

EFFECTIVE PARTICIPATION IN SUBDIVISION REVIEW
FOR THE CONSERVATION OR INLAND WETLANDS

COMMISSION

BY

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Introduction

Whether you're on a conservation commission or an inland wetlands commission, or a combination thereof, you can only influence decisions about subdivisions *to the extent that the planning commission has the authority to heed your advice*. Therefore, the most important place to begin is to understand what your local regulations require; to be sure that they address the topics that are important to you as conservationists; and that they have procedures that allow you to participate in the review process effectively.

The Subdivision Regulations

A Planning Commission¹ has very limited discretion in reviewing subdivision applications. If the application complies with the adopted subdivision regulations and also the zoning regulations, the Commission *must* approve it. Conversely, if the subdivision does not comply with the adopted subdivision or zoning regulations, the Commission *must* deny it. Therefore, the first question for the Conservation or Wetlands Commission is: **Do the subdivision and zoning regulations give the Planning Commission the *authority* to do what you feel they should do?** It's a waste of your time to urge the Planning Commission to make decisions that they aren't legally capable of making.

Cluster Subdivisions: Don't be confused by the terms "cluster subdivision" and "open space subdivision." Many people use the terms interchangeably to describe a pattern of development in which lot size is reduced in exchange for larger areas of open space, but legally they are not the same. Connecticut General Statutes Section 8-18 defines a "cluster subdivision" as follows:

¹ While many towns have combined planning and zoning commissions, for clarity I will refer to the "Planning Commission" when I'm discussing the planning power to review subdivisions conferred by Chapter 126 of the Connecticut General Statutes; and refer to the "Zoning Commission" when I'm discussing the zoning powers of Chapter 124.

“cluster development” means a building pattern concentrating units on a particular portion of a parcel so that at least one-third of the parcel remains as open space to be used exclusively for recreational, conservation and agricultural purposes except that nothing herein shall prevent any municipality from requiring more than one-third open space in any particular cluster development; “town” and “selectmen” include district and officers of such district, respectively.

The use of a cluster subdivision vehicle is a *planning power*, which means that a cluster subdivision regulation has to be *in the subdivision regulations, not the zoning regulations*. Note also that in order for a Planning Commission to make use of cluster subdivision, they have to comply with Section 8-18, i.e., the cluster subdivision must contain at least one third open space. In many rural towns that don’t have public sewer and/or water, this is impossible to achieve, so because the development can’t support 33% open space, you get *none*. In my experience, most towns don’t use the cluster subdivision vehicle and instead adopt open space subdivision regulations in their *zoning* regulation. The point is that if you’re going to allow or require a true cluster subdivision to avoid sprawl and preserve significant blocks of open space, it has to be in the subdivision regulations. For discussion of what such a regulation should contain, see the discussion below under Zoning Regulations, Open Space Subdivisions.

Open Space Requirements. Both Connecticut law and Federal law allow municipalities to require open space in any subdivision *as long as your regulations say so*. In conferring the power to adopt subdivision regulations, Connecticut General Statutes Section 8-25 provides:

Such [subdivision] regulations shall also provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan.

This power has been upheld by our Connecticut Supreme Court,² and, by reference, by the U. S. Supreme Court. U.S. Supreme Court cases³ have required that there be a “nexus” between any development exaction and the burden imposed by the development, meaning that the exaction—what the municipality is demanding from the developer in exchange for the land use approval—is proportionate to the burden imposed by that development, and related to addressing that burden.⁴ Therefore, you need to be sure that the Planning Commission has

²*Aunt Hack Ridge Estates v. Danbury*, 160 Conn. 109, 113 (1970) (“Such regulations shall also provide that the commission may provide open spaces for parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces for parks and playgrounds shall be shown on the subdivision plan.”) (Internal quotations omitted).

³*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard, Oregon*, 512 U.S. 374 (1994).

⁴ In *Nollan*, the plaintiff was taking an existing house along the beach and making it much larger, but it was still just one house. California wanted the owner to grant an easement for the public along the private beach, but the Court

regulations that allow it to require open space in subdivisions. See the discussion below about open space subdivision regulations for the topics that should be addressed.

Fee in Lieu of Open Space. Connecticut General Statutes Section 8-25 also authorizes the Planning Commission to require a fee instead of open space, with that fee going into a dedicated open space or recreation fund:

Such [subdivision] regulations may, with the approval of the commission, authorize the applicant to pay a fee to the municipality or pay a fee to the municipality and transfer land to the municipality in lieu of any requirement to provide open spaces. Such payment or combination of payment and the fair market value of land transferred shall be equal to not more than ten per cent of the fair market value of the land to be subdivided prior to the approval of the subdivision. The fair market value shall be determined by an appraiser jointly selected by the commission and the applicant. A fraction of such payment the numerator of which is one and the denominator of which is the number of approved parcels in the subdivision shall be made at the time of the sale of each approved parcel of land in the subdivision and placed in a fund in accordance with the provisions of section 8-25b.

For subdivisions where there just isn't an appropriate area that should be preserved as open space, this vehicle allows money to be substituted. Again, this power only exists if it is *in your subdivision regulations*. See the sample language, Exhibit A, Section 11.

Exemptions from Open Space and Fees In Lieu of It. Be aware that the Statutes contain an exemption for certain subdivisions from the open space requirements described above:

The open space requirements of this section shall not apply if the transfer of all land in a subdivision of less than five parcels is to a parent, child, brother, sister, grandparent, grandchild, aunt, uncle or first cousin for no consideration, or if the subdivision is to contain affordable housing, as defined in section 8-39a, equal to twenty per cent or more of the total housing to be constructed in such subdivision.

But how do you know if the subdivision will, in fact, be for affordable housing or if it will, in fact, be to provide lots for relatives as described above? For affordable housing, the answer is easy because affordable housing units have to be deed restricted as such, and you should require that such a deed restriction be filed along with the final endorsed mylar plan with the Town Clerk. But what about the "family subdivision?" We can't deed restrict the lots to be kept in the family *forever*, but how can you be sure that the "family subdivision" isn't just a scam to

found that just making a house bigger didn't create a greater burden on public beaches in the area. By comparison, the Court observed that if the State had required a public viewing area to compensate for the lost ocean views obstructed by the new, larger house, that would have had a nexus to the project. *Nollan*, 483 U.S. at 836.

avoid open space, and then each family member will turn around and sell the lots to third parties? You really can't, but I recommend language in the regulations to at least discourage such deceptive conduct. See Exhibit A, Section 12.

The Plan of Conservation and Development: Another Planning Commission power is the authority to adopt a Plan of Conservation and Development. Connecticut General Statutes Section 8-23 describes what the Plan must or may contain, and included in that list is the following language:

the need for protection of existing and potential public surface and ground drinking water supplies, . . . the use of cluster development and other development patterns to the extent consistent with soil types, terrain and infrastructure capacity within the municipality . . . protection and preservation of agriculture . . . provide for a system of principal thoroughfares, parkways, bridges, streets, sidewalks, multipurpose trails and other public ways as appropriate . . . conservation and restoration of the natural environment, cultural and historical resources and existing farmlands . . . protection of environmental assets critical to public health and safety . . .

While the Plan of Conservation and Development has been held to be advisory for zone change decisions made by the Zoning Commission, other cases have held its recommendations to be *mandatory* for the Planning Commission when reviewing a subdivision application.⁵ Therefore, it is desirable for the Plan to reflect open space and farmland preservation and the other topics listed above. For example, the Planning Commission will have a much stronger argument for requiring a public walking trail through a subdivision if that trail is depicted on the adopted Plan.

Don't wait. Once a subdivision application has been filed, it is too late to fix the subdivision regulations to achieve your goals. Connecticut General Statutes Section 8-26a says:

Notwithstanding the provisions of any general or special act or local ordinance, when a change in the subdivision regulations is adopted by the planning commission of any town, city or borough, or other body exercising the powers of such commission, no subdivision plan which has been approved, prior to the effective date of such change, by such planning commission or other body, and filed or recorded with the town clerk, shall be required to conform to such change.

The time to discuss regulation or Plan changes with the Planning Commission is *now*.

⁵ *Town of Lebanon v. Woods*, 153 Conn. 182, 193 (1965); *Crescent Development Corp. v. Planning Commission of Town of New Canaan*, 148 Conn. 145, 153 (1961); *Purtill v. Town Plan & Zoning Commission of Town of Glastonbury*, 146 Conn. 570, 572 (1959); *Levinsky v. Zoning Commission of City of Bridgeport*, 144 Conn. 117, 123 (1956).

The Zoning Regulations

Open Space Subdivisions.

As noted above, "Cluster Subdivision" is a creature of the subdivision regulations and must comply with the Statutes for such a procedure. An open space subdivision regulation located in the zoning regulations can be much more flexible. For example, an open space subdivision regulation can, instead of being density neutral, grant bonus lots for additional open space, for open space improvements (like active recreation fields or interpretative trails), for affordable housing, or for other special amenities. An open space subdivision also doesn't have to contain one third open space, but can contain whatever percentage makes sense on that parcel. See the sample Open Space Subdivision Regulation for zoning, Exhibit B.

Watch out for the "other land of" developer parcel. Once land is cut off, it *will be built on* eventually because to do otherwise would be an unconstitutional confiscation. Developers often try to shield the most environmentally valuable land by saying it's a future phase and not a building lot at this time. The subdivision regulations should require all land to be in lots, with no "other land of" left over.

Determining the number of lots. One of the questions that arise in both cluster and open space subdivision regulations is how to be sure that the development is density neutral, i.e., that the lot size reduction is being used to generate meaningful open space and not increase density. Some towns still use formulae that attempt to estimate what a particular piece of land could actually support without the benefit of the open space/cluster subdivision, but because all land is unique, none of these are accurate. With the advent of Computer Assisted Design (CAD) the modern approach is to require a "yield plan." This is a preliminary subdivision plan that is designed without the benefit of the open space/cluster lot size reduction, and which sets the "yield" of the parcel, i.e., the number of lots that the parcel could reasonably support. That number then becomes the number of lots in the open space/cluster subdivision.

What should qualify for open space. Another issue is what to accept for open space. Some regulations discount or even exclude counting inland wetlands. I recommend against that. We seek to preserve inland wetlands and watercourses because of their environmental value, and that makes them appropriate for open space preservation. Many commissions think that wetlands are protected anyway, without being dedicated as open space, but that is just wrong. There are exemptions to the inland wetlands act, including the single family home exemption. No land is preserved in its natural state by any regulatory scheme. Only ownership or easements can achieve that.

How to preserve the open space. Land can be preserved by a conservation easement (restriction) or by conveyance of such an easement or property in fee simple to the town, to the

State, to a homeowners association, or to a local land trust. The commission can't compel a conveyance to a land trust because that uses public authority to enrich a private entity, even though it's a non-profit entity. Many developers would rather a conveyance to a land trust for fear that the town or state will use the land for a garage, a gun range, or whatever. If a land trust is being used, be sure that the trust is willing to accept the land and confirm that before voting on the subdivision.

If an association is used, be sure that the association documents give the association the authority to insure and maintain the protected area and the authority and financial ability to enforce any protections. Also require that all association documents are filed along with the endorsed subdivision mylars so you know that the association *exists*. I don't like homeowners associations for open space because you're asking neighbors to enforce restrictions against neighbors and to spend money doing it. They aren't going to bother.

Some towns say that they don't want to own open space because of liability. That is nonsense. Towns own land, have exposure to liability, and that's why they carry insurance, just like you do on your home.

What to use open space for. Open space can be left in its natural state, used for active recreation, preserved as farm land, or any combination thereof. If you use conservation restrictions, be sure that they're tailored to the use that you specify. One size does not fit all.

When to participate in the Subdivision Process

Yesterday. The conservation/wetlands commission should be monitoring every development proposal from its inception. The farther into the design process that the subdivision goes, the harder it's going to be to change it. Town staff should be requiring all applicants to confer with the conservation/wetlands commission early in the process. I recommend that the subdivision regulations *require* review by an advisory conservation commission, and a *permit* from the wetlands agency, *before filing the subdivision application*. This is better for everyone.

How to participate in the Subdivision Process

With specificity. The most common mistake that wetlands/conservation commissions make is to transmit generic, vague, or otherwise nonspecific comments to the planning commission. Don't say, "the proposed open space is in the wrong place" without also saying "it should be *here*" and *why* that's where it should be. The developer has a lawyer, an engineer, experts, and maybe political steam. You have to have *facts* and you have to relate those facts to what the subdivision regulations require. If you've gotten the regulations to say what you need them to say, you're rounding third.

Nothing beats a personal appearance. Letters are fine, but remember that the developer will be at the planning commission *in person* and if it really matters, you need to be there, too. Build a constituency for open space and conservation in your town so you have a list of people who will show up at a hearing . . . if this *is* a hearing. By Statute, a subdivision doesn't require a public hearing, though many subdivision regulations require one. If you want to be certain that you (and your supporters) are heard, the regulations must require a public hearing for at least the subdivisions that matter, such as ones over a certain size in acres or lots.

It may be obvious, but don't wear out your welcome. Focus on those subdivisions that matter. Try to work with developers. They would rather have your support if they can get it without giving up too much. Don't abuse your powers. For too many land use agencies and the public, "conservation" is just a buzz-word to fight development. If everyone who ever attended a land use hearing and opposed a development based on "conservation" had immediately joined the environmental group of their choice, those organizations would be flushed with money. But that doesn't happen. "Environmental protection" only gets their attention when the development is in their own back yard. Don't let yourselves get drawn into that. You have to take a broader, longer-term view that protects your credibility with the planning commission and the developers.

Don't Just *Learn* from Your Mistakes, *Teach* from Them!

There's a fine line between saying, "I told you so" and saying, "Gosh, I sure hope we can avoid making *that* mistake again!" Every defeat is a stepping zone to victory. Each time your advice isn't taken, watch the results and see what happens. There are lessons to be learned and you want the zoning commission to learn them, too. And when the commission does heed your advice, follow up with photos, hikes, and publicity about how well it worked out.

Conclusion

Know the applicable regulations and make sure that they say what you need them to say. Participate early and make sure that regulations and procedures are in place that allow you to do that. Articulate your comments in ways that are specific and constructive. You can't stop development altogether and that shouldn't even be your goal. Property owners have rights, too.



CHAPTER VIII - OPEN SPACES AND RECREATION AREAS

SECTION 1: DISPOSITION

For any subdivision of land under these Regulations, the Commission may require of the subdivider the disposition and official dedication of appropriately located and sized open space or recreation areas. For the purpose of this Chapter VIII, "open space or recreation areas" shall be defined to include, but not be limited to: areas left in their natural, undisturbed state; agricultural land for which development rights have been assigned or otherwise alienated in perpetuity; areas and facilities for non[^] commercial, non[^] profit recreation; and similar areas for wildlife habitat, passive and active recreation, groundwater recharge, scenic preservation, and the like. In determining the appropriateness of an open space and/or recreation area disposition, the Commission shall consider Plan of Development objectives and map designations and the subject site's characteristics with respect to the following objectives: The conservation and protection of wildlife and natural or scenic resources including lakes, ponds, rivers, streams, streambelts, inland wetlands, aquifers, significant woodlands, ridges, ravines, ledge cutcroppings and other unusual physical features; the protection of historic or archeological sites; the expansion of existing open space and recreational areas and the meeting of neighborhood and/or community[^] wide recreational needs. In determining the location of open space, the Commission may consider potential for combination with existing or proposed open space on adjoining properties owned by any public or private institution.

SECTION 2: SIZE

Where open space and/or recreation area disposition is deemed appropriate, the size of the required areas shall be determined by the Commission based on the site's value and importance in meeting the objectives cited in Section 8.1 and the scope of the subdivision proposal. Required open space and/or recreation areas may be up to _____ (____%) percent of the property under consideration. In determining the total land to be reserved as open space or recreation land, the Commission may consider not only the tract or tracts of land to be immediately subdivided, but also any other adjacent tract or tracts owned, controlled or under agreement to buy or optioned by the subdivider. Areas to be reserved as open space and/or recreation land shall be shown on the subdivision map. This Section shall only apply to subdivisions of more than _____ (____) created since the adoption of these Regulations. For purposes of calculating the percentage of open space required, any lot upon which a dwelling existed prior to the filing of the subdivision or resubdivision application shall be excluded; provided, however, that the open space required may be located within such lot. Any open space required under this Section shall be credited toward the requirements for any subsequent resubdivision of any component lot of the subdivision.

SECTION 3: SITES OF ARCHAEOLOGICAL SIGNIFICANCE

In all subdivisions of five (5) acres or more, all applicants shall make written inquiry of the State Archaeologist to determine if there is evidence of sites of archaeological significance within the subdivision. Any significant sites shall, where possible, be left undisturbed and may be considered in meeting the minimum open space requirements of this Chapter.

SECTION 4: METHOD OF DISPOSITION

The Commission shall determine the most appropriate method of disposition after considering, among other things, the relationship of the subject area(s) and its specific characteristics to the Plan of Development and the objectives cited in Section 8.1; the desirability and suitability of public access and use and the scope of the subdivision proposal. The following disposition option may be utilized by the Commission:

- a) Perpetual dedication to the Town.
- b) Perpetual dedication to the State of Connecticut.
- c) Perpetual dedication to a land trust (at the option of the subdivider).
- d) Dedication to a homeowners' association (see, Section 8.7).
- e) Utilization of conservation easement(s), with or without public access.
- f) Utilization of a recreation easement.
- g) Private ownership with the appropriate taking of development rights.
- h) Any combination of the above or any suitable alternative approved by the Commission.

Any conservation easements or other open space covenants or restrictions shall be subject to the approval of the Commission in form and content.

SECTION 5: REFERRALS

The Commission may refer for review and comment any subdivision plan and proposal for the provision of open spaces and/or recreation land to the Conservation Commission, Recreation Commission, _____ County Soil and Water Conservation District, or any other appropriate agency.

SECTION 6: CONDITION OF OPEN SPACES AND/OR RECREATION LAND

Open space and/or recreation areas shall typically abut or have direct public access to a public street and, as appropriate, any existing park or public land. All such areas shall include access roadways to be graded and improved in a manner suitable for safe pedestrian and vehicular traffic. Access roadways shall have an adequate base, shall be adequately drained and shall typically be twenty (20') feet wide and have a slope no greater than twelve (12%) percent.

Land to be provided as open space for the purpose of conservation and protection of wildlife and natural or scenic resources shall typically be left in a natural state by the subdivider. Except for improvement as may be required by the Commission, open space areas shall not be graded, cleared, or used as a repository for brush, stumps, earth, building materials or debris. The Commission may require that any land to be dedicated for recreational use be cleared of brush, trees and debris; be graded to properly dispose of surface water; be covered with organic topsoil to a depth of four (4") inches; be seeded with low maintenance grass seed and be otherwise improved so that the land is left in a condition appropriate to the intended use. The Commission need not accept land composed entirely or substantially of inland wetlands in satisfaction of the requirements of this Chapter, unless it considers such areas to have special habitat or other environmental value.

When site improvements are required, they shall be clearly shown on the final subdivision maps or alternatively on a separate site improvements plan and they shall be approved by the Commission prior to the filing of the subdivision plan.

SECTION 7: ENFORCEMENT BONDING

To ensure proper construction of any required Improvements, the Commission shall require the subdivider to post a performance bond in an amount and with terms acceptable to the Commission. Unless modified by the Commission in accordance with Chapter X of these Regulations, all required Improvements of open space and/or recreation land shall be completed prior to the occupancy of fifty (50%) percent of the dwellings within the subdivision.

SECTION 8: HOMEOWNERS' ASSOCIATION

The Commission may, upon the request of the subdivider, permit the ownership and maintenance of the open space and/or recreation area to be transferred to an association of property owners. Such transfer shall be in accordance with standards established by the Commission to include, but not be limited to, the following which:

- a) Establishes a mandatory participation in an association of property owners to maintain the land reservation for open space park and playground purposes, with power to assess all members for all necessary costs.
- b) Will be binding on all future property owners.

- c) Will be perpetual.
- d) Will not be affected by any change in zoning or land use.
- e) Will assure adequate maintenance.
- f) May be enforced by the Town by appropriate legal action.
- g) Shall provide that if maintenance or preservation of the dedication no longer comply with the provisions of the document, the Town may take all necessary action to assure compliance and assess against the association all costs incurred by the Town for such purposes.

After approval by the Town Attorney and Commission, said document shall be filed by the subdivider in the Office of the Town Clerk.

SECTION 9: LEGAL TRANSFERAL

Properly executed legal documents, including warranty deeds for any title transferals, shall be prepared in accordance with the provision of this section and shall be submitted in triplicate with the final subdivision map to be filed. All documents must be acceptable to the Town Attorney and Planning Staff and shall refer to the subdivision maps by title. All warranty deeds for dedication of land to the Town shall be held in escrow by the Commission to be recorded on the Town Land Records upon acceptance by the Board of Selectman. In the event that acceptance is rejected by the Board of Selectman, the deed shall be returned and the subdivider shall return to the Commission for determination of an alternative means of preserving the open space and/or recreation areas. In no case, shall the acceptance of any deed by the Commission or an employee of the Town be deemed as acceptance of the open space and/or recreation area by the Town.

SECTION 10: DEDICATION FOR OTHER MUNICIPAL PURPOSES

In the event the subdivider desires to transfer to the Town land for other municipal purposes such as future schools, fire houses, etc., the dedication provisions of this Regulation shall be complied with. The Commission may consider such a municipal dedication as a credit toward any open space and/or recreational area disposition requirements.

SECTION 11: PAYMENT OF FEE IN LIEU OF OPEN SPACE

In accordance with Connecticut General Statutes §8^A 25, as amended by Public Act 90^A 239, Section 1, the Commission may authorize a subdivider to pay a fee to the Town of in lieu of the disposition of land by one of the methods set forth in Section 8.3 hereinabove. Such authorization may be granted by the Commission if and when it determines, in its sole discretion, that there are inadequate areas on the subdivision which merit preservation by one of the

methods set forth in Section 8.3, or that there are other areas in the Town of ^[town] where preservation would be more beneficial to the public health, safety and welfare. In the event that such authorization is granted by the Commission, such payment or combination of payment and the fair market value of land transferred shall be equal to not more than ten (10%) percent of the fair market value of the land to be subdivided prior to the approval of the subdivision. The fair market value shall be determined by an appraiser jointly selected by the Commission and the subdivider. A fraction of such payment, the numerator of which is one and the denominator of which is the number of approved lots in the subdivision, shall be made at the time of the sale of each approved lot in the subdivision and placed in a fund. Such fund shall be used solely for the purpose of preserving open space or acquiring additional land for open space or for recreational or agricultural purposes. The said payment obligation shall be secured by a lien against each lot in the subdivision which shall be filed at the time that the final subdivision plans are filed in the Office of the Town Clerk, in accordance with Section II.3(h) of these Regulations. The said lien shall be in a form approved by the Commission, and shall be unencumbered by any mortgage or encumbrance having priority over said lien, as evidenced by a Certificate of Title, in accordance with Section II.3(h) of these Regulations.

SECTION 12: EXEMPTIONS FROM FEE IN LIEU OF OPEN SPACE DISPOSITION REQUIREMENTS

In accordance with Public Act 90⁺ 239, Section 1, the provisions of Section 11 of this Chapter VIII shall not apply if:

- a) The transfer of all land in a subdivision of less than five (5) lots is to a parent, child, brother, sister, grandparent, grandchild, aunt, uncle, or first cousin of the property owner for no consideration. Such intended transfer shall be evidenced by covenants, restrictions, contracts, or other legally binding documents as the Commission may approve, which documents shall be filed in the Land Records in accordance with the procedure and other requirements of Section II.3.(h) of these Regulations. If the Commission determines, based on events subsequent to the approval of such subdivision, that such transfers were intended to be temporary, and for the sole purpose of evading the requirements of this Chapter VIII, the Commission may void the subdivision in accordance with Chapter XI, Section 3 of these Regulations.
- b) The subdivision is to contain affordable housing, as defined in Section 8⁺ 39a of the Connecticut General Statutes, equal to twenty (20%) percent or more of the total housing to be constructed in such subdivision. Such restrictions for affordable housing shall be evidenced by such documents as the Commission may require, and such restrictions shall run with the lots affected thereby in perpetuity. If, subsequent to approval of the Subdivision, the lots designated for affordable housing shall not be sold for that purpose, the Commission may void those subdivision lots in accordance with Chapter XI, Section 3 of these Regulations.



SECTION 10 - OPEN SPACE SUBDIVISION

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- 10.1 Findings. The Commission finds that in some cases the strict adherence to traditional land development and subdivision techniques within the Town of [town] may result in:
1. The consumption of areas containing valuable recreational, agricultural, forest and other unique natural resources.
 2. The construction of extensive roads and other improvements requiring maintenance by the Town of [town].
 3. The development of sites without specific consideration of the limitations of, or opportunities offered by, the existing topographical and soil conditions.
 4. The destruction of significant historic sites, geological features, severe slopes, scenic vistas, significant stands of trees, watercourses, wetlands, wildlife habitat or other areas of environmental value, natural beauty or historic interest.
- 10.2 Purpose: To provide an opportunity for the preservation and protection of the Town of [town]'s natural resources by permitting a transfer of density by way of reduction in the minimum lot size normally required in specified zones for residential development in return for the dedication of designated areas as Open Space; provided, however, that the total number of lots in such subdivision approximates the number otherwise permitted under these Regulations and the [town] Subdivision Regulations.
- 10.3 Definitions.
- a. Development Restriction. A restriction which perpetually prohibits further development or use inconsistent with the enhancement, preservation and protection of a defined area for the benefit of fish, wildlife, plants, or other similar ecosystems, or preserves such areas predominantly in their natural scenic or open condition; but which may, in the sole discretion of the Commission, permit non-profit recreational, and/or agricultural uses which non-profit recreational or agricultural uses do not involve any significant alteration or development of the restricted area in a manner which is inconsistent or inimical to the preservation and protection of the restricted area.

- b. Normal Lot Size. The lot size, expressed in square feet, normally applicable to the Zone in which the proposed Open Space Subdivision is located.
- c. Open Space. Land within an Open Space Subdivision which is subject to a Development Restriction.
- d. Open Space Subdivision. A subdivision approved in accordance with this Section 10.
- e. Total Area. The total area of the proposed Open Space Subdivision expressed in square feet, but excluding any areas not used for detached single-family residential development or Open Space.
- f. Unbuildable Area. The area, expressed in square feet, within the proposed Open Space Subdivision which is comprised of wetlands, watercourses, Flood Zone A per FEMA maps, existing and proposed streets and highways, easements and rights-of-way for vehicular access and utilities. For purposes of this Subsection, easements and rights-of-way of an undefined width shall be deemed to be twenty-five (25') feet in width.

10.4 General Eligibility Requirements. An Open Space Subdivision:

- 1. Shall only be permitted in the _____ Zone[s].
- 2. Shall consist of a parcel(s) of land containing no less than a total of () contiguous acres.
- 3. Must not be harmful to the character of the surrounding area and property values of surrounding land owners.
- 4. Must, except as provided in this Section 10, otherwise comply with all applicable Sections of these Regulations and the [town] Subdivision Regulations and provisions of federal, state and local law.
- 5. Must provide for the dedication of Open Space in accordance with Subsection 10.7.b of this Section 10.
- 6. Must provide beneficial utilization of suitable soil and topographic conditions and protection of soils and topographic conditions not suitable for development.

7. Shall be used only for detached single-family dwellings [and two-family dwellings], where and as permitted by these Regulations, and permitted accessory uses. All other uses shall require the Normal Lot Size and be subject to approval of the Commission in accordance with the applicable Sections of these Regulations. In addition, any other use which is proposed after the approval of the Open Space Subdivision shall require an amendment to the Special Permit granted under this Section 10 in accordance with the applicable sections of the Regulations.
8. Must be consistent with the intent of planning and zoning to promote the public health, safety and welfare of the Town of [town] and the [town] Plan of Development.

10.5 Application Procedure.

- a. Pre-Application Conference. The Commission recommends that, prior to submission of an application for approval of an Open Space Subdivision, the applicant initiate a pre-application conference with the Commission and its staff to discuss conceptual aspects of the proposed Open Space Subdivision and prepare and present a preliminary plan for informal consideration by the Commission. The pre-application conference is recommended to permit the general consideration of factors and problems affecting the development of the subject site before the applicant proceeds with the application and the preparation of final maps, plans and documents required to accompany such application.

Following the pre-application conference, the Commission may provide informal, non-binding suggestions to the applicant as to whether to proceed with an application under this Section 10 or to adhere to the conventional subdivision requirements of the applicable Sections of the [town] Subdivision Regulations.

Neither the pre-application conference, the informal consideration of preliminary plans, nor the Commission's suggestions shall be deemed to constitute any portion of the application for approval of an Open Space Subdivision.

- b. Application. An application for the approval of an Open Space Subdivision shall:
 1. Require approval of the Commission (a) as a Special Permit and (b) as a subdivision in accordance with the applicable Sections of these Regulations and the [town] Subdivision

Regulations.

2. Be submitted with a proper and complete Special Permit form and Subdivision Application form, and application fees as set forth in Town Ordinances.
 3. Be accompanied by ten (10) copies of the proposed plan setting forth the information required by this Section 10, the applicable Sections of these Regulations and the [town] Subdivision Regulations as well as such additional information as the Commission may require for a review of the proposed Open Space Subdivision under the applicable Sections of these Regulations or in order to reach a determination of the impact of the Open Space Subdivision on the surrounding area. Such additional information may include, but is not limited to, the following: Information concerning surrounding land uses, building locations, driveways, streets, topography, watercourses and wetlands; utilities and other information of a similar nature and purpose; a traffic impact study prepared by a Connecticut Registered Professional Engineer qualified to prepare such studies; an environmental impact statement prepared by professionals qualified to prepare such studies; and any reports prepared by the applicant's staff or consultants.
 4. Be accompanied by copies of the proposed Certificate of Incorporation, if any, By-Laws, Rules and Regulations of any association or corporation of the lot owners within the proposed Open Space Subdivision; copies of the proposed Covenants and Restrictions to be placed in the deeds of conveyance to the lot owners, and copies of any proposed deeds, agreements, conveyances and restrictions necessary for the creation of Open Space, including, a precise statement of the proposed Development Restriction.
- c. Public Hearing. The public hearings on the Special Permit and Subdivision Application shall be held concurrently.

10.6 Standards and Controls.

a. Minimum Area, Yard and Coverage Requirements.

Minimum Lot Area, Single-Family	sq. ft.
Minimum Lot Area, Two-Family	sq. ft.
Minimum Lot Frontage	feet
Minimum Lot Depth	feet
Minimum Front Yard	feet

Minimum Side Yard	feet
Minimum Rear Yard	feet
Maximum Building Coverage	percent

- b. Rear Lots. Rear lots in Open Space Subdivisions shall contain square feet for a Single-Family Dwelling and square feet for a Two-Family Dwelling, excluding the area of the access strip, but shall conform to all other requirements for rear lots (see Section 4.18, Rear Lots).
- c. Minimum Buildable Area. All lots in an Open Space Subdivision shall comply with the Minimum Buildable Area Requirements contained in Section 4.4 (General Regulations) of these Regulations.
- d. Calculation of Maximum Allowable Lots. In order to determine the maximum number of lots allowable within the proposed Open Space Subdivision, the applicant shall either: *[With the increased availability of CAD, the formula approach is rarely used today. Yield plan (#2) is almost universal now.]*
 - 1. Submit a statement, certified by a Connecticut Registered Land Surveyor or Engineer, setting forth the results of the following calculation:

$$\frac{(\text{Total Area}) - (.25 \text{ Total Area}) - \frac{(\text{Unbuildable Area})^2}{(\text{Total Area})}}{(\text{Normal Lot Size})} = \text{Number of Lots}$$

; or

- 2. Submit a conventional subdivision plan using the Normal Lot Size which will be reviewed by the Commission without the application of this Section 10, including the depiction of the required open space (%) set forth in Chapter [open space requirement section] of the [town] Subdivision Regulations. Such conventional plan need not contain all information required for a Final Subdivision Plan by the [town] Subdivision Regulations, but shall contain only such information as is necessary to permit the Commission to determine that the conventional plan represents a feasible subdivision of the land at Normal Gross Lot Dimensions. If approved by the Commission as representing a feasible conventional subdivision plan, the total number of lots in such conventional subdivision plan shall be the maximum total number of lots in the Open Space Subdivision.

- e. Conformance. Any lot with reduced area approved under the provisions of this Section 10 shall be deemed to be a conforming lot notwithstanding the Normal Lot Size; provided, however, that such lot meets the requirements of the other applicable Sections of the Regulations and the [town] Subdivision Regulations. Any such lot shall be designated on the approved Open Space Subdivision Plan which is presented for recording.

10.7 Open Space and Development Restriction.

- a. Calculation of Required Open Space. In return for the reduction in the Normal Lot Size, the proposed Open Space Subdivision shall require the dedication as Open Space of an area which is, at a minimum, equal in size to the aggregate difference between Normal Lot Size and the Minimum Lot Area set forth in Section 10.6.a applicable to each lot in the Open Space Subdivision.
- b. Dedication of Open Space. Open Space shall be dedicated, by conveyance in fee simple, in accordance with the applicable provisions of Chapter [open space requirement section] of the [town] Subdivision Regulations.

The applicant shall designate in its application which of the entities set forth in Chapter [open space requirement section] of the [town] Subdivision Regulations are proposed to own the Open Space, but, as part of the approval of such application, the Commission may modify such designation. Furthermore, the Commission may modify any application so as to designate Open Space in locations other than those proposed. In determining whether the proposed entity is appropriate to own the proposed Open Space, or whether to require Open Space in locations different from those proposed, the Commission shall consider the following factors: The ownership of any existing Open Space on adjacent properties, or the proximity to non-adjacent Open Space which might reasonably interconnect with the proposed Open Space in the future; the proposed use of the Open Space for active or passive uses, and the extent of maintenance, supervision, or management required; the potential benefits which the Open Space might provide to residents of the Town or the State, if it were accessible to them; the size, shape, topography, and character of the Open Space; the recommendations of the [town] Plan of Development and the [town] Open Space Plan; the reports or recommendations of any State or Town agencies, including, but not limited to, the Board of Selectmen, the [town] Inland Wetlands [Commission/Agency], the Recreation Commission, the Conservation Commission, the [county] Regional Planning

Agency, and the Connecticut Department of Environmental Protection.

- c. Alteration of Open Space. Any excavation, filling, regrading or alteration of Open Space; any construction or expansion of any building, structure or other improvements thereon, or any paving or surfacing of Open Space subsequent to the date of approval of the Open Space Subdivision shall require an amendment to the Special Permit granted under this Section 10 in accordance with the applicable Sections of the Regulations.
- d. Evidence of Acceptance. If Open Space is to be owned by a private not-for-profit conservation trust or corporation, the State of Connecticut, the Town of [town], or another entity, the application shall contain written evidence from the proposed entity satisfactory to the Commission, stating that it is willing to accept ownership of and responsibility for the preservation and maintenance of the Open Space.
- e. Required Provisions. Regardless of the manner of ownership of the Open Space, the instrument of conveyance must include provisions satisfactory in form and substance to the Commission to ensure:
 - 1. The continued use of such land for the intended purposes;
 - 2. The continuity of proper maintenance for those portions of the Open Space requiring maintenance;
 - 3. When appropriate, the availability of funds required for such maintenance;
 - 4. Adequate insurance protection; and
 - 5. Recovery for loss sustained by casualty, condemnation or otherwise.

Homeowners associations shall comply with the provisions of Chapter [open space requirement section] of the [town] Subdivision Regulations.

- f. Boundary Lines. The boundary lines of all Open Space shall be set in the field and marked by permanent, readily-visible markers where such lines intersect any lot line, road or perimeter line within the proposed Open Space Subdivision and at such other points as may be required by the Commission to insure identification in the field.

- g. Recording. At the time the approved Open Space Subdivision Plan is filed, the applicant shall record on the [town] Land Records all deeds and legal documents required to ensure the aforesaid guarantees.
- h. Right to Enforce. A right to enforce the Development Restriction shall be conveyed to:
 - 1. The Town of [town], the State of Connecticut, or a private, not-for-profit conservation trust or corporation dedicated to conservation or preservation purposes in cases where the Open Space is dedicated to an association or corporation of lot owners; or
 - 2. To the association or corporation of lot owners in cases where Open Space is dedicated to the Town of [town], the State of Connecticut, or a private, not-for-profit conservation trust or corporation.

Any deed of conveyance shall contain language providing the holder of the Development Restriction with the right to obtain reimbursement for all costs it reasonably incurs, including attorney's fees, in any action to enforce the Development Restriction, in which it is the prevailing party.

- i. Association Requirements. If the Open Space is to be dedicated to an association or corporation of lot owners, then the Commission may set additional requirements, including, but not limited to, the following:
 - 1. Creation of the association or corporation prior to the sale of any lot.
 - 2. Mandatory membership in the association or corporation by all original lot owners and any subsequent owner.
 - 3. The association or corporation shall have the power to assess and collect from each lot owner a specified share of, and, where necessary, provide reserves for the costs associated with maintenance, repair, upkeep and insurance of the Open Space.

10.8 Protection of Surrounding Areas. In reviewing the proposed Open Space Subdivisions, the Commission shall additionally utilize the following criteria:

- 1. The recommendations of the [town] Plan of Development, as amended, relative to Open Space and Recreation.

2. The suitability of areas within the proposed Open Space Subdivision for Open Space purposes in light of the topography, size, shape, and character of the land to be subdivided, and its relationship to other existing or proposed areas of Open Space.
3. The maintenance, insurance, and other burdens placed upon the residents of the Open Space Subdivision, and/ or the Town of [town].
4. The increase in the burden imposed by the proposed Open Space Subdivision on existing and proposed areas of Open Space.
5. The recommendations of the Board of Selectmen, the [town] Inland Wetlands Commission, the Recreation Commission, the Board of Finance, the Conservation Commission, and any other public or private agencies or authorities providing comment to the Commission.
6. The level of access to the areas of Open Space afforded to members of the general public.

10.9 Location of Open Space. Open Space preserved in accordance with this Section 10 need not be included within the area of the subdivision for which approval has been sought, but may, at the option of the applicant, be located in such proximity to such subdivision as to insure that the residents of the proposed subdivision shall derive direct benefits from the open space so dedicated. In determining whether the residents of the proposed subdivision shall derive benefits from the proposed open space, the Commission shall consider:

1. The physical distance between the open space and the proposed subdivision, such that residents of the subdivision will have a view of, ready use of, or other benefit from, such open space.
2. Whether the proposed open space land to be dedicated is served by the same road as the subdivision, such that traffic generation will remain constant over the length of such road.
3. Whether the area of the proposed open space is served by the same municipal service district, as, for example, elementary school district, fire company, or sewer and/or water trunk lines, such that the burden of providing such services will remain constant within such district(s).

4. Whether the proposed open space provides a needed recreational or other facility; preserves a critical wildlife habitat or unique natural feature; or otherwise fulfills an important recreational/ environmental objective of the Town of [town] in the general area of the subdivision such that property values in the proposed subdivision will be enhanced.

[10.9 is optional, and allows transfer of development rights, i.e., the open space need not be on the same parcel as the development is located. But you want those residents to benefit in some tangible way.]

Updated June 15, 2009, commentary added.