
P.O. Box 419
Manchester, MI 48158

For Purposes of this Conservation Easement, the Donor, who is the current Owner, and all subsequent Owners of the subject Property, will be referred to as the "Owner" throughout this Conservation Easement. The Donee will be referred to as the "Conservancy" throughout this Conservation Easement.

PROPERTY: (INSERT COMPLETE LEGAL DESCRIPTION)

CONVEYANCE: The Owner conveys and warrants to the Conservancy a perpetual Conservation Easement over the Property. The scope of this Conservation Easement is set forth in this agreement. This conveyance is a gift from the Donor to the Conservancy. Accordingly, this is exempt from Transfer Tax pursuant to MCL 207.505(a) and 207.526(a). **(Delete exemption language in the case of a purchase of the conservation easement).**

THE OWNER AND THE CONSERVANCY AGREE TO THE FOLLOWING:

1. **PURPOSES OF THIS CONSERVATION EASEMENT AND COMMITMENTS OF THE DONOR/OWNER AND THE CONSERVANCY.**

1. This Conservation Easement assures that the Property will be perpetually preserved in its predominately natural, scenic, historic, agricultural, forested, and open space (DELETE THOSE THAT DO NOT APPLY) condition. The Purposes of this Conservation Easement are to protect the Property's natural resource and watershed values; to maintain and enhance biodiversity; to retain quality habitat for native plants and animals, and to maintain and enhance the natural features of the Property. Any uses of the Property which may impair or interfere with the Conservation Values are expressly prohibited.
2. The Donor is the Owner of the Property and is committed to preserving the Conservation Values of the Property. The Owner agrees to confine use of the Property to activities consistent with the Purposes of this Easement and the preservation of the Conservation Values.

3. The Conservancy is a qualified Recipient of this Conservation Easement, is committed to preserving the Conservation Values of the Property, and is committed to upholding the terms of this Conservation Easement. The Conservancy protects natural habitats of fish, wildlife, plants, and the ecosystems that support them. The Conservancy also preserves open spaces, including farms and forests, where such preservation is for the scenic enjoyment of the general public or pursuant to clearly delineated governmental conservation policies and where it will yield a significant public benefit.

2. **CONSERVATION VALUES.** The Property possesses natural, scenic, historic, open space, scientific, biological, and ecological values **(DELETE THOSE THAT DO NOT APPLY)** of prominent importance to the Owner, the Conservancy, and the public. These values are referred to as the "Conservation Values" in this Easement. The Conservation Values include the following:

(NOTE TO DRAFTER: It is critically important to include all of the Conservation Values that are specific to your Property. Include the following values that pertain; add additional specific values; include local policy statements, goals, and laws; delete those Conservation Values that do not apply; delete any legislation that does not apply. The headings are meant to stimulate ideas for listing Conservation Values and may be deleted).

OPEN SPACE and SCENIC:

1. A scenic landscape and natural character which would be impaired by modification of the Property.
2. A scenic panorama visible to the public from publicly accessible sites which would be adversely affected by modifications of the natural habitat.
3. Relief from urban closeness.
4. Prominent visibility to the public from (INSERT), and, which will enhance tourism if preserved in its natural state.
5. Biological integrity of other land in the vicinity has been modified by intense urbanization, and the trend is expected to continue.
1. There is a reasonable possibility that the Conservancy may acquire other valuable property rights on nearby or adjacent properties to expand the Conservation Values preserved by this Conservation Easement.

PUBLIC POLICY:

2. The State of Michigan has recognized the importance of protecting our natural resources as delineated in the 1963 Michigan Constitution, Article IV, Section 52, "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction."
3. The Property is preserved pursuant to a clearly delineated federal, state, or local conservation policy and yields a significant public benefit. The following legislation, regulations, and policy statements establish relevant public policy:

(For a more extensive list of relevant laws, see the *Collection of Conservation, Preservation, and Environmental Laws and Summaries* compiled by the Little Traverse Conservancy in April 2000 and provided to each land conservancy in Michigan.)

- Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.2140 *et seq*.;

- Biological Diversity Conservation, Part 355 of the Michigan Natural Resources and Environmental Protection Act – MCL §§ 324.35501 *et seq;* (Legislative Findings § 324.35502);

- Sand Dune Protection and Management, Part 353 of the Michigan Natural Resources and Environmental Protection Act, MCL §§ 324.35301 *et seq*.; (Legislative Findings MCL § 324.35302);

- Wetland Protection, Part 303 of the Michigan Natural Resources and Environmental Act - MCL §§ 324.30301 *et seq*.; (Legislative Findings MCL § 324.30302);

- Water Pollution Control Act of 1972, 33 USC §§ 1251 - 1387 (§1251 Goals & Policy; § 1344 Wetlands permitting, aka "Section 404" Clean Water Act.);

- Coastal Zone Management Act, 16 USC §§ 1451 *et seq*.; (§§ 1451, 1452 Congressional Findings and Policy.);

- Shorelands Protection and Management, Part 323 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.32301 *et seq*.;

- Inland Lakes and Streams, Part 301 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.30101 *et seq.*;

- Great Lakes Submerged Lands, Part 325 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.32501 *et seq*.;

- Farmland and Open Space Preservation, Part 361 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.36101 *et seq*.;

- Soil Conservation, Erosion, and Sedimentation Control, Parts 91 & 93 of the Michigan Natural Resources and Environmental Protection Act – MCL §§ 324.9101 *et seq;* 324.9301 *et seq*; (Legislative Policy § 324.9302);

9. The **(INSERT)** governmental agency has endorsed the proposed scenic view of the Property under a landscape inventory, pursuant to a review process.
10. The **(INSERT)** office has recognized the importance of the Property as an ecological and scenic resource, by designating this and other land as **(INSERT)**.
11. The Township / County of **(INSERT)** has designated this area as **(INSERT)** in its Comprehensive Plan dated **(INSERT)**.

12. **(Insert local policy statements which apply)**.

WILDLIFE VALUES:

13. The Property is home to many species of wildlife, including: **(INSERT)**.
14. The Property provides vital corridor wetlands and upland wildlife habitats which serve as a connection for wildlife movement and create a natural "greenway" **(INSERT AREA)**.
15. The Property is noteworthy for the **(INSERT)**.

ECOLOGICAL / HABITAT:

16. The Property contains significant natural habitat in which fish, wildlife, plants, or the ecosystems which support them, thrive in a natural state.
17. Wetlands, as described in Wetland Protection, Part 303 of the Michigan Natural Resources and Environmental Code MCL 324.30301 et seq., identified as important natural resources for the people of the State of Michigan, are present on the Property.
18. Habitat for rare, endangered, or threatened species of animal, fish, plants, or fungi, including: **(INSERT SPECIES)**. **(INSERT if threatened or endangered and if in the State of Michigan or federal)** are supported on the Property.
19. The Property contains natural areas which represent high quality examples of terrestrial or aquatic communities **(INSERT)**.
20. The Property contains sustainable habitat for biodiverse vegetation, birds, fish, and terrestrial animals.
21. A diversity of plant and animal life are found on the Property in an unusually broad range of habitats for a property of its size.
22. The Property is characteristic of **(INSERT)**. Its dominant vegetation is **(INSERT)** interspersed with **(INSERT other habitats, streams, important natural features)**. These plant communities are in a relatively natural and undisturbed condition and support the full range of wildlife species found in these habitat types.
23. The Property contains natural wetland areas that provide habitat for aquatic invertebrates, reptiles, amphibians, and aquatic and/or emergent vegetation.
24. Valued native forest land exists on the Property, which includes diverse native species, trees of many age classes and structural diversity, including a multi-story canopy, standing dead trees and downed logs.

WATERSHED PROTECTION:

25. The Property provides important natural land within the watershed of **(INSERT)**. Protection of the Property in its natural and open space condition helps to ensure the quality and quantity of water resources for the **(INSERT)** area.
26. The Property includes the **(INSERT)** feet of frontage on the **(INSERT)(river, stream, lake)**.
27. The Property has a significant amount of undeveloped frontage on the banks/shore of **(INSERT)**, which is a State designated Natural River (designated as a Wilderness River, Wild and Scenic River, or Country-Scenic River) under the Natural Rivers Section (Part 305) of the Michigan's Natural Resources Environmental Protection Act, MCL §§

324.30501-30515 *et seq*., **(OR)** a State designated "Blue Ribbon Trout Stream" considered by the Department of Natural Resources to be one of the "Top Ten" trout streams in Michigan.

28. Sections of the property are situated on hillsides with slopes greater than 20% that are adjacent to or in close proximity to **(INSERT BODY OF WATER OR STREAM)** and the vegetated slopes would be highly susceptible to erosion damage and accelerated stormwater runoff that could adversely affect water quality if the trees or other vegetation were removed.

ADJACENT TO PROTECTED LANDS:

29. The Property lies in close proximity to the following conserved properties which similarly preserve the existing natural habitat: **(INSERT).**
30. This Easement protects a natural area which contributes to the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or similar conservation area.
31. Preservation of the Property enables the Owner to integrate the Conservation values with other neighboring lands.

FARMLAND:

32. The Property consists entirely of "prime farmland" and "farmland of local importance" as classified by the U.S. Department of Agriculture and the Natural Resources Conservation Service.
33. The Property has a long history of productive farming and contains significant areas with soil classifications designated as **(INSERT).**
34. The Property is located within **(INSERT)** Township, a community with an agriculture-based economy in an area presently experiencing rapid development, including the subdivision of prime farmland.

3. **BASELINE DOCUMENTATION.** Specific Conservation Values of the Property have been documented in a natural resource inventory signed by the Owner and the Conservancy. This "Baseline Documentation Report" consists of maps, a depiction of all existing human-made modifications, prominent vegetation, identification of flora and fauna, land use history, distinct natural features, and photographs. The parties acknowledge that this natural resources inventory, the Baseline Documentation Report, is an accurate representation of the Property at the time of this donation.

4. **PROHIBITED ACTIONS.** Any activity on, or use of, the Property which is inconsistent with the Purposes of this Conservation Easement or which is detrimental to the Conservation Values is expressly prohibited. By way of example, but not by way of limitation, the following activities and uses are explicitly prohibited:

1. Division. Any division or subdivision of the Property is prohibited.
2. Commercial Activities. Any commercial activity on the Property is prohibited. *De minimis* commercial recreational activity is, however, permitted.

(Optional language) except as associated with permitted activities (such as agriculture, timber management, home business) as specified in Section 5 below.

3. Industrial Activities. Any industrial activity on the Property is prohibited.
4. Construction. The placement or construction of any human-made modification such as, but not limited to, structures, buildings, fences, roads, and parking lots is prohibited.
5. Cutting Vegetation. Any cutting of trees or vegetation, including pruning or trimming, is prohibited, except for the cutting or removal of trees or vegetation which pose a threat to human life or property.
6. Land Surface Alteration. Any mining or alteration of the surface of the land is prohibited, including any substance that must be quarried or removed by methods that will consume or deplete the surface estate, including, but not limited to, the removal of topsoil, sand, gravel, rock, and peat. In addition, exploring for, developing, and extracting oil, gas, hydrocarbons, or petroleum products are all prohibited activities.
7. Dumping. Waste and unsightly or offensive material is not allowed and may not be accumulated on the Property.
8. Water Courses. Natural water courses, lakes, wetlands, or other bodies of water may not be altered.
9. Off-Road Recreational Vehicles. Motorized off-road vehicles such as, but not limited to, snowmobiles, dune buggies, all-terrain vehicles, and motorcycles may not be operated off of designated roads on the Property.
10. Signs and Billboards. Billboards are prohibited. Signs are prohibited, except the following signs may be displayed to state:

The name and address of the property or the owner's name.

The area is protected by a conservation easement.

Prohibition of any unauthorized entry or use.

An advertisement for the sale or rent of the Property.

5. **PERMITTED USES.** The Owner retains all ownership rights which are not expressly restricted by this Conservation Easement. In particular, the following rights are reserved:

1. Right to Convey. The Owner retains the right to sell, mortgage, bequeath, or donate the Property. Any conveyance will remain subject to the terms of the Conservation Easement and the subsequent Owner will be bound by all obligations in this agreement.
2. (Optional) Right to Maintain and Replace Existing Structures. The Owner retains the right to maintain, renovate, and replace the existing structure(s) as noted in the Baseline Documentation Report in substantially the same location and size. Any expansion or replacement may not substantially alter the character or function of the structure. Prior to beginning renovation or replacement of the existing structures, the Owner will provide a written plan to the Conservancy for the Conservancy's review and approval. Such approval shall not be unreasonably withheld.

3. (Optional) Right to Add Designated Structures or Uses. The Owner retains the right to add the following structures, modifications, or uses on the following legally described portion of the Property (Insert legal description of building envelope). Prior to beginning construction, the Owner will provide a written plan to the Conservancy for the Conservancy's review and approval. Such approval shall not be unreasonably withheld.

1. _____
2. _____
3. _____

6. **RIGHTS OF THE CONSERVANCY.** The Owner confers the following rights upon the Conservancy to perpetually maintain the Conservation Values of the Property:

1. Right to Enter. The Conservancy has the right to enter the Property at reasonable times to monitor the Conservation Easement Property. Furthermore, the Conservancy has the right to enter the Property at reasonable times to enforce compliance with, or otherwise exercise its rights under, this Conservation Easement. The Conservancy may not, however, unreasonably interfere with the Owner's use and quiet enjoyment of the Property. The Conservancy has no right to permit others to enter the Property. The general public is not granted access to the Property under this Conservation Easement.
2. Right to Preserve. The Conservancy has the right to prevent any activity on or use of the Property that is inconsistent with the Purposes of this Conservation Easement or detrimental to the Conservation Values of the Property.
3. Right to Require Restoration. The Conservancy has the right to require the Owner to restore the areas or features of the Property which are damaged by any activity inconsistent with this Conservation Easement.
4. Signs. The Conservancy has the right to place signs on the Property which identify the land as protected by this Conservation Easement. The number and location of any signs are subject to the Owner's approval.

7. **CONSERVANCY'S REMEDIES**. This section addresses cumulative remedies of the Conservancy and limitations on these remedies.

1. Delay in Enforcement. A delay in enforcement shall not be construed as a waiver of the Conservancy's right to eventually enforce the terms of this Conservation Easement.
2. Acts Beyond Owner's Control. The Conservancy may not bring an action against the Owner for modifications to the Property resulting from causes beyond the Owners' control, including, but not limited to, unauthorized actions by third parties, natural disasters such as unintentional fires, floods, storms, natural earth movement, or even an Owner's well-intentioned action in response to an emergency resulting in changes to the Property. The Owner has no responsibility under this Conservation Easement for such unintended modifications.
3. Notice and Demand. If the Conservancy determines that the Owner is in violation of this Conservation Easement, or that a violation is threatened, the

Conservancy shall provide written notice to the Owner. The written notice will identify the violation and request corrective action to cure the violation and, where the Property has been injured, to restore the Property.

However, if at any time the Conservancy determines, at its sole discretion, that the violation constitutes immediate and irreparable harm, no written notice is required. The Conservancy may then immediately pursue its remedies to prevent or limit harm to the Conservation Values of the Property.

If the Conservancy determines that this Conservation Easement is, or is expected to be, violated, and the Conservancy's good-faith and reasonable efforts to notify the Owner are unsuccessful, the Conservancy may pursue its lawful remedies to mitigate or prevent harm to the Conservation Values without prior notice and without awaiting the Owner's opportunity to cure. The Owner agrees to reimburse all reasonable costs associated with this effort.

4. Failure to Act. If, within 28 days after written notice, the Owner does not implement corrective measures requested by the Conservancy, the Conservancy may bring an action in law or in equity to enforce the terms of the Conservation Easement. In the case of immediate or irreparable harm, or if an Owner is unable to be notified, the Conservancy may invoke these same remedies without notification and/or awaiting the expiration of the 28-day period.

The Conservancy is entitled to enjoin the violation through temporary or permanent injunctive relief and to seek specific performance, declaratory relief, restitution, reimbursement of expenses, and/or an order compelling the Owner to restore the Property. If the court determines that the Owner has failed to comply with this Conservation Easement, the Owner shall also reimburse the Conservancy for all reasonable litigation costs and reasonable attorney's fees, and all costs of corrective action or Property restoration incurred by the Conservancy.

5. Unreasonable Litigation. If the Conservancy initiates litigation against the Owner to enforce this Conservation Easement, and if the court determines that the litigation was initiated without reasonable cause or in bad faith, then the court may require the Conservancy to reimburse the Owner's reasonable costs and reasonable attorney's fees in defending the action.
6. Actual or Threatened Non-Compliance. The Conservancy's rights under this Section, Conservancy Remedies, apply equally in the event of either actual or threatened violations of the terms of this Easement. The Owner agrees that the Conservancy's claim for money damages for any violation of the terms of this Easement is inadequate. The Conservancy shall also be entitled to affirmative and prohibitive injunctive relief and specific performance, both prohibitive and mandatory. The Conservancy's claim for injunctive relief or specific performance for a violation of this Conservation Easement shall not require proof of actual damages to the Conservation Values.

7. Cumulative Remedies. The preceding remedies of the Conservancy are cumulative. Any, or all, of the remedies may be invoked by the Conservancy if there is an actual or threatened violation of this Conservation Easement.

8. **NOTIFICATION PROVISION.** The Conservancy is entitled to 60 Days written notice whenever its approval is required under this Conservation Easement. If the Conservancy fails to respond within 60 Days after it receives the written request, then its approval shall be deemed given. This implied approval shall not extend to any activity contrary to this Conservation Easement or impairing a Conservation Value. The Conservancy's approval shall continue for three years. If the approved activity is not completed within three years after the approval date, then the Owner must re-submit the written application to the Conservancy.

9. **CONSERVATION EASEMENT REQUIREMENTS UNDER MICHIGAN LAW AND UNITED STATES TREASURY REGULATIONS.**

1. This Conservation Easement is created pursuant to the Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Protection Act (NREPA) - MCL §§ 324.2140 *et seq*.
2. This Conservation Easement is established for conservation purposes pursuant to the Internal Revenue Code, as amended at Title 26, U.S.C.A., Section 170(h)(1)-(6) and Sections 2031(c), 2055, and 2522, and under Treasury Regulations at Title 26 C.F.R. § 1.170A-14 *et seq*, as amended.
3. The Conservancy is qualified to hold conservation easements pursuant to these statutes. It is a publicly funded, non-profit 501(c)(3) organization.

10. **OWNERSHIP COSTS AND LIABILITIES.** In accepting this Conservation Easement, the Conservancy shall have no liability or other obligation for costs, liabilities, taxes, or insurance of any kind related to the Property. The Conservancy's rights do not include the right, in absence of a judicial decree, to enter the Property for the purpose of becoming an operator of the Property within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act. The Conservancy, its members, trustees or directors, officers, employees, and agents have no liability arising from injury or death to any person or physical damage to any property on the Property. The Owner agrees to defend the Conservancy against such claims arising during the term of the Owner's ownership of the Property.

11. **HAZARDOUS MATERIALS.** (Suggested, but optional language) The Owner warrants that Owner has no knowledge of a release of hazardous substances or hazardous wastes on the Property. The Owner agrees to protect and defend the Conservancy against any claims of hazardous materials contamination on the Property.

12. **CESSATION OF EXISTENCE.** If the Conservancy shall cease to exist or if it fails to be a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3), or if the Conservancy is no longer authorized to acquire and hold conservation easements, then this Conservation Easement shall become vested in another entity. This entity shall be a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3). The Conservancy's

rights and responsibilities shall be assigned to any entity having similar conservation purposes to which such right may be awarded under the *cy pres* doctrine.

13. **TERMINATION.** This Conservation Easement may be extinguished only by an unexpected change in condition which causes it to be impossible to fulfill the Conservation Easement's purposes, or by exercise of eminent domain.

1. Unexpected Change in Conditions. If subsequent circumstances render the Purposes of this Conservation Easement impossible to fulfill, then this Conservation Easement may be partially or entirely terminated only by judicial proceedings. The Conservancy will then be entitled to compensation in accordance with the provisions of IRC Treasury Regulations Section 1.170A-14(g)(6)(ii).
2. Eminent Domain. If the Property is taken, in whole or in part, by power of eminent domain, then the Conservancy will be entitled to compensation by the method as is set forth in IRC Treasury Regulations Section 1.170A-14(g)(6)(ii).

14. **LIBERAL CONSTRUCTION.** This Conservation Easement shall be liberally construed in favor of maintaining the Conservation Values of the Property and in accordance with the Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Code MCL 324.2140 *et seq.*

15. **NOTICES.** For purposes of this agreement, notices may be provided to either party by personal delivery or by mailing a written notice to the party (at the last known address of a party) by First Class mail.

16. **SEVERABILITY.** If any portion of this Conservation Easement is determined to be invalid, the remaining provisions will remain in force.

17. **SUCCESSORS.** This Conservation Easement is binding upon, and inures to the benefit of, the Donor/Owner's and the Conservancy's successors in interest. All subsequent Owners of the Property are bound to all provisions of this Conservation Easement to the same extent as the Donor.

18. **TERMINATION OF RIGHTS AND OBLIGATIONS.** A party's future rights and obligations under this Conservation Easement terminate upon transfer of that party's interest in the Property. Liability for acts or omissions occurring prior to transfer will survive the transfer.

19. **MICHIGAN LAW.** This Conservation Easement will be construed in accordance with Michigan Law.

20. **ENTIRE AGREEMENT.** This Conservation Easement sets forth the entire agreement of the parties. It is intended to supersede all prior discussions or understandings.

TWO WITNESSES: OWNER:

* Print/type names under signatures)

_____ _____

* *

_____ _____

* *

STATE OF MICHIGAN)
)
COUNTY OF _____)

Acknowledged before me on this _____ of _____, of 2000, by (Insert Owner's names) , ____(Insert marital status)_____.

_____
Notary Public

_____ County, Michigan

My commission expires: _____

TWO WITNESSES: CONSERVANCY:
(* Print/type names under signatures)

_____ _____

* *

_____

*

STATE OF MICHIGAN)
)
COUNTY OF _____)

Acknowledged before me on this _____ of _____, of 2000, by (Insert Executive Director or signer's name), known to me to be the President of the Raisin Valley Land Trust .

_____
Notary Public

_____ County, Michigan

My commission expires: _____

AFTER RECORDING SEND TO: SEND TAX BILL TO: PREPARED BY:
Insert correct name and address Owner Insert name and address

Part C. REFERENCE GUIDE

§ 3.12 Bibliography

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§ 3.13 Internet Directory

[1] Forms and Resources

The Uniform Conservation Easement Act, together with the Commissioners' Prefatory Note and Comments, is available at the National Conference of Commissioners on Uniform State Laws web site: http://www.nccusl.org.

A model conservation easement of the Natural Lands Trust and Land Trust Alliance is available from the EPA at:
http://www.epa.gov/nps/ordinance/documents/A2e-ModelLand.pdf.

Other conservation easements available online include:
California: Land Trust for Santa Barbara County Agricultural Conservation Easement: http://www.sblandtrust.org/conservationeasements.html.
Georgia: A model conservation easement: http://www.georgiawildlife.dnr.state.ga.us.
A Model Management Plan for Conservation Easements in Longleaf Pine-Dominated Landscapes, which discusses considerations and strategies in managing sensitive resources under conservation easements, is available at:
http://www.jonesctr.org/education_and_outreach/publications.
Massachusetts: Sweet Water Trust: Model Conservation Easement to Protect Land as Wild: http://www.sweetwatertrust.org.
New York: Westchester County Land Trust A Model Conservation Easement, with Key Provisions: http://www.westchesterlandtrust.org.

Many municipal codes are available online at:
American Legal Publishing Corporation: http://www.amlegal.com
LexisNexis Municipal Codes Web Library: http://www.bpcnet.com
General Code Publishers Corporation: http://www.generalcode.com
Municipal Code Corporation: http://www.municode.com

[2] Federal Agencies

EPA, Smart Growth page: http://www.epa.gov/smartgrowth
Bureau of Land Management: http://www.blm.gov/nhp/index.htm
Department of Energy, Center of Excellence for Sustainable Development:
http://www.sustainable.doe.gov
Federal Highway Administration, Planning, Environment, and Real Estate:
http://www.fhwa.dot.gov/hep/index.htm
Natural Resource Conservation Service, Department of Agriculture: http://www.nrcs.usda.gov
US Geologic Survey: http://www.usgs.gov Regional studies, state information
National Oceanic and Atmospheric Administration: http://www.noaa.gov
National Climatic Data Center: http://www.ncdc.noaa.gov
Department of the Interior: http://www.doi.gov
Fish and Wildlife Service: http://www.fws.gov

[3] Planning and Land Use Organizations

American Farmland Trust, Farmland Information Library: http://www.farmlandinfo.org
American Planning Association: http://www.planning.org
APA Growing Smart Program: http://www.planning.org/growingsmart
Association of Metropolitan Planning Organizations: http://www.ampo.org
Cyburbia: http://www.cyburbia.org
Delaware Valley Regional Planning Commission: http://www.dvrpc.org
Environmental Law Institute: http://www.eli.org
International City/County Management Association: http://www.icma.org
Land Trust Alliance: http://www.lta.org
Lincoln Institute of Land and Policy: http://www.lincolnisnt.edu
Michigan Land Use Institute: http://mlui.org
National Association of Development Organizations: http://www.nado.org
National Governors Association, Center for Best Practices: http://www.nga.org
People and Land: http://www.peopleandland.org
Rocky Mountain Institute http://www.rmi.org
Smart Growth America: http://www.smartgrowthamerica.com
Smart Growth Network: http://www.smartgrowth.org
Soil and Water Conservation Society: http://www.swcs.org
South Carolina Coastal Conservation League: http://www.sccl.org
Sustainable Communities Network: http://www.sustainable.org
Trust for Public Land: http://www.tpl.org
Urban Land Institute: http://www.uli.org

[4] Environmental Organizations

Audubon Society: http://www.audubon.org
The Biodiversity Partnership: http://www.biodiversitypartners.org
The Conservation Fund: http://www.conservationfund.org
Defenders of Wildlife: http://defenders.org
The Heinz Center: State of the Nation's Ecosystems report and 2003 update: http://www.heinzctr.org
Natural Resources Defense Council: http://www.nrdc.org
National Environmental Directory: http://www.environmentaldirectory.net
Nature Conservancy: http://www.nature.org
Sierra Club: http://www.sierraclub.org
Wilderness Society: http://www.wilderness.org

[5] Educational Institutions

Albany Law School, Government Law Center: http://www.als.edu/centers
Conservation Technology Information Center: http://www.ctic.purdue.edu
Cornell Legal Information Institute, Land Use: http://www.law.cornell.edu
National Center for Agricultural Law: http://www.nationalaglawcenter.org
National Center for Smart Growth Education and Research (University of Maryland): http://www.smartgrowth.umd.edu
Natural Resources Law Center: http://www.colorado.edu/Law/NRLC
Natural Resources Research Information pages: http://www4.ncsu.edu/~leung/iousa.html
New York University Law School, Center on Environmental and Land Use Law, Land Use Program: http://www.nyu.edu/pages/elc
Pace University School of Law, Land Use Law Center: http://www.law.pace.edu/landuse
Rocky Mountain Land Use Institute: http://www.law.du.edu/rmlui
University of California at Berkeley, Environmental Design Library, Internet Resources for City Planning Research: http://www.lib.berkeley.edu/ENVI/cityweb.html
University of Texas at Arlington: http://www.uta.edu/supa/academics/mcrp_limks.htm

[6] Other Web Sites

American Bar Association; Section of Environment, Energy, and Resources; Public Lands and Land Use Committee: http://www.abanet.org/environ/committees/publiclands/home.html
Brookings Institution, Center on Urban and Metropolitan Policy: http://www.brookings.edu
Center for Watershed Protection: http://www.stormwater.net
International Council for Local Environmental Initiatives: http://www.idei.org
Local Government Clearinghouse: http://www.lgc.org
Local Initiatives Support Corporation: http://www.liscnet.org
National Association of Counties: http://www.naco.org
National Association of Homebuilders: http://www.nagb.com
National Association of Regional Councils: http://www.narc.org/links/cogslist.html

National Conference of State Legislatures: searchable table of state incentive-based growth management laws: http://www.ncsl.org
Pew Oceans Commission: http://www.pewoceans.org
Planning Commissioners Journal: http://www.plannersweb.com
SprawlWatch Clearinghouse: http://www.sprawlwatch.org
State Line (Pew Charitable Trust): http://www.stateline.org