

LAND CONSERVATION OPTIONS

A GUIDE FOR MASSACHUSETTS LANDOWNERS

SIGNIFICANT CHANGES MADE TO MASSACHUSETTS ESTATE TAX LAW, FEDERAL TAX LAW, AND M.G.L. CHAPTERS 61, 61A, & 61B

Since the publication of the *Fifth Revised Edition of Land Conservation Options*, some significant changes have been made in the state and federal tax laws related to conservation giving as addressed in *Land Conservation Options*. In 2003, the Massachusetts legislature substantially revised the Massachusetts estate tax, and in 2006 the U.S. Congress made very significant changes to the federal tax code related to the deductibility of certain conservation gifts. Also in 2006, the Massachusetts legislature made a set of changes to the Chapter 61, 61A and 61B programs. This Addendum is intended to summarize those changes for readers of *Land Conservation Options*, but readers are, as always, cautioned and advised to consult a qualified tax professional before making any decisions related to tax or estate planning.

- The Massachusetts Estate Tax Law was revised in 2003 to “decouple” Massachusetts Estate Tax from the federal estate tax. From 1997 to 2003, Massachusetts employed a so-called “sponge tax”, whereby Massachusetts would collect an estate tax equal to the maximum credit for state estate taxes allowed under the federal tax code. When the Federal estate tax was revised in 2001 to effectively phase out the estate tax by 2010, the Massachusetts legislature created separate filing thresholds and exemption amounts, as a means of preserving the estate tax. Please refer to your tax or estate planner to understand the implications of this change for your estate.
- In August 2006, Congress passed changes to the federal income tax code that significantly enhance the deductibility of conservation restriction gifts and bargain sales. Specifically, the period over which CR gifts and bargain sales can be deducted was extended from six years (year of the gift and five years thereafter) to sixteen years (year of the gift and 15 years thereafter). In addition, the caps on deductibility were raised from 30% of Adjusted

Gross Income (AGI) to 50% of AGI. Unfortunately, these provisions expired on December 31, 2007, and do not apply to transactions completed after that date. While legislation has been filed that would make these changes permanent, and the land trust community is working hard to support it, there is no assurance as of this writing (February, 2008), that the legislation will pass. At this time, conservative planners must assume that the 2007 tax benefit will not apply to transactions completed after December 31, 2007.

- As part of the 2006 legislation, Congress also tightened the appraisal and substantiation requirements for conservation gifts. We recommend that all donors confirm that their advisors are aware of these new requirements
- In 2006, the Massachusetts legislature passed a bill significantly revising the Chapter 61, 61A and 61B current use taxation programs. These changes were a long-term legislative priority for the land conservation community, and clarify many of the provisions of these programs. A summary of these changes may be found at www.massland.org, the website for the Massachusetts Land Trust Coalition.

The co-publishers of *Land Conservation Options*, the Trustees of Reservations and the Essex County Greenbelt Association, are planning a comprehensive re-write once the fate of the federal legislation is known. Please contact the Trustees at (978) 840-4446 or Greenbelt at (978) 768-7241 with questions relating to the revision.



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FIFTH REVISED EDITION

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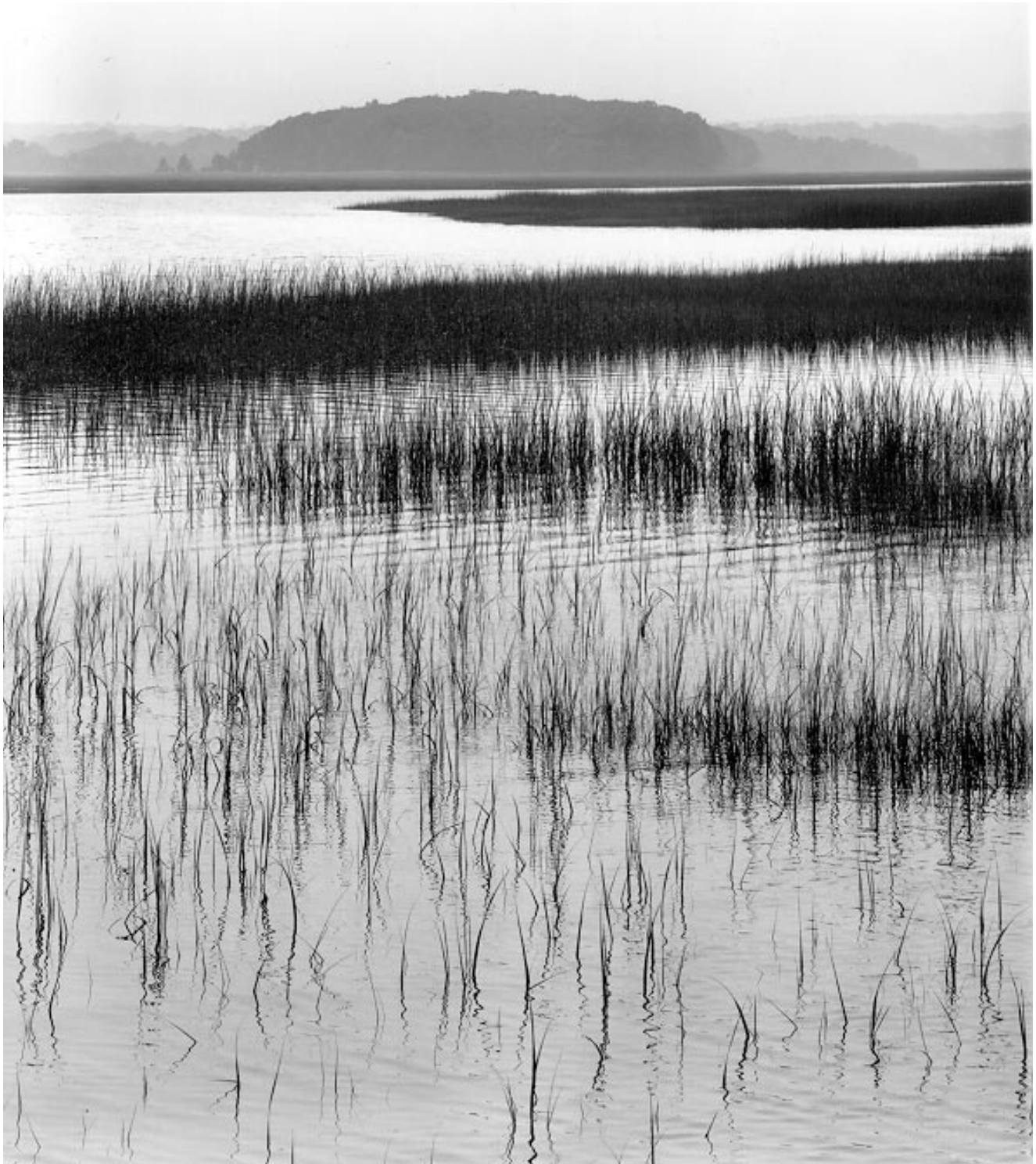
COVER PHOTO: Slocum's River Reserve, formerly known as Island View Farm, includes mature woodlands, agricultural fields, and pastures rising from the western bank of the tidal Slocum's River in Dartmouth. Two miles of trails cross the Reservation and connect to trail easements over an adjoining sixty acres of private land. The Reservation protects more than 3,000 feet of frontage along the Slocum's River. Adjoining private farmland and pastures produce corn, alfalfa, and horticultural nursery stock and are used to graze livestock. The Trustees of Reservations and Dartmouth Natural Resources Trust (DNRT) acquired this 47-acre Reserve in 2000.

PHOTO COURTESY OF: Indurama Finance USA Corporation



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The Cornelius and Miné S. Crane Wildlife Refuge, Essex and Ipswich, was donated to The Trustees of Reservations in 1974, with an endowment by bequest in 1991.



INTRODUCTION

The earth is common ground and...gradually the idea is taking form that the land must be held in safekeeping, that one generation is to some extent responsible to the next...

—E. B. WHITE

Whenever a busy man is over-worried, the doctor prescribes the country; and when any of us are brought into depression by care or trouble, our cure is the sight of our chosen hills.

—CHARLES ELIOT

E. B. White, the Maine summer resident who wrote *Charlotte's Web* and *Stuart Little*, was a keen observer of human society as well as nature and nature's creatures. His words still ring true. From Maine to California, support grows for a land ethic that recognizes our "common ground" in our land and natural environment, our forests, mountain tops and ridgelines, rivers, streams, wetlands, open meadows, beaches, and rocky coasts. The land trusts and conservation organizations in Massachusetts are leaders of this growing national—and international—movement.

In spite of the assaults that we continue to visit upon our land, our Massachusetts landscape offers countless windows into nature and 10,000 years of human experience in relation to the material world. The special places in our landscape reflect a legacy of stewardship by owners who valued their land more for its beauty and integrity than for its dollar value. This book describes practical ways to extend this tradition of stewardship for the special places, natural features, and cultural heritage that are the best of our Massachusetts landscape.

The private commitment to land conservation is deeply rooted in Massachusetts. It began with Henry David Thoreau who recognized the need to preserve remnants of uncultivated nature in his native Concord. A generation later, that tradition continued with the private initiatives of the Laurel Hill Association in Stockbridge (1853), the Appalachian Mountain Club (1876), Samuel Sawyer's Ravenswood Trust in Gloucester (1889), The Trustees of Reservations (1891), and the Andover Village Improvement Society (1894).

In 1891, The Trustees of Reservations, the first land trust serving a broad region, was founded by pioneering Boston landscape architect Charles Eliot. The Trustees of

Reservations soon became the model for land trusts throughout the United States and the world, beginning in 1895 with the National Trust of England. These organizations, more than 1,000 strong with millions of members, reflect great diversity of mission and program. All of them rest upon Charles Eliot's brave expectation that private landowners and supporters would respond generously to the call for conservation.

Since 1891, private landowners in Massachusetts working with land trusts and other conservation organizations have conserved more than 100,000 acres of the natural and cultural landscape. The parcels saved range from tiny wetlands and historic sites to forests of several thousand acres. Many properties are cared for primarily by local volunteers; others are managed by professional staff.

This tradition of private conservation has continued through lean times and boom times, and it thrives today. Often, private commitments have leveraged matching—and, often, much greater—levels of public investment. These landowners come from all walks of life and all income levels. Their motivations vary—from wanting to share the natural beauty they have protected through their own care and foresight, to fearing that estate taxes will prevent their children from inheriting and keeping lands in the family, to seeking relief from income and/or property taxes. All share a deep concern and appreciation for the land.

This booklet explains how to protect your special part of the Massachusetts landscape in ways that have been employed successfully by many other landowners and families. Often, conservation methods offer attractive tax advantages, helping landowners to reduce estate, income, and property taxes, thus making conservation more affordable. Protecting land can involve complicated financial and legal decisions; careful thought and good advice are essential. What is most important is your and your family's love and concern for the land and desire to see it conserved.

As an owner of a special part of the Massachusetts landscape, you have a singular opportunity to protect it as a legacy for future generations. What becomes of our Commonwealth and our New England region depends in large part on the choices you and others make, as landowners, today and in the years ahead.

ABOUT THIS BOOKLET

This publication revises *Land Conservation Options: A Guide for Massachusetts Landowners* (1999), which in turn revised and expanded a 1984 pamphlet by Darby Bradley, Esq. and Cortland Bacall, C.P.A. The Bradley/Bacall pamphlet was based upon Bradley's earlier summary written for the Vermont Land Trust, of which he now serves as President. The current revision draws extensively—and usually without specific attribution—upon *Conservation Options* (1993), edited by Karen Deans and published by the national Land Trust Alliance, and on the related booklet, *Conservation Options: A Guide for Maine Landowners*, by F. Marina Schauffler, edited by Caroline M. Pryor, published by the Maine Coast Heritage Trust in cooperation with the Land Trust Alliance. The sponsors expect that the able staff of the Land Trust Alliance will update its *Conservation Options* periodically to reflect tax changes at the federal level. The sponsors of this booklet intend to keep it current with changes in Massachusetts law and conservation practice.

ACKNOWLEDGMENTS

The sponsors greatly appreciate the excellent work done by Karen Deans of the Land Trust Alliance and F. Marina Schauffler and Caroline M. Pryor of the Maine Coast Heritage Trust and the gracious permission given by both the Maine Coast Heritage Trust and the Land Trust Alliance for the adaptation of, and extensive quotation from, their excellent publications. We especially appreciate their permission to borrow text without quotation marks or footnotes. The sponsors are grateful for the generous and expert attention of the members of our informal editorial committee: Edward Becker, Douglas Muir, Margaret Wheeler, and Charles Wyman. Andrea Pullo, Program Assistant in the Land Conservation Center of The Trustees of Reservations, coordinated editorial review, helped with research and fact checking, and generally assisted in bringing this revision to completion. Virginia Slack, Administrative Coordinator of the Land Conservation Center, and Andrea Pullo handled word-processing with efficiency and good cheer. Kate Wollensak and Beth Swan of The Trustees' publication staff took time from their demanding schedule of publications to contribute the graphic design. We are especially grateful to Dorothy Kerper Monnelly who donated her extraordinary photographs.

TECHNICAL TERMS AND FURTHER SOURCES

Some of the terms in this booklet may be unfamiliar. We have printed these terms in *bold italics* when they first appear and sometimes when they reappear in a new context and we define them in the Glossary at the end of this booklet. For those who wish to delve more deeply into the relevant law, cases, and regulations, the most important citations are given in the Notes. For those who wish to explore conservation issues further, we recommend numerous Sources of Information at the end of this booklet.

AN IMPORTANT NOTE OF CAUTION

This booklet explores several complex, interrelated topics: tax law, estate planning, real estate, and conservation. Any attempt to summarize an enormous body of law and regulations entails oversimplification and may be misleading. Laws and regulations may be adopted, amended, or repealed at any time; they are always subject to a range of interpretation, and their application varies in different factual settings. This booklet reflects state and federal tax law and Internal Revenue Service regulations as of January 1, 2001. While we take note of several important changes brought about by the tax law signed by President George W. Bush in June 2001, it is much too soon to attempt a comprehensive analysis of that legislation and this booklet does not attempt to do so.

While the sponsors believe this booklet to be accurate at the time it was written, it is not meant to offer legal or tax advice for any specific situation. We urge every landowner and prospective donor of land and restrictions to consult with a knowledgeable attorney experienced in real estate and tax matters before entering into any transaction for the sale or gift of conservation land.

Wesley T. Ward
Director of Land Conservation
The Trustees of Reservations
Long Hill, Beverly

Edward O. Becker
Executive Director
Essex County Greenbelt Association, Inc.
Cox Reservation, Essex

October 2001

CHAPTER 1

LOOKING AHEAD TOWARD CONSERVATION

If you value the special qualities and features of your land several questions may come to mind. What will happen to your property when it passes into other hands? Will your children want to maintain it and will they be able to do so? Will it be developed? If so, will its character and special features be respected? Will others be able to share its beauty in the future?

We offer the following “decision path” to help you address such questions in an orderly manner. Two principles should be clear at the outset:

- Unless you take positive action to protect your land, the odds are strongly in favor of its eventual development or subdivision.
- To be effective, your conservation strategy must rest upon a clear-headed assessment of your situation, the land, the available options, and your own wishes for the future of that land.

TOWARD A CONSERVATION PLAN

We have prepared this booklet to help you find the conservation technique, or combination thereof, that is best suited to your situation, your values, and the special qualities of your land. The chart on page 5 is a “field guide” to this process and this booklet.

Four basic issues to consider are (1) the conservation values and special features of the property; (2) your goals for the property and its conservation; (3) your financial situation; and (4) the needs and wishes of your family, especially family members that depend upon you.

As you work through these issues, some basic questions will arise. What is special about the property? Whom do you wish to own the property immediately following you and over the long term? What are the financial and tax ramifications of the options available to you?

WHAT IS SPECIAL ABOUT THE PROPERTY?

- *What scenic, ecological, and historic features are found on the land?*

Your local or regional *land trust*, including the sponsors of this pamphlet, will be glad to help you

make this assessment, or to suggest the best sources for this information.

- *What arrangements are needed to protect the natural, scenic, and historic qualities of the property?*

The owner or manager of a working farm needs a great deal of flexibility to allow for practical management. On the other hand, a rare habitat or extraordinary scenery may require specific care for its protection. At its best, conservation planning weaves together the most appropriate and effective techniques to suit both the land and its owners.

- *Are the laws and regulations affecting the property sufficient to protect its qualities?*

Many people feel that “the community should decide” through its laws and regulations as they evolve over time. Others observe that these legal mechanisms rarely give adequate weight to environmental, historic, and scenic factors that make our landscape special.

FUTURE OWNERSHIP OF THE PROPERTY

- *Do you want to continue owning the land and then pass it on to a family member? Or do you wish to dispose of your land during your lifetime or through your will?*

Conservation restrictions place permanent restrictions on the land while keeping it in private ownership. **Deed restrictions, mutual covenants,** management agreements, and leases offer less secure protection, but have their appropriate uses in conservation planning.

- *Do you hope to continue your relationship with the land?*

Conservation restrictions, land donations with **reserved life estates**, and land donations by will (known as bequests, devises, or testamentary donations) offer permanent protection while you, and possibly your heirs, remain on the land.

- *Who will inherit the property and how will it be owned? Will a growing number of **partial interests** eventually cause the land to be partitioned and developed, in spite of your best intentions?*

The right conservation techniques can help families protect the integrity of a family-owned property over time. On the other hand, poorly thought-out forms of ownership can lead to inadequate management and to family conflict.

- *Would you consider donating all or a portion of the property to a land trust or other charitable organization, or selling it at less than fair market value?*

Land donations can be arranged in several ways. Some may provide considerable tax benefits and/or possible income to the donor.

should keep in mind that funds are quite limited and the process is highly competitive. You may also be able to sell the land to a private party with a permanent conservation restriction in place, at a price that approximates fair market value. In some cases, portions of the land with little conservation value can be sold for appropriate **limited development** without affecting the conservation value of the remaining, protected portion.

- *Has the property appreciated greatly in value during your period of ownership?*

If so, sale of the property may trigger a sizable **capital gains tax**. This tax can be minimized by granting a conservation restriction prior to the sale, or by selling the land at a bargain sale to a land trust or conservation agency.

- *Assuming you wish to retain ownership, will you build a house or other structures on the property?*

If building sites can be located where they will not damage conservation values, you may be able to retain this option while achieving conservation goals. Conservation restrictions can be tailored to allow a specified amount and kind of development in defined areas.

FINANCIAL SITUATION AND TAX CONSIDERATIONS

- *Is reducing property taxes an objective?*

Enrollment in one of the Chapter 61 preferential open space tax programs in Massachusetts can significantly reduce taxes on forest land, productive agricultural land, and other open space, and gives the town or a land trust a chance to match a future offer for the property. Conveying property outright to a conservation organization eliminates taxes on the portion conveyed.

- *Could you benefit from an income tax deduction?*

Donations and **bargain sales** of land or conservation restrictions can provide substantial income tax savings in the year of the gift, and for as many as five years thereafter.

- *Are estate taxes a concern?*

Federal and state estate taxes may force the untimely sale of property that family members would prefer to retain. Conservation restrictions, properly donated during your lifetime or made part of your will, can result in substantial estate tax savings, thus enabling your family to retain ownership of a beloved property.

- *Do you or your estate need to sell the property for top dollar? Would you accept less than full fair market value in exchange for assurance that the land will be protected?*

You may be able to sell the land at a discounted price to a conservation organization or agency, though you

TAILORING A CONSERVATION PLAN TO YOUR SITUATION

The techniques discussed here have helped landowners throughout Massachusetts and the rest of the United States to protect hundreds of thousands of acres of irreplaceable land and historic places. A conservation plan may rely on one or more of the techniques outlined in the following chapters. Every conservation plan should be tailored to the needs and wishes of the individual landowner and the special features and conservation values of the property.

PROFESSIONAL GUIDANCE AND THE NONPROFIT LAND TRUST

A nonprofit **land trust** may help as you plan for the future of your property. Whether they operate locally, regionally, or throughout Massachusetts, most land trusts stand ready to help landowners review their options and locate the professional guidance and other resources needed to prepare and carry out a conservation plan. If the land trust does not have the needed expertise at hand, it will be

able to suggest experienced consultants. Most land trusts accept donated land that meets their criteria, and many land trusts are willing to accept conservation restrictions. Depending on your particular situation, you may need the services of an appraiser, surveyor, land use planner, or tax expert. When legal documents are required to carry out the plan, you will need an attorney familiar with conservation transactions and methods. **Moreover, an attorney should always be consulted with regard to real estate transactions, wills, and trusts.** Your land trust may be able to recommend advisors who have done successful conservation work in your area.

WHERE TO BEGIN?

We suggest that you call a land trust to discuss your property and your concerns in general. The sponsors of this booklet, the Land Trust Alliance, or the Massachusetts Land Trust Coalition can refer you to an established organization in your area.

If you wish to begin with a professional advisor, you should realize that the quality of the advisor and his or her understanding of your values and intentions are more important at the outset than the discipline the advisor represents. Trusted family advisors with no specific expertise in the field have been key to many conservation successes. In our experience, the most important skills are the ability to understand and communicate your wishes, needs, and intentions and the patience to stay with a project that involves a number of decisions, checkpoints, and input from a variety of sources.

FINDING A PATH TO LAND PROTECTION

Do you wish to retain ownership of the land?

YES ← → NO

Do you wish to protect the land permanently?

| <i>If Yes...</i> | <i>See chapter:</i> |
|------------------------------------|---------------------|
| Conservation Restriction | 3 |
| Donation of an Undivided Interest | 2 |
| Donation of Land by Bequest (will) | 2 |
| Donation of a Remainder Interest | 2 |

| <i>If No...</i> | <i>See chapter:</i> |
|---|---------------------|
| Deed Covenants and Restrictions | 5 |
| License or Lease to a Conservation Organization | 5 |
| Management Agreement | 5 |
| Chapter 61 Open Space Tax Programs | 8 |

Is monetary compensation needed?

| <i>If Yes...</i> | <i>See chapter:</i> |
|----------------------------|---------------------|
| Sale at Fair Market Value | 4 |
| Bargain Sale | 4 |
| Installment Sale | 4 |
| Charitable Remainder Trust | 2 |

| <i>If No...</i> | <i>See chapter:</i> |
|-----------------------------------|---------------------|
| Lifetime Donation of Land | 2 |
| Donation by Will | 2 |
| Donation of a Remainder Interest | 2 |
| Donation of an Undivided Interest | 2 |

Do you wish to limit the future uses of the property when you convey title?

| <i>If Yes...</i> | <i>See chapter:</i> |
|---------------------------------|---------------------|
| Conservation Restriction | 3 |
| Deed Covenants and Restrictions | 5 |

| <i>If No...</i> | <i>See chapter:</i> |
|---------------------------|---------------------|
| “Free and Clear” Donation | 2 |
| Bargain Sale | 4 |
| Sale at Fair Market Value | 4 |

Combinations of options are often used to achieve specific goals.

(Adapted, with permission, from *Conservation Options*, published by Maine Coast Heritage Trust in cooperation with the Land Trust Alliance.)

CHAPTER 2

DONATING LAND FOR CONSERVATION

Donating land to a private, nonprofit conservation organization or to a public conservation body is the most straightforward method of permanent land conservation. “Donating” land for conservation means conveying the land to a conservation organization or agency for no compensation or with only nominal compensation (such as \$1 or \$100). It transfers ownership and management responsibilities to the organization or agency, thereby ending the burden of property taxes. Donation of the land provides maximum income tax and estate tax benefits and avoids the capital gains tax.

You may donate land during your lifetime or upon your death as you direct in your will. You may donate an entire property, a smaller parcel, portions of a parcel, or an *undivided interest* in a parcel; or you may retain a *reserved life estate* in a property and transfer a *remainder interest* to the conservation organization. By agreement with the recipient, you may retain defined rights or *easements* for yourself, your heirs, and successors. Gifts can be made free and clear or subject to certain restrictions. In general, retaining interests, rights, easements, or restrictions when you make a conservation gift will reduce the value of the donation for tax purposes.

ADVANTAGES & DISADVANTAGES

Donations of land are simple, generally straightforward, and permanent. You will no longer incur expenses of ownership and management. If you or family members own or retain adjacent or nearby property, you may well benefit from its proximity to the conservation land. In general, the full fair market value of the donated property interests is tax-deductible as a charitable contribution. Through a donation of land, you may avoid capital gains taxes and you will eliminate property taxes on the donated land. You will reduce the size of your estate and thereby reduce the amount of federal and state estate taxes.

The disadvantages are obvious: you will no longer own, hold, and control the property, therefore you may not pass it on to your children or heirs. The gift will be permanent and irrevocable.



DOROTHY KERPER MONNELLY

In 1889, Samuel Sawyer of Gloucester willed 600 acres of land he had assembled in the Ravenswood Woods to the charitable trust he established for conservation purposes. Ravenswood Park is presently owned and managed by The Trustees of Reservations and additionally protected by a conservation restriction held by Essex County Greenbelt Association.

If you fit one or more of the following categories, you may find donating land attractive:

- You treasure your property and are committed to permanent preservation for the common good;
- You own property, perhaps a vacation retreat, that you no longer wish to use or maintain;
- The value of your property has appreciated greatly and its sale would result in high capital gains taxes;
- You hold substantial real estate and wish to reduce the estate tax burden for your heirs;
- You do not have heirs who can or will protect the land's conservation values;
- You have come to the conclusion that certain features of the property, like rare habitats, require greater care and expertise than you can provide.

CONCERNS ABOUT FUTURE MANAGEMENT

Quite understandably, donors often want to influence how the organization or agency will use or manage the land in the future. Appropriately, donors may outline their wishes in writing to the recipient, which will do its best to accommodate those desires, while retaining the right to make necessary or desirable management decisions as circumstances change. If the donor's wishes are stated as requirements, however, the IRS will assert that the value of the gift, and therefore the charitable deduction is reduced, because the recipient's rights to use the land have been limited.

There is, however, a method by which the donor can impose restrictions on the use of the donated land without losing part of his charitable deduction. The donor can first donate a conservation restriction on the property to a conservation organization and then deed the property to a second recipient. Each gift is independently deductible, and added together the two deductions should equal, or almost equal, the total value of the land. This two-step gift strategy is perhaps a bit more complicated and costly to arrange, but it will maximize the donor's tax deduction while ensuring that the donor's wishes are respected. In fact, the involvement of a second "watchdog" conservation organization should provide even more assurance to the donor that his wishes will be honored.

Before accepting a donation of land, the organization or agency must carefully consider the present and future costs of long-term ownership and management. Fields must be mown, trails maintained or built, and signs posted.

Any buildings must be maintained; these costs will rise as the structures age. At some point structures may need to be removed. The property must be insured against liability, fire and other disasters.

As a matter of good policy and financial necessity, a land trust may seek to establish an *endowment* to defray management costs of a donated property; one possible source of help is the property owner. It may be difficult for the land trust to make this further request of someone who has generously offered to donate a valuable property, but doing so demonstrates that the land trust is seriously committed to long-term stewardship of the property.

OUTRIGHT GIFT OF LAND FOR CONSERVATION



Sunset Mountain in Gloucester is one of the highest points on the coast northeast of Boston, offering spectacular views of the surrounding countryside and the Atlantic Ocean. The Roberts family had owned the four-acre summit for several generations, during which it had provided a favorite destination for family hikes and family picnics.

When the Essex County Greenbelt Association purchased the surrounding land in 1994, the Roberts family decided the time was right to make permanent provision for their hilltop. They donated the land to Greenbelt, and thereby protected an important piece of open space and a strategic trail linkage.

While the tax benefits were a consideration, the family was most pleased that their land was part of a larger conservation effort. According to Roger Roberts, "We wanted the land to be protected and to provide for the public the kind of use and enjoyment our family had known for so many years."

TAX ADVANTAGES: THE BASICS

By donating land to a charitable organization or governmental agency, you can claim a deduction against your taxable income on your federal and possibly Massachusetts income tax returns. That deduction is usually equal to the current fair market value. If the value claimed is greater than \$5,000, it must be established by independent, professional appraisal. The deduction is governed by the limitations of the federal tax code; see Chapter 6. Donating land eliminates the donor's property tax burden (after any past and current taxes are paid), and removes the value of the property from the donor's estate, thus reducing estate taxes.

DONATING A REMAINDER INTEREST WITH A RESERVED LIFE ESTATE OR TERM OF YEARS

This technique allows you to donate property during your lifetime, while reserving the right for yourself, and other persons you specifically designate, to continue using the property during your and their lifetimes or for a shorter period of years. When you and those you have specified either die or release their life interests, the recipient assumes full *title* and control over the property.

In the case of a remainder interest in a farm or personal residence, including surrounding land, you may be entitled to an income tax deduction in the year of the gift. Unfortunately, that is not true for commercial or other investment property. The value of the gift for tax purposes is the value of the remainder interest. It is determined by subtracting the value of the reserved life estate or term of years from the appraised fair market value of the property. These values are determined from IRS actuarial tables based on average life expectancies. Of course, the longer the period of reserved use (that is to say, the younger the donor or specified holders of the reserved life estate) the lower the value of the remainder interest will be, and the lower the value of the gift for tax purposes. The income tax advantages are less than from a current donation but greater than from a gift by bequest. The holders of a reserved life estate continue to be responsible for property taxes until the recipient obtains full title to the property.

The donor may be interested in reserving only a short period of time ("term of years") for family use. This may increase the value of the gift because the term of years is significantly less than the donor's life expectancy.

For example, a married couple in their fifties might want to retain use of a vacation property for only ten or fifteen years (until their children leave the nest) and then turn the property over to the land trust.

DONATING LAND BY WILL



MASSACHUSETTS AUDUBON SOCIETY

For three generations, the Marsh Family owned and farmed a beautiful 130-acre tract of land with extensive frontage on Pierpoint Meadow Pond in Dudley, Massachusetts. With no children to leave the farm to, and concerned that it would be developed after his death, Mr. George C. Marsh decided to bequeath the property to the Massachusetts Audubon Society in his will. In addition to the land, Mr. Marsh also donated an endowment to provide the financial resources necessary to maintain and manage the property as a wildlife sanctuary.

The advantages to Mr. Marsh in making these gifts through his will were: 1) he controlled his assets during his life time, so they were available to him for medical, nursing home or other financial contingencies; 2) upon his death, Mr. Marsh's estate avoided an estate tax liability; and 3) he had the satisfaction and peace of mind in knowing that his beloved property would always remain in a natural condition for the benefit of wildlife and the local community.

Mr. Marsh died shortly after completing his will and today the property is known as the Pierpoint Meadow Pond Wildlife Sanctuary. "Thanks to Mr. Marsh's foresight and generosity a significant tract of land is now protected for the benefit of future generations," said Tim Storrow, former Director for Land Protection for the Massachusetts Audubon Society.

The donor might also wish to retain a full life estate and then, if his circumstances change, relinquish the balance of his life estate and accelerate the remainder. The effect should be an additional deduction, because the relinquishment of the balance of his life estate is (at that point) a gift of the donor's entire interest in the property.

Suppose the donor isn't sure how long she expects to use the property. She might reserve a full life estate when she makes the gift, and then, if her circumstances change and she doesn't need the property any longer, relinquish her life estate and accelerate the remainder. The effect of the release of her life estate should be a second charitable gift equal to the remaining value of her life estate.

COMBINING THE GIFT OF A REMAINDER INTEREST WITH A CONSERVATION RESTRICTION

This technique allows you to assure permanent protection of the land that is the subject of a remainder interest gift and maximize your income tax deduction. Before donating a remainder interest, you donate a conservation restriction, preferably to another organization. You would then qualify for two separate income tax deductions—one for the restriction and the other for the remainder interest. By donating a conservation restriction first, you will realize a larger deduction without appreciably constraining your intended use of the property.

DONATING LAND BY BEQUEST

Some of the most beautiful, ecologically significant, and historically valuable properties in Massachusetts have been donated to land trusts and conservation organizations by will—also known as bequests, testamentary gifts, or devises. With a bequest, you receive no income tax benefit and you continue to be responsible for property taxes during your lifetime; however, there are several advantages that make bequests among the most popular techniques for conservation.

First, donating land by will removes the property from your estate and can significantly reduce the estate tax burden faced by your heirs. Second, a bequest is relatively simple to prepare as it avoids many of the detailed negotiations required to determine the most efficient income tax deduction. Third, donating land by will ensures the conservation of your treasured property while allowing you to enjoy the benefits of full ownership during your lifetime. Finally, a bequest is reversible—you can re-write your will at anytime to remove the donation if your financial situation or intentions change.

Before writing a bequest of property into your will, be sure to consult the chosen recipient to determine whether the organization is both willing and able to accept the bequest. Because an organization's priorities

and abilities can change over time, it is a good idea to name an alternate recipient (whose consent should also be secured) in case the primary beneficiary cannot accept the gift after your death. Your will can also specify that if the primary recipient fails to use the land as specified, the property will be transferred to the second organization.

As with a lifetime gift, the recipient organization as a condition of its acceptance of the gift may request or require an endowment contribution to provide for the expense of maintaining the property.

DONATING UNDIVIDED INTERESTS

To take advantage of the potential charitable deductions generated by a large gift, donors may spread the gift over two or more years by donating a series of fractional portions, called *undivided interests*. These are not separate parcels, but are shares of the whole, say 10%, 20%, 30%, etc. This technique allows you to tailor the size and number of charitable deductions to the amounts you can use from year to year, given your tax situation. The tax code governs the calculation of deductions. An updated, formal written appraisal is required with each donation that exceeds \$5,000. Since separate parcels are not created, a survey of the partial interests will not be needed; however, the boundaries of the overall parcel may still require a survey.

Because the recipient organization cannot effectively control and manage the land until it achieves full ownership, the organization may ask you to sign a legally binding pledge agreement committing you to donate any remaining undivided interests by a specific date or at death. You will be expected to pay property taxes and, usually, to maintain the property until the organization receives full ownership.

DONATING REAL ESTATE TO GENERATE CONSERVATION FUNDS

You can help generate badly needed funds for conservation purposes by donating real estate to benefit the work of a favorite conservation organization. Property that does not have special conservation features or that is not suited for permanent management by a conservation organization may be a candidate for donation.

TRADE LAND DONATION

Many conservation groups will accept donations of non-conservation property: houses, condos, or commercial property, for instance. The organization can then resell the property, subject to appropriate restrictions to protect any conservation values, and use the proceeds to benefit its conservation programs. In effect, the organization has



The Richard T. Crane Jr. Memorial Reservation was initially donated to The Trustees of Reservations by several members of the Crane family in 1945. Castle Hill was bequeathed by Mrs. Crane in 1949. An endowment bequest by Miné S. Crane in 1991 provides additional support for management of this property.

“traded” the land for financial resources, which it may use to purchase other land of conservation interest. This method protects the land, keeping it in private ownership and on the tax rolls, while allowing the trust to use proceeds from the sale for its conservation work.

DONATING LAND TO BENEFIT A CONSERVATION ORGANIZATION WHILE ESTABLISHING A LIFE INCOME

The *charitable remainder trust* is a well-known technique of planned giving that can be directly relevant to a donor’s conservation objectives. When combined with conservation restrictions, a charitable remainder trust can protect land, provide significant immediate and long-term tax benefits, and assist in family estate planning. Charitable remainder trusts give enduring support for conservation organizations, enhancing their work long after the donor’s lifetime.

This technique offers advantages to donors of highly appreciated property, including real estate, allowing a donor to increase income from a low-yielding asset. When real estate is involved, the technique works as follows:

1. The charitable remainder trust is established by the donor, who should be advised by an attorney experienced in planned giving techniques.
2. The donor gives a conservation restriction on the property to the recipient organization.
3. The donor then gives the restricted property to the charitable remainder trust.
4. The trust sells the property (with the help of the donee organization), and invests the proceeds to provide income to one or more designated beneficiaries for a fixed term or the beneficiary’s lifetime.
5. After this time, the trustee turns over any remaining funds in the trust to the designated conservation organization.

There are some pitfalls associated with this very useful technique, and experienced legal advice is required to avoid complications. One of the most important points to remember is that a “deal” with the buyer of the property cannot be made prior to establishment of the charitable remainder trust.

The gift of the property to the charitable remainder trust generates a charitable tax deduction. In addition, capital gains taxes are avoided when the property is sold. As a result, net proceeds for the beneficiaries from the property sale can be higher than from a private, non-charitable sale. One disadvantage is that the initial gift for a charitable remainder trust must be large enough—generally at least \$50,000—to justify the legal and administrative expenses involved.

CHAPTER 3

CONSERVATION RESTRICTIONS

One of the best ways to protect property while retaining ownership is to donate a permanent *conservation restriction* to a conservation agency or nonprofit land trust. You retain full ownership and the ability to sell or convey the property, by deed or by will, through gift or sale, to a family member or to anyone else. Such a sale or conveyance will always be subject to the terms of the conservation restriction document. In effect, that document becomes part of the deed to the property.

NEIGHBORS COOPERATE TO PROTECT A SCENIC RIVERFRONT

When the 1980s development boom threatened the relatively unspoiled eastern shoreline of the West Branch of the Westport River, neighbors first contacted the Westport Land Conservation Trust and then The Trustees of Reservations. They were seeking advice and suitable organizations to hold and monitor a series of shorefront conservation restrictions they wanted to impose. Their goal was to protect most of the riverfront, so that it would forever retain its largely natural and unspoiled character. A series of meetings led to a model conservation restriction for members of the group to adapt. The restrictions would be held jointly by the two land trusts.

In 1991, Bill and Harriet Barker were the first to donate a restriction, protecting 16 acres of upland and riverfront marsh. Since then, six other landowners have joined them, bringing the protection totals to more than 167 acres and one mile of shoreline. All the restrictions permit modest structures near the shore, like a boathouse, dock and observation platform, but prohibit residences and place limitations on clearing for agriculture and opening views.

Conservation restrictions are frequently known as “conservation easements.” We use the term conservation restrictions generically, to refer to several types of permanent restrictions that are authorized by Massachusetts law (M.G.L. Chapter 184, Sections 31–33). These include *agricultural preservation restrictions*, *watershed preservation restrictions*, and *historic preservation restrictions*. The term may also include *scenic easements* and similar devices which, if properly drafted, may also qualify as conservation restrictions under Massachusetts law.

Historic preservation restrictions are similar to conservation restrictions and are authorized by the same Massachusetts statute. Commonly applied to architecturally and historically significant structures rather than to natural lands, they can be used to protect the setting of historic structures and land that contains historic or archeological sites. Because historic preservation restrictions are a specialized topic, detailed discussion of them is beyond the scope of this booklet. For further information contact the Massachusetts Historical Commission or Historic Massachusetts, the statewide advocacy and educational organization.

HOW CONSERVATION RESTRICTIONS WORK

When you grant a conservation restriction to an appropriate organization or public agency, you agree on behalf of yourself and successor owners not to develop or use the property in specified ways that would harm the features or qualities being protected. The restrictions must be accepted and recorded by the recipient agency or organization—for example, a land trust—which is then legally empowered to monitor and enforce this agreement. The document is recorded like a deed and ensures that present and all future owners of the property will have to comply with its terms. Although conservation restrictions are donated and enforced for the benefit of the public, they do not give the public any right to use the property in any way, unless the document specifically allows for public access or public use. To qualify as a tax-deductible gift, a conservation restriction must be written to be effective in perpetuity. Though, in concept, a conservation restriction may be limited to a specific number of years, most conservation organizations do not accept non-permanent conservation restrictions.

The key advantage of this conservation method is its adaptability to the needs and wishes of the landowner and the special conservation features and values of the property. A restriction may prohibit all activities that change the natural condition of the property, or it may allow agricultural or forestry activities and the construction of roads and structures necessary to carry them out. In some cases, the document may permit other kinds of development, but it must specify the type, extent, location, and conditions of that development.

When the restriction is drafted, it is essential to make its terms and conditions as clear as possible so that your heirs, successors in title, and the organization's future staff will know what was intended. A clear plan of the restricted property, suitable for recording, is also important. It should show the location of the restricted area on the parcel, prominent landmarks and other special features mentioned in the restriction, and the location of existing structures, driveways, fence lines, utilities, and so on.

MUNICIPAL AND STATE APPROVAL

Massachusetts is the only state in which conservation restrictions must be approved by the municipality involved and by the agency of the Commonwealth designated in the statute for that particular form of restriction. For *conservation restrictions*, approval by the Secretary of Environmental Affairs is required. Municipal approval of a conservation restriction is not required when it is granted to a state or federal agency.

Within the Executive Office of Environmental Affairs, the Division of Conservation Services is responsible for reviewing proposed restrictions and recommending whether the Secretary should grant approval. Generally, the Division will recommend approval if the recipient organization clearly demonstrates significant public benefit. Public access to restricted land is usually not required; however providing for meaningful public access is almost certain to demonstrate the required level of public benefit. In reviewing the benefits of a proposed conservation restriction, the Division applies the criteria set forth by the Internal Revenue Service in its Final Regulation for Qualified Conservation Contributions¹. We discuss these criteria below.

The Division of Conservation Services carefully reviews each restriction after the municipality has approved the document. When planning the gift of a restriction, landowners and recipients should allow sufficient time for this review to be completed and for any necessary adjustments to be made. In order to avoid false starts and surprises, it is a good idea to give the Division an opportunity to review a draft of the restriction document before obtaining official signatures.

INCOME TAX TREATMENT OF CONSERVATION RESTRICTIONS

The most important federal income tax rules affecting conservation restrictions relate to “qualified conservation contributions,” as defined in Section 170(h) of the Internal Revenue Code. That section was enacted in 1980 to clarify the deductibility of conservation restrictions.

The basic standards it sets forth are as follows:

- The conservation restriction must be granted to a qualified recipient, meaning a public agency or a conservation organization qualified as a publicly supported charity under Section 501(c)(3) of the Internal Revenue Code. *Private foundations* are not qualified to receive conservation restrictions.
- The conservation restriction must be granted in perpetuity. This means, for example, that **any mortgage on the property must be formally subordinated to the restriction** to ensure that the terms of the restriction will be binding on all future owners of the land.
- If the owner retains oil, gas, or mineral interests in the land, future mining must be limited to subsurface methods that do not damage the surface of the land.
- The conservation restriction must be granted exclusively for a conservation purpose. Of all these requirements, “conservation purpose” is the most difficult to apply in any particular case.

DEFINITION OF “CONSERVATION PURPOSE”

As noted above, the Massachusetts Division of Conservation Services has adopted the IRS standards as criteria for state review and approval. As defined by the IRS, a valid conservation purpose is one of the following²:

1. The preservation of land areas for outdoor recreation by, or the education of, the general public.
2. The preservation of a relatively natural habitat for fish, wildlife, plants, or similar ecosystems.
3. The preservation of open space (including farmland and forest land) where such preservation is for the scenic enjoyment of the general public, or is pursuant to a clearly delineated federal, state, or local conservation policy, and will yield a significant public benefit.
4. The preservation of a historically important land area or a certified historic structure.

A conservation restriction designed to enhance the value or appeal of an abutting development, without really accomplishing at least one of these four purposes, will not qualify as tax-deductible. Donated restrictions must be thoroughly documented to show that they carry out one or more of the above conservation purposes, and their claimed value as charitable deductions must be thoroughly substantiated by appraisal.

A landowner who questions whether a proposed restriction will qualify for a charitable deduction could have an attorney experienced in these matters apply for a letter ruling directly from the IRS. It may take a number of months after the request has been filed before the ruling is issued, so gifts should be planned well in advance.

APPRAISING CONSERVATION RESTRICTIONS FOR TAX PURPOSES

Appraising gifts of conservation restrictions has become a highly specialized craft. Unfortunately, an adequate appraisal that meets IRS requirements³ can cost several thousand dollars. For this reason, appraisals can be a real disincentive for donors of conservation restrictions.

The appraiser must give very careful attention to the specific terms of the restriction at hand, and must be able to estimate their effects on the value of the land being restricted. Here, the critical factors are the value of the land *before* and the value *after* the gift of restrictions. The difference between the two is the value of the restriction. That value is deductible for tax purposes, provided that all other requirements of the tax code are met. The “after” value may also be important for other purposes, such as estimating property taxes in the future, determining the value of the restricted property for estate purposes, or estimating potential revenues from resale of the restricted property. The IRS closely scrutinizes appraisal values; nevertheless, donors can be confident that the IRS will accept professionally prepared appraisals employing accepted methods of determining value. However, aggressive appraisals that lack sufficient supporting documentation (such as recent comparable sales, soils data and zoning information indicating that the property could in fact be developed to the extent claimed in the appraisal) will almost certainly be challenged.

In some cases, you may wish to donate conservation restrictions on one portion of your property while retaining the balance of the land without restrictions. IRS rules require that the “before” and “after” values must be determined for the entire property, including the unrestricted portion. This rule applies even though the restricted and unrestricted portions were acquired by separate deeds or are held by different family members.

The reasoning behind the rule is that, while the restrictions may reduce the value of the land being conserved, they may correspondingly increase the value of adjoining or nearby unrestricted retained property, which may benefit from its proximity to the restricted property. A tax deduction is available only for the value that has actually been contributed, as determined by a qualified, independent appraisal.

An example will illustrate this concept. Assume that Mr. Brown owns two adjacent lots, one with river frontage, and the other overlooking the first. Assume that the fair market value of each lot is \$100,000. A conservation restriction is placed on the first lot, reducing its value to \$20,000, because a house is no longer permitted on it. As required by the IRS, the appraiser turns his attention to the adjacent, retained lot, and determines that its value has been increased to \$125,000, because it now overlooks protected land rather than land that might be developed in the future. The net change in value after the restriction is calculated as \$80,000 (the reduction in value of the first lot) minus \$25,000 (the increase in value of the other lot), for a net tax-deductible donation of \$55,000. Usually, this so-called enhancement value will be less than indicated in this example. Often, 10% is used as a rule-of-thumb for planning purposes, but an appraiser must arrive at an estimate using specific market research.

DOROTHY KERPER MONNELLY



Salt panne at Sawyer's Island Conservation Area in Rowley is subject to a conservation restriction held by the Essex County Greenbelt Association.

WHAT TO DO WHERE A CONSERVATION RESTRICTION IS NOT APPROPRIATE

Where a conservation restriction is not appropriate because it raises persistent questions about deductibility or valuation, there may be other ways to accomplish your conservation objectives.

- The land to be preserved might be donated outright to a land conservation trust.
- You might consider a bargain sale to a land trust or conservation agency at less than fair market value.
- You could place a limited term deed restriction on the property before its sale, especially if you plan to retain an adjacent portion, which allows you to enforce the restriction against successor owners of the parcel.
- You might consider a sale to a *conservation buyer* known to you, whom you trust to place a conservation restriction on the property following its sale.
- If you must subdivide the property, you can make clear to your advisors (landscape architect, engineer, surveyor, lawyer) that you want your plan to respect the natural features of the property and not be a “cookie-cutter” subdivision.



Stevens Glen, Richmond. The donors of this 128-acre parcel located on the side of West Stockbridge Mountain opted for a two-fold protection plan, imposing a conservation restriction co-held by the Richmond Land Trust and the Berkshire Natural Resources Council before conveying title to the BNRC.

THE TREIBER/LEGEYT PROJECT



KATHY ORLANDO

Four generations of LeGeys have cared for the land and worked their dairy farm in Sheffield. In 1992, 141 acres of fields which the LeGeys had rented for the last forty years had just gone on the market as part of Caroline Treiber’s estate. With the Commonwealth’s Agricultural Preservation Restriction Program (APR) funds exhausted, developers were perking away with visions of houses supplanting corn and hay. The viability of the LeGeys’ farm was suddenly in question.

Through coordinated efforts, a consortium of conservation organizations, spearheaded by the Sheffield Land Trust and the Massachusetts Audubon Society, along with the Sweet Water Trust, The Trustees of Reservations, the Berkshire Natural Resources Council and The Nature Conservancy, were able to raise enough money to purchase the Treiber land. If and when the APR Program was refunded the investments would be returned. Meanwhile, the fields would be safe.

Massachusetts Audubon Society (MAS) held title to the Treiber fields and applied for admission to the APR Program on behalf of the Treiber and LeGeyt properties. In 1994, when the Program was refunded, a simultaneous closing occurred in which MAS sold the development rights on the Treiber fields to the APR Program; the LeGeys traded the development rights on their fields to MAS for the restricted Treiber fields (a like-kind exchange) and MAS sold the LeGeyt development rights to the Commonwealth. The 305 acres of rolling fields are now permanently protected from development, helping to preserve the rural character of Sheffield.

SELLING LAND OR RESTRICTIONS FOR CONSERVATION

In spite of limited funding, nonprofit land trusts and public agencies in Massachusetts are making substantial investments in the protection of high quality, strategically located open space through purchase. Often these purchases are the result of expressions of interest by landowners themselves.

Most land trusts and conservation organizations have only limited funds available for purchases of land, conservation restrictions, or other interests in land. They must raise new funds for each new project. This is generally true, even if the organization is one of the few that is fortunate enough to have a *revolving fund* available as a source of interim financing for its projects. Moreover, organizations that actively manage their conservation holdings will usually require that a substantial endowment be raised to provide ongoing funds for stewardship of the property.

Although Massachusetts government has generously supported open space acquisition and farmland protection for many years, funds at any one time are limited and must be directed to the most important and most immediately threatened lands.

For further information on the Massachusetts open space acquisition and farmland protection programs, contact the Metropolitan District Commission or the Departments of Environmental Management, Food and Agriculture, or Fisheries, Wildlife and Environmental Law Enforcement. In addition, Scenic Byway funds have been authorized for the Massachusetts Highway Department to acquire land or restrictions for the protection of the natural landscape as viewed from public highways. Three federal agencies have been active from time to time in land acquisition in Massachusetts: National Park Service, Forest Service, Fish and Wildlife Service. (see “Sources of Information” in the end of this booklet.)

SALE AT FAIR MARKET VALUE

While selling land at its *fair market value* to a conservation organization or agency may be ideal from the landowner’s point of view, funds are rarely available for such a purchase. A sale at full fair market value may not be as desirable as it may seem at first glance. Capital gains taxes and transaction costs can cut deeply into sale proceeds and revenues, particularly for landowners in

PARTNERSHIP PROTECTS SHELBURNE FARM IN STOW

Jean and David Lynch were among the pioneers in pick-your-own orchard operations, but since David’s death several years ago, Jean and her son have found it increasingly difficult to manage their 110-acre Shelburne Farm in Stow. Jean wanted to ensure that even if she sells the land, it will continue to be farmed.

The Stow Conservation Trust, an all-volunteer private land trust, coordinated a meeting to assist the Lynch’s with their conservation vision. The meeting included several land conservation organizations, neighbors, town and state officials who utilized their various skills and expertise to design a conservation plan for Shelburne Farm.

To ensure the continuation of farming, 58 acres were protected through an APR. The 42 wooded acres not suitable for farming were sold to the town as conservation land. As is often the case, one land protection project in the neighborhood inspired another. Ms. Virginia Frecha donated a 3.5-acre parcel abutting Shelburne Farm which provides public access to the woodlands parcel. She also granted a conservation restriction jointly to the Stow Conservation Trust and Sudbury Valley Trustees which protects an additional 37.75 acres along Heath Hen Meadow Brook, a tributary to the Assabet River.

Of the land trusts with professional staff, Sudbury Valley Trustees had the most direct interest, since Shelburne Farm lies within its watershed, and provided technical assistance throughout the project. The Stow Conservation Trust educated local citizens and succeeded in raising over \$50,000 towards acquisition costs. The Stow Conservation Commission helped to apply for funds from the Commonwealth’s Agricultural Preservation Restriction Program and generated support from the town for additional funds to purchase the wooded acreage. The town meeting enthusiastically supported expending their tax dollars to preserve the working landscape of Shelburne Farm.

higher tax brackets or those selling highly appreciated property. Although bargain sales usually provide a lower financial net, the charitable tax-deductible component can help to offset capital gains taxes while protecting the land.

BARGAIN SALE

A *bargain sale* is a sale to a charitable organization or governmental agency at less than fair market value. It increases the chance that a conservation organization or agency can obtain the funds for the transaction. While a bargain sale may produce less financial return than a full-value sale, the difference may be partially offset by tax savings. The difference between the appraised market value and the sale price to a qualified nonprofit or governmental agency is considered a tax-deductible charitable contribution.

As a landowner, you negotiate the bargain price with the purchasing organization. You should state in writing, preferably in the purchase and sale agreement, the intent to make a charitable bargain sale; doing so establishes your charitable intent for tax purposes. For any bargain component greater than \$5,000, the value of the gift must be substantiated by a qualified appraisal to validate the tax deduction.

INSTALLMENT SALE

In an *installment sale*, the seller accepts a series of payments over time rather than one lump sum. An installment sale may benefit a landowner by spreading income and taxable gain over several years, subject to special tax limitations. An installment sale may benefit the purchasing organization by giving it additional time to raise the necessary funds.

OPTION TO PURCHASE

If funds are not readily available to allow an immediate purchase, the owner may be willing to consider granting the organization a specific *option to purchase* the property. Under an option, seller and buyer agree on a specific sale price and terms and the buyer is given a specific amount of time in which to exercise the option and complete the purchase. Typically, during the option period, the land cannot be sold to other buyers, giving the conservation group or agency time to raise the necessary funds.

RIGHT OF FIRST REFUSAL

You may grant a *right of first refusal* to buy a property in the future. Under a right of first refusal, the organization has a certain, specified period of time in which to match

A MEMORIAL BARGAIN SALE



DOROTHY KERPER MONNELLY

Sally Weatherall had a life-long commitment to preserving the natural resources and scenic beauty of her native Ipswich. When she died in the early 1980s, a memorial fund was established in her name and a search began for conservation property that would be a suitable legacy.

In 1992, a 60-acre parcel of upland and marsh was located. Essex County Greenbelt Association approached the owners. Although they liked the idea of dedicating their land for conservation to honor Sally, they were not able to give the land away.

A bargain sale was negotiated, establishing an affordable price (about 25% of appraised value) for Greenbelt. The tax benefits to the sellers were especially attractive, because they offset capital gains taxes on the sale at the same time of other appreciated real estate. But perhaps the most important benefit resulting from this bargain sale is that the generations to come will have this property to enjoy as a site for birding, nature exploration, and environmental education.

any *bona fide* offer from another purchaser. As with an option, a right of first refusal does not obligate the organization to purchase the land.

SALE OF A RESTRICTION OR OTHER PROPERTY INTEREST

In some instances, a conservation organization or government agency may purchase—at fair market value or bargain sale—a conservation restriction, a trail easement, a remainder interest, or some other *partial interest* (or less-than-fee interest) in the property. You should recognize that it is usually more difficult for a conservation organization to raise funds for the purchase of an easement than of full title to the property.

CHAPTER 5

DEED RESTRICTIONS AND OTHER INTERIM TECHNIQUES

Sales or gifts of land or of undivided interests in land are usually intended to be permanent. However, a landowner may prefer a short-term approach, even without the income and estate tax advantages available when permanent gifts are made. From the organization's point of view, a short-term approach may provide at least interim protection, and may encourage the owner to adopt a permanent solution later. Cooperating on a short-term basis may give the owner a chance to gain confidence in the organization, and may give them both time to explore long-term alternatives. However, you will understand if conservationists admit to a general lack of enthusiasm for these interim techniques. In many cases, they are at least as complicated and time-consuming as techniques of permanent protection.

You should be aware of the following methods of shorter-term protection.

DEED RESTRICTIONS

Private *deed restrictions* are legal devices for controlling the use and development of land by future owners. For example, as a landowner, you may impose certain restrictions on the use or development of a lot subdivided from a larger parcel. In order for it to be enforceable, a private deed restriction must be "appurtenant" to a parcel of land that is adjacent to the restricted parcel or, if it is not adjacent, then the restriction must designate the parcel (or parcels) that is intended to be benefitted from the restriction.

Under Massachusetts law, a private deed restriction may run for no longer than thirty years, unless a definite time limit longer than thirty years is stated, or unless the restriction is given for public, charitable, or religious purposes. If a definite time limit is stated, such as one hundred years, a private deed restriction may be extended up to that limit by re-recording the restriction before the first expiration at thirty years and re-recording it every twenty years thereafter.

Even when their holders remember to re-record them, private deed restrictions are inherently less stable and permanent than conservation restrictions. Courts may refuse to enforce private deed restrictions if they are contrary to public policy or if conditions have changed substantially since they were created. There are no income



DOROTHY KERPER MONNELLY

A cooperative agreement between The Nature Conservancy and the Barnstable Water Company, owners of Mary Dunn Pond in Hyannis allows TNC to research the effect of groundwater withdrawals and hydrological changes on plants of coastal plain ponds.

or estate tax incentives available for private deed restrictions. In some cases, property tax reductions can be negotiated when a restriction serves the interests of a particular municipality.

MUTUAL COVENANTS

Similar to deed restrictions, *mutual covenants* are commonly used by neighboring owners who wish to protect some shared feature, such as a lakeshore. Developers often use them to control certain features of a subdivision or development plan, in an attempt to maintain overall quality and design character to enhance property values after the developer has completed the project. Like private deed restrictions, mutual covenants may run for no longer than thirty years unless a definite time limit is stated and unless they are properly re-recorded; and they may be subject to challenge on the same legal and policy grounds.

Covenants and deed restrictions are most appropriate where they protect features of local importance, primarily for the benefit of the adjacent residents. Where environmentally important lands are involved, these techniques are poor substitutes for conservation restrictions. Nevertheless, deed restrictions remain an important tool for conservation organizations where a conservation restriction cannot be arranged⁴.



Development on the properties surrounding Powisset Farm in Dover is limited by deed restrictions held by The Trustees of Reservations.

LEASES OF CONSERVATION LAND

Although temporary, leases can help to conserve productive land or can provide for use of, or access to, land important to a conservation organization. Suitable conditions can be written into the lease, and the lease can be binding upon heirs and successors.

Two examples will suffice. Leasing productive agricultural land to a local farmer keeps it in production, provides some income with which to defray taxes (which may be reduced if the parcel meets state preferential assessment criteria—*see* Chapter 8), and avoids development of the land while it is being leased. Similarly, you may be willing to lease or *license*, perhaps at little or no cost, a portion of your land to a conservation organization in order to provide public access to a protected natural area, a trail, or to a site of recreational interest. After the organization has demonstrated its management capabilities, you may be willing to donate the parcel or sell it at a bargain price to the organization. In the meantime, the lease may be ideal for owners who wish to maintain ownership, but to see the land suitably used or protected by a conservation organization for a period of years.

MANAGEMENT AGREEMENTS

A management agreement enables a land trust or open space agency to help plan for the care of the natural and scenic features of your land. Management agreements are written for a defined term, usually a short term. They are renewable and they usually provide for revocation by either party with appropriate notice. They are often used to protect plant and wildlife habitats or to keep scenic fields open. The land trust often provides technical advice and assistance (sometimes for a fee), while the landowner carries out the plan. In most cases, only nominal lease payments are involved.



NANCY STRAZZULLA / WALKING MAGAZINE

Volunteers from Walking Magazine building a stream crossing in Harold Parker State Forest in Andover, part of the Bay Circuit Trail.

INCOME AND ESTATE TAX ADVANTAGES

Income tax and estate tax advantages have encouraged many landowners to pursue conservation opportunities. This chapter sketches the basic tax principles affecting conservation gifts and offers some examples. The discussion reflects federal and Massachusetts tax law as of January 2001. As is usually the case, both minor and fundamental changes in the federal tax system are being seriously discussed. At the very least, some changes in the income tax rates and possibly in the estate tax seem likely over the next few years and perhaps sooner. For that reason, we do not provide detailed numerical examples that could soon be out of date. As an excellent reference, we refer readers to *Conservation Options*, published by the national Land Trust Alliance.

COMPETENT TAX ADVICE IS ESSENTIAL

The tax implications of your conservation plan or transaction will depend on the value of your gift, your financial circumstances, the tax rules in effect at the time, and other factors. Where substantial dollars or the future of your property are at stake, you should always consult with an experienced attorney or qualified tax advisor before giving, or making bargain sales of, land or conservation restrictions.

CHARITABLE CONTRIBUTIONS: BASIC PRINCIPLES

A few basic tax principles should be remembered when you consider making a conservation gift.

1. Where the gift of land or interest in land meets IRS criteria for deductibility, donors are permitted an income tax deduction on their federal and Massachusetts income tax return for the gift, subject to certain limitations and substantiation requirements described below.
2. Qualified property gifts made during the donor's lifetime or by will also remove the donated property from the donor's estate, thereby reducing his or her federal estate tax. Since the Massachusetts estate tax has become what is known as a "sponge tax," equal to the maximum credit allowed on the federal return, it is no longer a separate factor in conservation planning (*see* Chapter 7).
3. The recipient of the gift must qualify under IRS rules. Qualified recipients are governmental bodies and religious, charitable, educational and scientific organizations (including land trusts) that have been determined to be tax-exempt under Section 501(c)(3) of the Internal Revenue Code. Section 501(c)(3) organizations are categorized either as *public charities* or as *private foundations*. Generally gifts of land (but not conservation restrictions) may be made to either category of organization, but the tax benefits of lifetime giving are usually much more attractive as gifts to *public charities*. See the discussion later in this chapter.
4. If a *partial interest* in land (for example, a remainder interest, undivided interest, or conservation restriction) is donated, it must meet specific IRS standards for deductibility.
5. In the case of a conservation restriction on property that has been mortgaged, the mortgage must be *subordinated* to the restriction. *In all too many situations, this threshold requirement is ignored until late in the process.* The IRS enforces this rule in order to ensure that conservation restrictions are permanent and will not be defeated if the mortgage is ever foreclosed.
6. In the case of bargain sales, the *cost basis* of the property must be correctly apportioned between the sale portion and the gift portion of the transaction.
7. Each claim of a charitable deduction on an income tax return must be properly acknowledged in writing by the recipient. If any goods or services reflecting more than incidental benefits to the Grantor of the Restriction have been or will be provided, the recipient organization must disclose them, and these received goods or services may, in effect, reduce the tax-deductible value of the gift.

8. If a donor of a conservation gift retains land whose value is enhanced by its location near the conservation land, the amount of the value enhancement must be deducted from the value of the donated property in calculating the amount of the charitable contribution.
9. If the charitable recipient sells or conveys the property or any interest in the property, including a conservation restriction, within two years of the gift, it must report the sale and sale price to the IRS and must identify the donor.
10. If the charitable deduction exceeds \$5,000, rigorous IRS procedures and standards for appraising the gift must be followed.

VALUING THE CONSERVATION GIFT

The tax savings from a gift of land will depend upon your overall tax situation as well as the fair market value of the donated property or property interest. In the case of an outright gift, a qualified appraiser usually will have little difficulty estimating the fair market value of the donated property. If the appraisal follows IRS guidelines, it will determine the amount of the tax deduction that can be claimed under the tax code.

Bargain sales are straightforward in concept but somewhat more complicated in practice. The difference between the fair market value of the property and the sales price (that is the “bargain”) is deductible as a charitable contribution. However, special capital gains tax rules regarding the treatment of the property’s *cost basis* apply. To ensure that the IRS will recognize the validity of your gift, the bargain sale contract must declare your charitable intention.

Gifts of partial interests in land are inherently more difficult to value. For example, a single person or married couple may wish to give their home or farm to a land trust, while retaining the right to live on and use the property during their lifetimes. This technique is known as a gift of a *remainder interest with a reserved life estate*. The value of the gift (that is, of the remainder interest) is determined by applying actuarial tables which give the life expectancies of the person or persons who retain the life estate. The older the person retaining a life estate, the shorter his or her life expectancy, therefore the higher the value of the gift.

IRS APPRAISAL REQUIREMENTS

For every charitable gift of land or conservation restriction valued in excess of \$5,000, you must obtain an independent appraisal by a qualified appraiser who is experienced with the type of transaction involved and who meets basic standards set by the IRS.

A qualified appraiser cannot be the taxpayer or donor, any party to the transaction by which the donor acquired the property, the donee (recipient), any person employed or related to any of the foregoing, or any person whose relationship with any of the foregoing “would cause a reasonable person to question the independence of such appraiser.” The appraiser must not be someone who does most of his appraisal work for either the donor or the donee.

The appraiser must prepare a signed summary of the appraisal. A copy of the summary must be submitted to the charitable organization and must be acknowledged in writing by the organization. The summary must be attached to your tax return.

Tax law provides for substantial penalties for overvaluation of a charitable gift and the IRS will almost certainly review aggressive claims for charitable deductions. Therefore, skimping on the appraisal is a false economy, especially for donors of land or conservation restrictions with substantial value.

INCOME TAX DEDUCTIONS

THE 30% LIMITATION

The IRS limits the maximum annual charitable deduction you can take against your income. Generally, for a gift of appreciated property (which includes most gifts of land and conservation restrictions), the amount you can deduct from your income in one year is limited to 30 percent of your *adjusted gross income*. If the value of your gift exceeds that level, you may carry forward the excess contribution for up to five more years, applying the 30 percent limit each year. Any remaining portion of the contribution after the sixth year cannot be claimed.

Note: You must claim the maximum deductible portion each year; you cannot hold back in early years in order to shelter a large infusion of income in later years.

THE 50% ELECTION

There is an alternative to the 30 percent limitation. You may claim as a deduction only the property’s *cost basis*. In this case, an annual deduction of up to 50 percent of adjusted gross income is allowed, with any excess carried further for an additional five years. Buyers of expensive land who are interested in placing conservation restrictions on that land may find the 50 percent election beneficial.

30% OR 50%: WHICH TO USE

Where property has appreciated substantially, the 30 percent option may be more advantageous, provided that you have sufficient income to absorb the deduction over the six-year period.

The 50 percent election may be more beneficial in the following situations:

- The property has not appreciated significantly.
- You anticipate a large drop in income in future years.
- You have recently purchased or inherited the property.
- You do not expect to live long enough to take full advantage of the five-year carry-forward period.

Beginning in 2001, Massachusetts taxpayer may for the first time claim a state income tax deduction for charitable contributions. The deduction is the amount allowed or allowable for federal income tax purposes, i.e., subject to the qualifications and limitations cited above. Two key differences are (1) the deduction may be claimed regardless of whether deductions are itemized for federal tax purposes, and (2) the deduction is claimed only against so-called “Part B” income, which is all income other than dividends, interest and capital gains and which is taxed in 2001 at 5.6%.

QUALIFYING RECIPIENT ORGANIZATIONS: PUBLIC CHARITIES VS. PRIVATE FOUNDATIONS

Gifts to governmental bodies and to *public charities*—501(c)(3) organizations that have broad support from membership and the public—are fully deductible to the extent allowable by law. Land trusts and other conservation organizations that seek to attract land gifts will invariably seek and obtain qualification as public charities.

Lifetime gifts of land and other assets to *private foundations* are often much less attractive than gifts to *public charities*. *Private foundations* are 501(c)(3) organizations that are typically created and maintained by a particular individual or family to carry out the specific charitable goals and objectives of that individual or family. Control of the foundation is usually lodged in the family and close friends and associates of the founders and the foundation normally limits its activities to making grants to other charities. Conservation restrictions may not be donated to private foundations at all, and normally if a gift of other appreciated property is made to a private foundation, the charitable deduction will be limited to the donor’s cost basis in the property. For this reason, private foundations are not of much interest to land donors as potential recipients.

Private operating foundations are a subgroup of *private foundations* that directly carry out educational or charitable activities, rather than simply making grants to other charities. With certain exceptions, gifts of land (but

not conservation restrictions) qualify for the same income tax treatment as gifts to public charities.

If you are considering a gift of appreciated land or other property to a 501(c)(3) organization, you or your advisors should make sure that the organization’s tax status is such that you will receive the tax benefits you expect from the gift. The organization can supply you with a copy of its *IRS determination letter* that will tell you whether the organization is, in fact, a *public charity*, a *private foundation* or a *private operating foundation*.

GIFTS OF PARTIAL INTEREST

The general rule is that, for a *charitable gift* to be tax deductible, the donor must contribute his entire interest in the donated property. That is, the property must be conveyed outright, without any property interests reserved by the owner. In the following three situations, however, partial interests are deductible:

- Contribution of a remainder interest in land for conservation purposes or a remainder interest in a personal residence or farm, but not commercial property.
- Contribution of an undivided interest in the donated property. For example, the gift of a taxpayer’s 40% undivided interest in a property would be tax deductible, because the owner’s interest (although less than the total) extends to the entire property. However, a deed provision allowing the organization to use a portion of the property as a parking lot is not tax-deductible, because the owner is granting only a limited right or interest that does not extend to the entire parcel⁵.
- Contribution of a perpetual conservation restriction.

COSTS INCURRED MAKING A CHARITABLE GIFT

Most real estate transactions, including gifts of real estate, involve transaction costs. Some of these costs are deductible. Cash or securities given to endow stewardship of a conserved property are considered charitable contributions and are deductible. Legal and appraisal fees associated with a charitable gift of land or conservation restriction can generally be deducted (as business expenses, *not* as charitable donations) if, in combination with other miscellaneous deductions, they exceed two percent of your adjusted gross income.

CHAPTER 7

ESTATE TAXES AND CONSERVATION PLANNING

GREENWOOD FARM

DOROTHY KERFER MONNELLY



Sally Dodge's greatest wish was to preserve Greenwood Farm in Ipswich, her childhood home. Its 213 acres include pastures, salt marsh, and islands—all home to an abundance of wildlife. Two historic buildings are also located on the property.

Miss Dodge decided to include The Trustees of Reservations, which she had long supported, in her will as recipients of Greenwood Farm. While discussing arrangements for this donation with The Trustees' staff, she realized the need to endow the property to maintain the pastures and restore the historic Paine house. To fund part of the endowment, she included in her will a provision to donate the proceeds from the sale of her 1659 Italian Amati violin and Fetique bow. At her death in 1993, Miss Dodge's generous gifts enabled her lifelong love of music to preserve Greenwood Farm forever.

Land is often a highly valued portion of a landowner's estate, especially in this time of high real estate values and considerable appreciation in many areas of Massachusetts. Without careful planning, property with high natural, historic, and scenic values may have to be sold in order to pay estate taxes, even when the sale of such property was not the owner's or the family's intention. Normally, the executor of an estate has a legal, fiduciary duty to seek the highest possible price for the estate's beneficiaries; and that is likely to force subdivision or development of the land.

Even when the property is not sold immediately, high estate taxes may so deplete other assets of the estate that eventual sale may be required. Moreover, when an estate passes to multiple heirs without careful planning, conflicts over future use and possible sale of the property can be wrenching for the family.

A well-considered conservation plan can address these problems, in many cases enabling your family to avoid or substantially reduce estate taxes on the property you value as a family holding. A bequest of land or conservation restrictions can reduce or even eliminate estate taxes. If the bequest is made to a governmental agency, land trust, or other qualified body, the estate is given a full deduction for the fair market value of that gift, and a corresponding reduction in estate taxes. If conservation

restrictions are willed, they may have the effect of reducing the estate tax burden to a level that allows the family to maintain ownership of the property. Even when estate tax savings are not a major consideration, a conservation-oriented estate plan can help to avoid serious family disputes.

Unlike income tax law, estate tax law does not limit the amount of charitable giving that can be deducted for tax purposes. For that reason, many potential conservation donors find that estate tax considerations are more important than income tax considerations when donations of land or conservation restrictions are considered.

FEDERAL ESTATE TAXES

Since 1981, Congress has taken a series of steps to reduce the tax liability for most estates by increasing the amount of property that can be transferred tax-free.

- You may transfer an unlimited amount of property to your spouse without estate tax (marital deduction).
- As of 2001, the first \$675,000 of assets in an estate are exempt from estate taxation (unified tax credit). This amount increases incrementally over the next eight years until it reaches \$3,500,000 in 2009.⁶

The ability to transfer a substantial amount of property tax free eliminates the estate tax problem for most people. Nevertheless, Massachusetts property values have risen dramatically since 1981, and you may be surprised to find that the value of assets, including real estate, greatly exceeds the amount of the exemption.

If your estate (which includes all land, houses, other real estate, stocks and bonds, personal property, life insurance, and other assets) exceeds the unified tax credit, you should seek help from your family attorney or professional estate planner. Because any property exceeding the exempt amount will be taxed at high rates, currently ranging from 37% to 55%, such advice can be essential to carrying out your wishes for your family and your property.

MASSACHUSETTS ESTATE TAXES

Massachusetts estate taxes have been substantially reduced in recent years. Massachusetts, like most other states, now has a so-called “sponge tax” which is limited to the amount allowable as a state death tax credit on the federal estate tax return. This means that no Massachusetts estate tax will be due where there is no federal estate tax due (e.g. for estates of \$675,000 or less in 2001, and higher amounts in future years, as voted under “Federal Estate Taxes” above). It also means that the total taxes due to the federal government and to Massachusetts will be no higher than if there were no Massachusetts estate tax at all.

What is important for this booklet is that Massachusetts, like the federal government, allows a full deduction from the taxable estate for gifts to qualified charitable organizations, including land trusts. This means that conveyances of land or conservation restrictions will reduce or even eliminate the donor’s state and federal estate tax liability, assuming that the technical requirements of the federal law have been met.

THE SCHEDULED BUT UNCERTAIN REPEAL OF ESTATE TAXES

In 2001, President George W. Bush signed legislation providing for the eventual repeal of federal estate taxes in the year 2010. Between 2002 and 2009, the amount each individual can pass on to anyone without estate tax will increase from \$1,000,000 to \$3,500,000. At the same time as the exclusion amount increases, the maximum estate tax rates will decrease by 1% each year until it reaches 45%.

A little-known fact is that, unless Congress makes further changes, the repeal will last only one year and will expire as of the beginning of 2011. Repeal could restore the estate tax rates and exclusion amounts in effect before the 2001 changes were made.

USING A CONSERVATION RESTRICTION BEQUEST TO STIMULATE NEIGHBORHOOD ACTION

Usually, estate tax savings are an important motivation for a bequest of a conservation restriction. For Geri and Doug Payne of Needham, one of the primary reasons for a conservation restriction bequest was to encourage neighbors to join them in conserving open land along the Charles River. In conversations with The Trustees of Reservations, the Paynes emphasized that they wanted to make sure that their 33.3-acre property on the Charles River would be protected from development and subdivision if they were to die unexpectedly. Moreover, they wanted to use their commitment to the future of their own property as leverage with their neighbors. The restrictions were drafted in final form and included in the Paynes’ will. Preliminary approval of the restrictions was obtained from the Division of Conservation Services and The Trustees of Reservations. The Paynes also very generously pledged a specified percentage of their estate as future endowment for the restrictions. The Paynes’ conservation restriction will be a significant addition to The Trustees’ 30+ conservation restrictions protecting over 1,200 acres in the Charles River priority area.

Another incalculable effect of the federal changes is a possible response by Massachusetts to restore its separate estate tax in an effort to compensate for the revenue the Commonwealth will lose as a result of the federal estate tax reductions.

How should a conservation-minded landowner react to these changes and uncertainties? Fundamentally, it is important to remember that estate tax reduction is usually not the primary motivation for careful estate planning that considers the landowner’s conservation values. Two other important motivations are reducing the potential for family conflicts over inherited property and ensuring that the owner’s conservation values are respected by his or her family or other beneficiaries of the estate. Too often, people delay too long in formulating an estate plan in order to save the maximum amount of taxes.

In view of these uncertainties, people will be advised not to make inflexible and irrevocable plans. Unfortunately, that advice (perhaps unassailable from the perspective of wealth-maximization) will lead to important, irreplaceable properties being split up and developed in spite of their owners’ best intentions.

ESTATE TAXES & CONSERVATION GIFTS

There are several common estate planning techniques to accomplish conservation purposes.

- Conservation restrictions can reduce the value of land within your estate, thereby reducing the estate tax liability. The 1997 Taxpayer Relief Act provides additional estate tax reductions (up to 40% of the value of the restricted land) for qualifying properties. See the criteria listed below in the section “*post mortem election*.”
- The gift of a residence or farm with a reserved life estate can also result in a lower taxable estate. Such a gift can also produce a substantial income tax deduction in the year of the gift and for as many as five years thereafter.
- Establishing a charitable remainder trust to benefit a conservation organization in return for lifetime income is another method for you to realize estate tax benefits in addition to income tax benefits.

POST MORTEM ELECTION

Until 1997, an estate could not take advantage of the above conservation incentives unless specific, detailed provisions were made in a will, prior to death. Thanks to efforts by the land conservation community and the Land Trust Alliance over several years, the 1997 Taxpayer Relief Act now permits the *post mortem election* of conservation restrictions on qualifying property. Conservation restrictions can now be placed on a property by the decedent’s estate before the due date for filing the federal estate tax return (usually nine months from the date of death.)⁷

The 1997 Taxpayer Relief Act allows for the exclusion of up to 40% of the value of restricted land from the gross estate. The maximum amount of the exclusion has been increasing incrementally; it stands at \$400,000 in 2001 and \$500,000 in 2002 and thereafter. Qualifying property must:

- have been owned by the decedent or the decedent’s family for the previous three years; and
- be subject to a qualifying conservation restriction by the due date for the estate tax return.

SPECIAL CURRENT USE VALUATION

Federal estate tax laws and regulations provide for “Special Current Use Valuation”⁸ as one way to reduce or defer the estate tax burden on farms and other family businesses with substantial real estate value.

Under this option, for example, an income-producing farm that is operated by the decedent’s family may be

valued at its lower, agricultural “use value” rather than fair market value for estate tax purposes. A maximum reduction of \$750,000, indexed for changes in the cost-of-living adjustment, in the real estate value of the farm or business can be claimed. The main requirement is for the heirs to continue to operate the farm for at least 10 years. If the family gives up farming within 10 years or sells the property, the family will have to pay deferred estate taxes in the amount saved under these provisions.

This option is available not only for a farm but also for real estate used in a closely held business. For example, the beneficiaries of an estate that includes a family-owned and family-operated cross-country ski area could elect to use this option. Several stringent standards must be met. If you intend to utilize these provisions, you should consult with an attorney or accountant to make sure that your estate will qualify.

KEEPING ESTATE PLANS UP TO DATE

For most people, attending to their estate plans is, at best, a chore, quickly put aside when the immediate task has been completed and the documents have been signed. The increase in the federal estate tax exemption beyond \$675,000 may lead many people into a false sense of security. In localities where lots are selling for \$175,000 and up, a relatively small amount of land can easily exceed the value of the unified tax credit. Moreover, tax rules as well as personal circumstances change. For these reasons, it is important to keep estate plans up to date. Careful review of an estate plan may reveal an opportunity to make a gift of land or conservation restriction as described in this booklet.



Killam Island, donated in fee to the Essex County Greenbelt Association, is one component of a larger protected area preserving the shore of the Ipswich River.

DOROTHY KERPER MONNELLY

PROPERTY TAXES AND CONSERVATION

High property taxes tend to encourage development while lower property taxes encourage continuation of open space uses such as agriculture and forestry. Massachusetts landowners who wish to reduce or stabilize their property taxes while carrying out conservation objectives have three main options:

- Make a charitable gift of land.
- Place a conservation restriction on the property (also considered a charitable gift, though you retain ownership of the land).
- Classify as much of the land as possible under the preferential property tax assessment classifications available in Massachusetts: forest land, agricultural and horticultural land, and recreational or open space land.

PROPERTY TAX INCENTIVES FOR CONSERVATION GIFTS

A conservation gift of land or restrictions may result in property tax reductions. Obviously, if you donate land outright to a charitable organization you will no longer have to pay property taxes on that property. Assuming that the recipient organization allows passive recreational uses of the property, you may, in effect, continue to enjoy the land without having to pay property taxes. In some cases, you may wish to reserve specific rights, such as the right to grow crops, hike, ride horseback, hunt, fish or even cut cordwood.

Keep in mind, however, that if you retain substantial rights, local assessors may assess a property tax on the conservation organization (which would otherwise be exempt) and you may find that you have given only a “partial interest” for which the IRS will not allow a tax deduction. Land given subject to a retained life estate continues to be taxed at full value until the expiration of the life estate; which party pays these taxes is usually negotiated by the conservation organization and the holder of the life estate.

Property tax reductions can provide an additional incentive for gifts or sales of conservation restrictions or agricultural preservation restrictions. Under Massachusetts law, a landowner who has conveyed a conservation

restriction to a qualified organization, with the necessary state and local approvals, may ask the local assessors to revalue the property to take into account the effect of the restrictions. Assuming that the restriction substantially reduces the overall development potential of the property (hence its fair market value), the landowner may expect a significant drop in local property taxes. However, it is the responsibility of the local assessors to determine the revised value of the restricted parcel and to consider possible increases in value of adjacent unrestricted parcels retained by the landowner. While assessors must take into account the effect of the restriction on the value of the parcel, assessment practices vary widely from town to town, and each parcel is different. Consequently, there are no rules of thumb statewide for the percentage change in value after a parcel has been restricted. Moreover, a landowner may already be receiving a lower per acre valuation on residual, open space land prior to the conservation restriction.

Owners who sell or give *development rights* to the Commonwealth under the agricultural preservation restriction program or the aquifer protection program are legally entitled to reduced property tax assessments reflecting the lower value of their property.

In an important 1986 case, *Parkinson v. Board of Assessors of Medfield*,⁹ the Massachusetts Supreme Judicial Court (SJC) decided that a landowner who had donated a valid conservation restriction was entitled to a property tax abatement to reflect the property’s lower value. The favorable SJC decision has reinforced the obligation of assessors to take conservation restrictions into account when determining “full and fair cash value,” the legal standard for their work.

A simple example will illustrate the effect of a conservation restriction on property taxes. Take a landowner with a home and 100+ acres of forest land. Assume that the area has suitable soils and is zoned for a minimum lot size of 2 acres so that 49 buildable lots could be carved out of this parcel. The owner deeds all future development rights to a conservation organization and retains only the right to use the existing dwelling, farm the land and harvest the timber. The assessed value (and therefore the taxes) should be substantially reduced, especially if the property is in an area where the market for lots of this size is active.

If, on the other hand, the landowner gives up only a portion of the development rights, and retains the ability to construct additional houses and to subdivide the land into several lots, the reduction in assessed value, if any, would be smaller than if all development rights were given up.

MOUNT GRACE LAND CONSERVATION TRUST



A forest management plan, required as part of Chapter 61 enrollment, has enabled the owner of this 120-acre parcel in Orange to manage the woodland for lumber and fuelwood while protecting the wetland and habitat values of the forest. A conservation restriction held by the Mount Grace Land Conservation Trust provides further protection for the forest and additionally protects a pond and hayfield on the property.

REDUCED PROPERTY TAXES FOR FORESTRY, AGRICULTURE, AND OPEN SPACE

Massachusetts has adopted three related measures—known as Chapter 61, 61A, and 61B—which substantially reduce property taxes on eligible forest land, agricultural or horticultural land, and open space and recreational land. These are similar in intent to open space or current use tax arrangements in other states, but there are important differences. All three measures are voluntary, have specific criteria for eligibility, and provide for penalties if the land becomes ineligible or is withdrawn from the program. Briefly, the principal features of each program are as follows. For more information on these programs, contact the agencies in the Sources of Information list at the back of this booklet.

Chapter 61: Forest Land

- You must enroll at least 10 contiguous acres of forest not developed for non-forest use.
- You must furnish and implement a 10-year forest management plan prepared by a professional forester. A state forester will review the plan and visit the property before certifying eligibility.

- The state-certified plan is submitted to the local assessors for a special forest land classification. Land in this classification is assessed at 5% of its fair market value, with a \$10 minimum assessed value per acre. The town's commercial tax rate is applied to determine the amount of property tax due.
- You must pay a "products tax" equal to 8% of the stumpage value of wood products harvested during the eligibility period and for two years prior to eligibility.
- If you withdraw from the program or fail to comply with the management plan, you must repay all taxes saved while in the program (for as many as 10 years), plus interest as set by the Legislature. The penalty will not apply if you convey the property to a new owner who agrees to continue under the program.
- If proposed sale or development would remove the property from the program, the municipality has a 120-day right of first refusal option to match the buyer's *bona fide* offer to purchase the property. Under a provision added in 1987, the town may assign its right of first refusal to a nonprofit land trust or conservation organization, which then has an opportunity (under conditions established by the Board of Selectmen or the City Council) to match the buyer's offer and acquire the property. The purpose of this assignment of the right of first refusal must be to maintain the major portion of the property in use as forest land.

Chapter 61A: Agricultural and Horticultural Land

- The land must be actively devoted to agricultural or horticultural uses during the present tax year and for the previous two tax years.
- You must enroll at least 5 acres, and show gross sales of at least \$500 per year in agricultural or horticultural products, plus \$5.00 per acre for each acre over 5 acres (\$0.50 per acre if wetland or woodland).
- The Commonwealth's Farmland Valuation Advisory Commission determines a range of per-acre values for several categories of agricultural and horticultural land that the town assessors then apply to lands under Chapter 61A (as well as to lands under the state agricultural preservation restriction program). The town's commercial tax rate is then applied to determine the amount of property tax due.

- A conveyance tax is due if you sell the property for a non-agricultural, non-horticultural use, or if the owner changes the agricultural/horticultural use within 10 years. The tax equals 10% of the total sales price in the first year, 9% in the second year, 8% in the third year, and so forth. No conveyance tax is due if the new owner agrees to retain the land in agricultural or horticultural use.
- A rollback tax is due if the enrolled land ceases to be eligible. In that case, you must repay all taxes saved during the current and preceding four tax years. If the conveyance tax is greater than the rollback tax, you pay the former (but not both). No interest is assessed.
- In the event of a proposed sale or development that would remove the land from the program, the municipality has a 120-day right of first refusal option to match the buyer's *bona fide* offer. If it elects to make the purchase, no conveyance tax or rollback tax is due.
- Under a provision of the law, the municipality may assign its first refusal option to a nonprofit organization, which would have the same 120 days to match the buyer's offer. Having acquired the property, the nonprofit organization may then resell the parcel to a farmer or other appropriate buyer, provided that the major portion of the parcel will continue in agricultural or horticultural use. Normally, the nonprofit organization would sell an agricultural preservation restriction to the Commonwealth as soon as possible after acquiring the parcel, but variations to this procedure are possible.

Chapter 61B: Recreational Land

- At least five contiguous acres of eligible open space or recreational land must be included.
- To be eligible for classification under Chapter 61B, the land must qualify as either (i) "open space" land; i.e., land that is maintained in a substantially natural, wild or open condition or maintained in a landscaped condition permitting the preservation of wildlife and other natural resources (including scenic resources) or, in the alternative (ii) "recreational" land; i.e., land used primarily for hiking, camping, nature study and observation, boating, golfing, horseback riding, hunting, fishing, skiing, swimming, picnicking, non-commercial flying, archery and target shooting.
- If the land can qualify as "open space" because of its natural resources, then the property does not need to be open to the public in any way. If, on the other

hand, the land can only qualify for Chapter 61B classification because of the recreational uses to which it is devoted, then it must be open to either the public or to members of a non-profit organization.

- Valuation of land under the program shall not exceed 25% of fair market value. The town's commercial tax rate is then applied to find the amount of property tax due.
- A conveyance tax is due if you sell the property for non-recreational use, or if the use is changed within 10 years. The tax equals 10% of the sales price if sold within the first five years, and 5% of the sales price if sold within the sixth through tenth year. No conveyance tax is due if the land is sold for and retained in recreational use by the new owner.
- A rollback tax is due if the enrolled land ceases to be eligible. In that case, you must repay all taxes saved during the current and preceding nine tax years, plus interest as set by legislature. If the conveyance tax is greater than the rollback tax, you pay the former (but not both).
- In the event of proposed conversion of the property, the municipality has a 120-day right of first refusal option similar to that described under Chapters 61 and 61A. The municipality may assign its option to a nonprofit conservation organization, provided that the major portion of the property will continue in recreational uses.

Interest in this program on the part of ordinary owners of natural areas and recreational land appears to be growing. For one thing, owners need not actually do anything with the land. Under Chapter 61 the owner must develop a forest management plan and actually harvest timber from time to time. Under Chapter 61A the owner must engage in an active agricultural program. Owners have also come to realize that many properties will qualify rather easily as "open space" under Chapter 61B, which will mean that no public access is required.



Russell Orchards in Ipswich is enrolled in Chapter 61A and is further preserved by an agricultural preservation restriction held by Essex County Greenbelt Association.

DOROTHY KERPER, MONNELLY



Grazing Fields Farm in Bourne is enrolled in Chapter 61A and additionally protected by an agricultural preservation restriction held by the Wildlands Trust of Southeastern Massachusetts.

THE MUNICIPAL RIGHT OF FIRST REFUSAL

Although all fifty states have similar preferential assessment programs to encourage retention of open space, only Massachusetts gives municipalities and their nonprofit partners a 120-day right of first refusal (ROFR) to acquire lands that have been aided by these programs. This Massachusetts innovation has made possible the acquisition and conservation of many parcels, in spite of considerable confusion and controversy surrounding the assertion of rights of first refusal.

The ROFR is triggered by the proposed conversion of the property through sale or development. Note that if a change of use will not take place, a sale of the property may be concluded without triggering the municipal ROFR.

One of two events will trigger the 120-day period. Either you submit to the municipality a *bona fide* purchase and sale agreement, signed both by you and the proposed buyer; or you notify the municipality in writing that you intend to develop the property (rather than simply sell it). The municipality involved then has 120 days to match the purchase price and terms (in the case of a proposed sale) or to purchase the property at fair market value (in the case of a proposed development).

At any point during that 120-day period, the municipality (through the Board of Selectmen or City Council) may assign its ROFR to a nonprofit conservation organization, such as a local or regional land trust. The

municipality may, and should, specify the conditions of the organization's involvement, in particular the requirements for conserving and managing the parcel after its acquisition.

Unfortunately the statute is not entirely clear about the process and requirements for correctly triggering, deciding upon, and exercising these ROFRs. As a result, a number of questions frequently arise. The following four are the most important. The answers represent a common-sense interpretation of the statute in the context of usual real estate law and practice. A recent decision by the Land Court in a case involving agricultural land in Billerica that was proposed for development supports these answers in general¹⁰.

1. *Will an offer to sell, rather than a purchase and sale contract, begin the 120-day period?*

No, the owner must submit a signed, *bona fide* purchase and sale agreement.

2. *What if there is no purchaser and the owner wishes to develop the property herself?*

In that case, the municipality or its assigned organization may hire a qualified independent professional appraiser to establish the fair market value for the property.

3. *What if the purchase and sale agreement includes contingencies, such as percolation testing, permitting, a mortgage contingency, or requirement for non-cash consideration?*

The municipality may accept and work with such contingencies, or it may insist upon a cash price without contingencies. The municipality does not have to begin the 120-day period until the purchase and sale agreement has been restated properly.

4. *How are these rights enforced?*

In the case of a proposed sale, the sale cannot go forward and deeds cannot be recorded until the municipality releases its lien on the property. In the case of a proposed development by the owner, the municipality may withhold a building permit until the lien has been satisfied. If the owner proceeds without permission, he risks court action.

RIGHT OF FIRST REFUSAL FROM THE OWNER'S PERSPECTIVE

If you are a landowner, bear in mind the very strong likelihood that, in most cases, a municipality will promptly waive its ROFR. After all, municipalities seldom have the ability to purchase land at full value for open space purposes. And, in the case of a town, a number of time-consuming formalities must be attended to, including approval of the purchase by the voters at a town meeting. When the municipality decides to exercise its rights, the owner can expect full payment within the 120-day period plus the time provided for closing in the purchase and sale agreement. On the other hand, in some cases owners may find that the 120-day ROFR may discourage some prospective buyers, who may be unwilling to undertake expensive percolation tests and other pre-permitting studies when they have no assurance that their offer will be accepted. That may mean that owners of sizable or complex parcels may need to do percolation and other engineering studies in advance of marketing the property, in order to obtain a clearer “fix” on its value.

RIGHT OF FIRST REFUSAL FROM THE MUNICIPALITY'S PERSPECTIVE

The ROFR provision is an important part of the open space tax reduction program. It helps to ensure that the long-term purposes of these tax reductions on open land will be achieved. Many properties have been obtained at fair prices through this process. In a given town, the list of properties currently under these programs should be used to prepare or augment a basic catalog of open lands that

may be candidates for conservation. Every landowner in this category should be encouraged to become familiar with conservation options and to prepare a conservation plan.

RELATIONSHIP OF THE CHAPTER 61 PROGRAMS TO CONSERVATION RESTRICTIONS

Chapter 61 and conservation restrictions are independent, but complementary, approaches to land conservation. Both should lower property taxes, though the Chapter 61 programs will do so more reliably because the guidelines for doing so are more explicit and, often, more generous. Chapter 61 enrollment will not lower a landowner's income or estate taxes, though, and landowners should not confuse a property's Chapter 61 assessment with its fair market value for estate tax purposes. Conservation restrictions, on the other hand, can provide substantial estate tax relief and provide far more lasting conservation protection than Chapter 61. Many landowners enroll in one of the Chapter 61 programs to obtain some property tax relief and because they do not intend to develop their property in the near term.

Often such owners subsequently decide to impose permanent conservation restrictions to ensure permanent protection. Having done so, they should not forget to maintain their 61, 61A, or 61B status. In the case of Chapter 61A (agricultural) and 61B (recreational), for instance, that means submitting the annual application by October 1. If this is not done, the landowner may find that taxes on the parcel increase substantially (even though it is under a conservation restriction) until the classification can be restored.



DOROTHY KERPER MONNELLY

THE NEXT STEP: TOWARD A CONSERVATION PLAN

Having read (or *skimmed*—we're realistic) this pamphlet, you may still have more questions than answers. We understand that, especially in the early stages of thinking about conservation, the variety of options and their consequences and implications can seem daunting. Our advice is to be patient and persistent; you have begun an important process for your family, your community, and your land. Many other families are engaged in this process, and there are plenty of experienced people who can help you answer your questions (see *Sources of Information*) and develop a logical, thorough process for addressing complicated or difficult issues.

Another suggestion: before hiring a professional, such as an attorney, appraiser, or land planner, take time to consider what you want to accomplish through this process. Clear thinking about your property, your situation, and your objectives will minimize costs and ensure that the process is completed in a timely manner and provides the results you desire.

Most basic conservation plans can be drafted at reasonable cost, sometimes at no cost to a conservation-oriented landowner, by working with a land trust or conservation organization such as the publishers of this pamphlet and the members of the Massachusetts Land Trust Coalition or the national Land Trust Alliance. For a list of the active land trusts in your area, contact:

Land Conservation Center
The Trustees of Reservations
572 Essex Street
Beverly, Massachusetts 01915
TEL 978/921-1944
FAX 978/921-1948
EMAIL landcons@ttor.org
WEBPAGE <http://www.thetrustees.org>

For a list of land trusts nationwide, contact:

Land Trust Alliance
1331 H Street, N.W., Suite 400
Washington, D.C. 20004-4711
TEL 202/638-4725
FAX 202/638-4730
WEBPAGE <http://www.lta.org>

We hope that you are, or will become, committed to conserving your land to the extent feasible for you and your family. If so, begin the process today! Do not let inaction or procrastination jeopardize the future of the land you treasure. A small investment of time, attention, and creativity now will launch a process that could be of immense benefit to you, your children, your neighbors, and your community.



DOROTHY KERPER MONNELLY

We can find happiness in protecting the world around us not only because we cherish it for its awesome beauty, power, and mystery, but because we cherish our fellow humans, those who live today and those who will live tomorrow.

JACQUES-YVES COUSTEAU
1910-1997

GLOSSARY

Adjusted gross income (AGI): Equals *gross income* minus business deductions, certain employee expenses, alimony deductions, and a few other specialized items allowed by the tax code. AGI is the basis for determining how large a charitable deduction a taxpayer may claim in a particular tax year. See the 30% and 50% rules explained in Chapter 6.

Agricultural preservation restriction (APR): In Massachusetts, an APR is a special type of conservation restriction. Authorized by Chapter 780 of the Acts of 1977, an APR is a legal restriction prohibiting non-agricultural use or development of a parcel in order to preserve the land for agricultural purposes. To date, Massachusetts has authorized approximately \$126 million for the purchase of APR's by the Department of Food and Agriculture. Owners of productive agricultural land may also donate APRs to the Department of Food and Agriculture or to land trusts, subject to approval of the municipality and the Commissioner of Food and Agriculture.

Bargain sale: The sale of land or interest in land to a governmental body or conservation organization at a price less than the fair market value. In other words, a bargain sale is partly a sale and partly a charitable gift. The difference between the fair market value and the bargain sale price is tax-deductible as a charitable contribution.

Capital gain: The "profit" (sales revenues minus *cost basis*) obtained by the taxpayer from the sale of property. A long-term capital gain or loss results from the sale of property held for more than twelve months.

Charitable gift: A gift of money or property to an IRS-qualified charitable organization. It means the same as "charitable donation" and "charitable contribution," which is the term used most commonly in the tax world.

Charitable remainder trust: A trust that provides for a specified distribution to one or more beneficiaries, at least one of which is not a charity, for life or for a term of years, with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity.

Conservation buyer: Generally an individual or means who will purchase land at full price (or close to full price) and then place a conservation restriction on the land or a major portion of the land, thus ensuring its permanent conservation.

Conservation restriction (or conservation easement): A legal agreement between a landowner and a conservation organization that permanently or for a stated period limits specified uses and development of the property to protect its natural and scenic features. The document conveys to the conservation organization the right to monitor the property and enforce the terms of the agreement.

The provisions of conservation restrictions will vary from situation to situation, depending upon the desires and goals of the *grantor* and *grantee*. Usually, the restriction forever prohibits development of the land on which a conservation restriction has been granted or placed. However, some uses of the property, such as farming or timber harvesting, are frequently permitted where they are consistent with the objectives of the parties. The conservation restriction should make clear which uses of the property are permitted, and which are prohibited. It is recorded like a deed and is binding upon future owners of the property.

Cost basis: The cost of the property at its time of acquisition, or value when inherited, plus the cost of certain permanent capital improvements. The cost basis is deducted from the sale price to determine *capital gain*. Note that with bargain sales or donations of restrictions, the cost basis must be allocated between the different portions of the transaction for tax purposes.

Deed restrictions: Restrictive covenants placed within a deed that guide the future use of a property. Usually placed on a portion of a property that is sold to protect the integrity of the parcel that is retained, these are less permanent than conservation restrictions as they may be released upon agreement of future owners of the parcels. The IRS does not allow deduction of their value as a charitable donation.

Development rights: The owner's legal right to develop the property, subject to law and regulation. An owner of land holds a bundle of various rights, including the right to develop the land. When a person conveys his "development rights" to a land trust, for example, he gives up his right (and the right of his heirs and successors) to develop the land. At the same time, the land trust or other recipient itself does not obtain the right to develop the property. Technically, the land trust obtains only the legal right to prevent future development of the property. (See also *conservation restriction* and *fee simple*.)

Easement: A right of one owner of land to make some particular use of the land of another owner, as created by express or implied agreement between the owners. A right-of-way is a common example.

Endowment: A capital fund invested to provide annual interest to support a charitable purpose. Typically, a land trust's endowment funds are merged for management and investment purposes, but each component should be recorded and reported in separate fund accounts. A responsible organization will observe a firm policy capping the amount of income that is withdrawn each year so that the endowment continues to grow. Some endowments allow for withdrawals of principal for stated purposes, others do not. It is important for an organization and donor to discuss the terms of a proposed endowment and agree on a clear statement for their records.

Fair market value: The appraiser's definition is "the price at which a willing buyer would purchase a property and a willing seller would sell the same property, when neither party is under any compulsion to buy or sell, and each party has full knowledge of all pertinent facts relating to the sale." Professional appraisers use several different methods for estimating fair market value depending on the type of property involved.

Fee: An ownership interest in real estate. 'Fee' derives from the medieval word *feodor* meaning land. Ownership of property "in fee" means that the property may be conveyed by sale, gift, or bequest.

Fee simple: An ownership interest in real estate that is perpetual and without conditions, limitations, or restrictions. To own land "in fee simple" means to have complete ownership of the land, with all the usual rights associated with ownership

Grantor/Grantee: The person conveying property to another is the grantor. The recipient is the grantee.

Gross income: Includes all income and property received by a taxpayer during a tax year, except gifts and bequests. (See also *adjusted gross income*.)

Historic preservation restriction: Authorized by the same Massachusetts law as conservation restrictions (Sections 31–33 of Chapter 184), it prohibits the alteration of historic features without the grantee's approval. Often known as a "facade easement," when limited to exterior features, though it may protect land areas as well as historic structures.

Installment sale: A contract by which goods are purchased now, but paid for over a period of time by a number of installments.

IRS Determination Letter: A letter from the Internal Revenue Service to a newly qualified 501(c)(3) organization which certifies that the organization is exempt from tax under Section 501(c)(3) and specifies whether the organization is considered to be a *public charity*, a *private foundation* or a *private operating foundation*.

Land trust: A nonprofit organization that assists landowners who wish to voluntarily conserve their properties. Land trusts are usually organized as charitable corporations, not as trusts.

License: In regards to property, it is a personal privilege or permission with respect to some use of land that is revocable at the will of the landowner.

Limited development: Less than maximum development of a parcel for the purpose of enabling conservation of remaining portions of the parcel.

Mutual covenants: Written commitments exchanged among neighboring landowners in deeds or separate agreement.

Option to purchase: A right, for a stated period of time, to acquire a specific property at a specific price.

Partial interest: An interest in land that is less than full fee ownership. (See also *fee* and *fee simple*.)

Post mortem election: The ability of a member of the decedent's family, the executor of the estate, or the trustee of a trust of the *corpus* to place a conservation restriction upon land in an estate after the landowner's death but before the federal estate tax is filed.

Private foundation: A 501(c)(3) organization controlled by relatively small groups of people or single families. Their activities are often limited to making grants to other 501(c)(3) organizations. The tax advantages of making lifetime gifts to private foundations are more limited than for gifts to public charities or private operating foundations.

Private operating foundations: These 501(c)(3) organizations are usually controlled by small groups of people, rather than a broad membership; but they are actively engaged in directly carrying out educational or other charitable endeavors rather than simply making grants to other organizations.

Publicly supported charities (or public charities): Nonprofit 501(c)(3) organizations that are engaged in educational, religious, scientific or charitable activities. A major part of their support comes from a broad membership base, governmental entities and other public charities. Within the limitations described in this booklet, a donor may take full advantage of tax deductions for contributions to public charities.

Remainder interest: If a donor conveys an asset to a charitable or governmental organization, but retains the right (for herself or some other person or persons) to live on or use the land for her lifetime or a stated number of years, the interest that is being conveyed is called the “remainder interest.” The interest being retained can be a “life interest” or a possessory interest for a term of years. (*See also reserved life estate.*)

Reserved life estate: In some cases, a landowner will make a gift of his property, but reserves the right to live on or use that property until death or for a lesser term of years. Where the donee is a governmental body or charitable organization, and where the gift is a personal residence or farm, or other property given for conservation purposes, the landowner may take a charitable deduction for the present value of the gift.

Revolving fund: A fund that provides interim financing for conservation projects when time is a critical factor. A land trust can borrow from the fund to acquire a property or restriction on a property, however the loan must be repaid, often with interest, once a fundraising effort has been conducted.

Right of first refusal: Agreement by an owner to offer a property to a specified individual or organization at the same price and terms as those in a future *bona fide* offer to purchase received by the owner. In other words, the individual or organization has the right to match the future offer, subject to certain conditions.

Scenic easement: A legal agreement that prohibits construction or development that would detract from a property’s scenic quality as described in the easement document. In Massachusetts a scenic easement is simply a specially tailored conservation restriction and must satisfy the same procedures and legal requirements as other similar restrictions.

Subordinate: (*v*) To yield one’s priority interest or senior interest in a property and to agree to become junior (or subordinate) to another party’s interest.

Title: A deed or other legal evidence of one’s ownership of land, usually in a document recorded in the Registry of Deeds.

Undivided interest: A percentage of the full fee interest in an entire property. Undivided interests are shared jointly with one or more other parties, known or unknown. The majority owner does not necessarily control the property. Any holder of undivided interests has the right to seek a court-ordered partition of the property.

Watershed preservation restrictions: A special type of conservation restriction recognized by Massachusetts law that gives the holder the right to retain land in such condition so as to protect the water supply or potential water supply of the Commonwealth by prohibiting building construction and placement and surface alterations such as mining or excavation of materials.



Schenob Brook Fen Preserve in Sheffield, owned by The Nature Conservancy, is one part of a larger complex of protected lands.

DOROTHY KERPER MONNELLY

SOURCES OF INFORMATION

The subject of land conservation is very broad, with an extensive literature. The following is a selection of basic sources useful to landowners and land conservation groups.

SOURCES FOR THE LANDOWNER

Englund, Gregory J. **Beyond Death & Taxes.** 1995, second edition. Published by and available from Estate Planning Press, PO Box 97, Boston, MA 02101. An excellent, readable review of estate tax planning options.

Report on 1985 National Survey of Government and Nonprofit Easement Programs. Available at no charge from the LTA*. A national perspective on the successes and public benefits of conservation restrictions.

Small, Stephen J. **Preserving Family Lands: A Landowner's Introduction to Tax Issues and Other Considerations.** 1998, third edition. Available from LTA*. A popular, highly readable introduction, emphasizing estate planning issues and estate tax incentives for private conservation.

Small, Stephen J. **Preserving Family Lands Book II: More Planning Strategies for the Future.** 1997. Picking up where *Preserving Family Lands* left off, Stephen Small's new publication takes the planning process a step further. It describes what every landowner should know about succession planning for family lands including estate and gift tax rules, basic rules about partnerships and trusts, and which charitable trust vehicles work best in different types of situations.

Stokes, Samuel N. with Elizabeth A. Watson and Shelley S. Mastran. **Saving America's Countryside: A Guide to Rural Conservation, Second Edition.** Johns Hopkins University Press, 1997. An attractive, comprehensive survey, sponsored by the National Trust for Historic Preservation.

Conservation Options: A Landowner's Guide. 1993. Land Trust Alliance. A clear, highly readable introduction.

SOURCES FOR LAND CONSERVATION GROUPS

Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements. National Trust for Historic Preservation and the Land Trust Exchange, 2001 (Third Edition). Available from LTA.* Prepared by an easement valuation panel of appraisers and attorneys from around the country. A basic guide to the state of the art, favorably cited in recent court decisions.

Dawson, Alexandra D. and Sally A. Zielinski. **Environmental Handbook for Massachusetts Conservation Commissioners.** Massachusetts Association of Conservation Commissioners, Inc., 10 Juniper Road, Belmont, MA 02178, 1997 (8th ed.). Includes a useful discussion of conservation and preservation restrictions as used in Massachusetts, and their tax treatment by local assessors.

Diehl, Janet and Thomas S. Barrett. **The Conservation Easement Handbook: Managing Land Conservation and Historic Easement Programs.** 1988, and, Thomas Barrett and Stefan Nagel. **Model Conservation Easement and Historic Preservation Easement, 1996.** Available from and published by LTA*. Thorough commentary and updated comprehensive model easements.

Exchange: The Journal of the Land Trust Alliance*. Quarterly, subscription price \$35. Resource for anyone interested in private land conservation efforts.

Lind, Brenda. **The Conservation Easement Stewardship Guide: Designing, Monitoring, and Enforcing Easements.** 1991. Published by and available from the LTA*. A step-by-step handbook to help conservation easement holders design and implement effective stewardship programs.

The Massachusetts Conservation Restriction Handbook. 1992. Published by and available from the Division of Conservation Services, address on the following page. Describes the process for obtaining approval by the Secretary of Environmental Affairs as well as guidelines for drafting conservation restrictions.

Small, Stephen J. **The Federal Tax Law of Conservation Easements.** 1990, second edition. Available from the LTA*. By a former Internal Revenue Service attorney who drafted the regulations on conservation restrictions. Unique in its field and highly recommended.

Starting a Land Trust: A Guide to Forming a Land Conservation Organization. 1990. LTA*. An essential guide that covers all of the basic information you need to begin to organize a land trust.

The Back Forty. A bimonthly publication covering developments in real estate, land use, taxation, and exempt organization law that affects conservation and preservation efforts. Published by the Hyperion Society, 200 McAllister Street, San Francisco CA 94102.

Whyte, William H. **The Last Landscape.** Garden City, NY: Doubleday and Company, Inc. 1968. Classic description of the conservation restriction as a tool for protecting landscape character and integrity.

* The Land Trust Alliance, 1331 H Street, N.W., Suite 400; Washington, D.C. 20004-4711 (www.lta.org), is a national service bureau for local and regional land conservation groups. Many Massachusetts land trusts are sponsors or members of this organization. Their Northeast Regional office is located at P.O. Box 792, Saratoga Springs, NY 12866-0774.

MASSACHUSETTS CONSERVATION ORGANIZATIONS AND AGENCIES

In Massachusetts, there are many organizations and agencies that are available to answer your land conservation questions. A complete listing is much too long; listed below are those organizations on the steering committee of the Massachusetts Land Trust Coalition, the several municipal land banks, and land trusts that are active on a regional or statewide basis. Any of these organizations should be able to refer you to a local land trust that can be of assistance. The state agencies listed here can answer your questions about their land conservation programs.

CONSERVATION ORGANIZATIONS

Massachusetts Land Trust Coalition
c/o Sudbury Valley Trustees
2 Clock Tower plaza S-500, Maynard MA 01754
978/897-0739
www.massland.org

The Trustees of Reservations
572 Essex Street, Beverly MA 01915
978/921-1944
www.thetrustees.org

Essex County Greenbelt Association
82 Eastern Avenue, Essex MA 01929
978/768-7241
www.ecga.org

American Farmland Trust—Northeast Office
Herrick Mill, One Short Street, Northampton MA 01060
413/586-9330
www.farmland.org

Barnstable Land Trust
Box 224, Cotuit MA 02435
508/771-2585
www.vsa.cape.com/~blt

**The Bay Land Center
Coalition for Buzzards Bay**
17 Hamilton St., P.O. Box 3006, New Bedford MA 02741
508/999-6363
www.savebuzzardsbay.org

Berkshire Natural Resources Council
20 Bank Row, Pittsfield MA 01201
413/499-0596

Compact of Cape Cod Conservation Trusts
3239 Main Street, P.O. Box 443, Barnstable MA 02630
508/362-2565
www.compct.cape.com

Concord Land Conservation Trust
Box 141, Concord MA 01742
978/693-7205

**Environmental League of Massachusetts and the
Environmental Collaborative**
14 Beacon Street, Boston MA 02108
617/742-2553
www.environmentalleague.org

Franklin Land Trust
P.O. Box 216, Ashfield MA 01330
413/628-4696

Hilltown Land Trust
P.O. Box 259, Chesterfield MA 01012
413/268-3160

Historic Massachusetts

Old City Hall, 45 School Street, Boston MA 02108
617/723-3383
www.historicmass.org

Land Preservation Society of Norton

P.O. Box 204, Norton MA 02766
508/285-4539

Lincoln Land Conservation Trust

P.O. Box 22, Lincoln Center MA 01773
781/259-0199

Martha's Vineyard Land Bank Commission

P.O. Box 2057, Edgartown MA 02539
508/627-7141

Massachusetts Audubon Society

South Great Road, Lincoln MA 01733
781/259-9500
www.massaudubon.org

Metacomet Land Trust

P.O. Box 231, Franklin MA 02038
508/528-5267

Mount Grace Land Conservation Trust

137 N. Main Street, New Salem MA 01355
978/544-7170

Nantucket Conservation Foundation

P.O. Box 13, Nantucket MA 02554
508/228-2884
www.nantucketconservation.com

Nantucket Land Bank Commission

22 Broad Street, Nantucket MA 02554
508/228-7240
www.nantucket.net/town/departments/landbank.html

Nantucket Land Council

4 North Water Street, P. O. Box 502, Nantucket MA 02554
508/228-2818

Natural Resources Trust of Easton

P.O. Box 188, North Easton MA 02356
508/238-6049

Natural Resources Trust of Mansfield

102 Jewell Street, Mansfield MA 02048
508/339-4691

New England Forestry Foundation

P.O. Box 1099, Groton MA 01450-3099
978/448-8380

Opacum Land Trust

P.O. Box 233, Sturbridge MA 01566
508/347-9144
www.opacumlt.org

Orenda Wildlife Trust

P.O. Box 669, West Barnstable MA 02668
508/362-4798

Princeton Land Trust

P.O. Box 271, Princeton MA 01541
978/464-5548

Sheffield Land Trust

Box 940, Sheffield MA 01257
413/229-0234

Sheriff's Meadow Foundation

Wakeman Center, RFD 319X, Vineyard Haven MA 02568
508/693-5207

Sudbury Valley Trustees

2 Clock Tower Plaza, Maynard MA 01754
978/897-5500
www.sudburyvalleytrustees.org

The Nature Conservancy—Massachusetts Chapter

205 Portland Street 4th Floor, Boston MA 02114
617/227-7017

Trust for Public Land—New England

33 Union Street, Boston MA 02108
617/367-6200

Upper Charles Conservation, Inc.

P.O. Box 5823, Holliston MA 01746
508/366-0560

Valley Land Fund

P.O. Box 522, Hadley MA 01035
413/584-4398

Wildlands Trust of Southeastern Massachusetts

P.O. Box 2282, Duxbury MA 02331
781/934-9018
www.savebzzardsbay.org/wildlands.htm

Williamstown Rural Lands Foundation

18 Spring Street, P. O. Box 221, Williamstown MA 01267
413/458-2494

STATE AND FEDERAL AGENCIES

Division of Conservation Services
Executive Office of Environmental Affairs
251 Causeway Street, Boston MA 02114
617/626-1012

For information on municipal open space grant programs and conservation restriction approvals.

Division of Forests and Parks
Department of Environmental Management
251 Causeway Street, Boston MA 02114
617/626-1449

For information on Chapter 61, forest land taxation program, and forest and park acquisition program.

Department of Fisheries, Wildlife and Environmental Law Enforcement

251 Causeway Street, Boston MA 02114
617/626-1500

For information on wildlife habitat acquisition programs.

Department of Food and Agriculture

251 Causeway Street Suite 400, Boston MA 02114
617/626-1700

For information on Chapter 61A, agricultural and horticultural taxation program, and the agricultural preservation restriction (APR) program.

Division of Local Services

Department of Revenue

P.O. Box 9490, Boston MA 02205-9490
617/626-2300

For information on Chapter 61B, open space and recreational property taxation program.

Department of Highways

10 Park Plaza, Boston MA 02116
617/973-7800

For information on the Scenic Byways program.

Executive Office of Environmental Affairs
Bob O'Connor, Director of Watershed Policy
251 Causeway Street, Boston MA 02114
617/626-1700

For general information on state land acquisition programs and the Watershed Initiative.

Massachusetts Historical Commission

The Massachusetts Archive Building
220 Morrissey Boulevard, Boston MA 02125
617/727-8470

For information on historic preservation initiatives.

Metropolitan District Commission

20 Somerset Street, Boston MA 02108
617/727-5114

For information about the metropolitan park system.

National Park Service

North Atlantic Region

15 State Street, Boston MA 02109
617/722-0141

For information about NPS land protection programs.

U.S. Fish and Wildlife Service

300 Westgate Center Drive, Hadley MA
413/253-8200

For information about USFWS land protection programs.

U.S.D.A. Forest Service

271 Mast Road, Durham NH 03824
603/868-7709

For information about the Forest Legacy Program.



DOROTHY KERPER MONNELLY

Strong community support in Gloucester enabled the Essex Country Greenbelt Association to purchase Goose Cove Reservation.

NOTES

¹ Internal Revenue Service Regulations (cited hereafter as “Regulations”), Federal Register, Vol. 51, No. 9, Tuesday, January 14, 1986. The major thrust can be found in 26 Code of Federal Regulations (CFR), Part 1, Section 1.170(A)–14, Qualified conservation contributions. The Regulations also amend 26 CFR Part 20, Estate Taxes, and Part 25, Gift Taxes.

² Regarding the conservation purpose test, see Regulations, 1.170A–14(d).

³ For the IRS appraisal requirements, see Regulations, 1.170A–14(h). The before value/after value procedure is described in Regulations, 1.170A–14(h)(ii).

⁴ A recent case decided by the Massachusetts Supreme Judicial Court, *Bennett v. Commissioner of Food and Agriculture* (August 1991), strongly suggested that private deed restrictions between a landowner and a state agency (and by extension a conservation organization) may be valid and enforceable even without adjacency *if the restriction is in the public interest*. Time limitations, however, may still govern. See Daniel Taylor and Gregory Bialecki (1991), “Common law easements in gross as a tool of last resort where statutory provisions fail” *Back Forty* 2(5):9.

⁵ A note of clarification: This rule does not prevent a landowner from legally subdividing a parcel and then donating only a portion thereof. For example, a person who gives a 5-acre marsh to a land trust, but retains ownership in the remaining land, will still qualify for a deduction on the value of the marshland portion, because the entire ownership interest in the 5 acres has been donated.

⁶ The unified tax credit increases as follows: For estates of those dying in 2001 the unified credit is \$675,000; in 2002 and 2003 it is \$1,000,000; in 2004 and 2005 it is \$1,500,000; in 2006–2008 it is \$2,000,000 and thereafter it is \$3,500,000.

⁷ Conservation restrictions can now be placed on a property by the decedent, a member of the decedent’s family, the executor of the estate, or the trustee of a trust of the *corpus* before the federal estate tax return is due. For the text of relevant portions of the 1997 Taxpayer Relief Act see Section 2031(c) of the federal tax code, and Stephen Small’s detailed commentary in *The Federal Tax Law of Conservation Easements*, Third Supplement (1996–2000).

⁸ On special current use valuation, see IRC Sections 2032A and the regulations 20.2032A–8.

⁹ “*Parkinson v. Board of Assessors of Medfield*” (July 17, 1986), 398 Mass. 1126, 495 N.E. 2d 294. The Medfield Assessors had challenged the validity of the Parkinson restriction (on account of alleged lack of clarity in its provisions) even though it had been properly executed and approved by the Selectmen and the Secretary of Environmental Affairs, and the Appellate Tax Board had upheld the Assessors’ decision. This case pointed out the need to provide as much clarity as possible in terms of a CR, particularly with respect to the location of and approval standards for any new or replacement structures in the restricted area.

¹⁰ Massachusetts Land Court, *The Trust for Public Land vs. John E. Farmer and W/S Development*, July 21, 1995. The Land Court ruled that the so-called “purchase and sale agreement” between John Farmer, owner of agricultural land under Chapter 61A, and W/S Development Associates (the developers of Wal-Mart), was in effect an option to purchase. The Land Court concluded that such an option to purchase is not a “*bona fide* offer to purchase” until the buyer notifies the seller of its intent to exercise the option. The municipality’s 120-day first-refusal option period does not come into effect until they have been notified of a *bona fide* offer to purchase.