

Chapter 16: Open Space Preservation

If you look at a land use map of the United States then you see that most of the nation is open space - farms, forest, desert, mountains, prairie, wetlands, lakes, and so forth.¹¹⁴ But this is not true for the urban-suburban areas where most of us live. And the pace at which growth is gobbling up our open space is accelerating. In the 1980s we were losing 1.2 million acres of rural land a year, which increased to an annual loss of 2.2 million acres in the 1990s.¹¹⁵

Preserving open space does not mean stopping growth, just growing smarter. In most cases a community can accommodate anticipated growth by concentrating new homes and businesses in a way that minimizes loss of open space and actually reaps more benefits, such as lower taxes. But before getting into *Smart Growth* techniques perhaps it would be helpful to review the benefits of open space, which include:

- much of our food comes from farms'
- farming is an important part of our economy;
- open space is frequently the source of our cleanest drinking water;
- trees and other open space vegetation improve the quality of our air;
- our highest quality waters are associated with undisturbed open space (e.g. forests); and
- open space recreation areas have been shown to reduce urban crime; and
- urban open space also provides residents with limited mobility an opportunity to enjoy and learn of the natural world.

In 1982, 44% of the United States was farmland.¹¹⁶ In 1997, the figure dropped to 41%. According to a study by the American Farmland Trust, we are losing our best, most productive agricultural lands at a rate 30% faster than other open space.¹¹⁷ Most alarming is that 83% of our fruits and vegetables and 63 percent of our dairy products, come from farms in urban-influenced areas.¹¹⁸ Conversion of these farmlands to suburbia is pushing agriculture onto marginal lands where, generally, more fertilizers, pesticides, and irrigation is needed and where soil erosion rates may be higher. So our food is coming at a higher cost in terms of dollars and environmental impact.

¹¹⁴ To view a map of United States land use visit:

<http://www.epa.gov/ceisweb1/ceishome/atlas/nationalatlas/landusecover.htm>

¹¹⁵ The rate of rural land conversion was obtained from the U.S. Natural Resources Conservation Service website: <http://www.farmlandinfo.org/>

¹¹⁶ Based on data available on the American Farmland Trust website at: <http://www.farmlandinfo.org/fic/census/1997usa.html>

¹¹⁷ See *Farming on the Edge* at: <http://www.farmland.org/farmingontheedge/index.htm>

¹¹⁸ Ibid.

The Trust for Public Lands (TPL) documented the financial benefits of land preservation in their report *The Economic Benefits of Parks & Open Space*.¹¹⁹ A number of studies have put a dollar value on the water quality benefits of preserving open space. For example, the TPL report described a proposal to develop a 16,000-acre area of open space known as Sterling Forest. The forest provided drinking water for two million New York and New Jersey residents. An analysis showed that a \$160 million treatment facility would be needed to remove the drinking water contaminants resulting from development of Sterling Forest. Instead, an effort lead by TPL and the Open Space Institute raised \$55 million to preserve 90% of the forest and eliminate the need for a new treatment plant - a savings of \$105 million!

OPEN SPACE PRESERVATION TECHNIQUES

The best way to preserve open space is to concentrate growth within and adjacent to existing towns, cities and other population centers. This is the essence of *Smart Growth*. And this approach to growth management truly is smart. Consider the cost of providing public services to a new home at the edge of town compared to one built a mile or two out of town. It would be far more expensive to extend water and sewerlines to the rural home, it would take longer to reach the home by school bus and by emergency service vehicles. All this adds up to more tax dollars to provide services for the rural home when compared to one built at the edge of town.¹²⁰

Following are the *Smart Growth* techniques for guiding development to existing population centers. One of the best sources for further detail on many of these techniques is the American Farmland Trust Farmland Information Library <http://www.farmlandinfo.org/> Another great resource is *Getting to Smart Growth: 100 Policies for Implementation* which is available for download from the Plannersweb at: <http://www.smartgrowth.org/pdf/gettosg.pdf>

Acquisition

Occasionally a tract of land is considered so important that some government or private entity will purchase it. But acquisition of proposed development sites is rare. Acquisition funds are usually quite limited and lands targeted for development are frequently more expensive to acquire. It may cost two- to ten-times as much to acquire a development site compared to other lands. Nevertheless, over the past decade citizen success in winning acquisition of development sites has become more common. For further detail see *Land Preservation* in Part III of this book.

¹¹⁹ To view the report *The Economic Benefits of Parks & Open Space* and the many other resources available from the Trust for Public Lands visit: <http://www.tpl.org/index.cfm>

¹²⁰ For further detail see the Sierra Club report *Sprawl Costs Us All* available for download at: <http://www.sierraclub.org/sprawl/report00/sprawl.pdf>

Clustering

One way to reduce loss of open space is to require clustering of rural development projects. In other words, rather than allowing, say, 20 five-acre lots on a 100-acre tract of land, the homes must be clustered on 20 one-acre lots, thereby preserving 80% of the site as open space.

Clustering is not the most effective way to preserve working farms. For a farm to remain viable, a minimum acreage is needed so fields can still be worked economically. Clustering can fragment agricultural land in a way that renders the remainder unsuitable for family farming. Some local governments also give a bonus density for clustered projects. For example, if the unclustered density is one house per five acres then the clustered density might be one per four.

In the previous discussion of septic systems mention was made of the relationship between water quality and septic system density. Care must be taken to ensure that clustering does not result in a concentration of septic systems in areas where water quality may be threatened, such as near existing homes served by shallow wells or waters that are sensitive to nutrients and bacteria.

Conservation Easements

If a property owner wishes to preserve their land but they don't want to give up title, then granting a conservation easement is one option. The owner signs an agreement in which they give up the right to develop their property, usually in exchange for a reduction in taxes. The agreement may be for a specific period, such as 10 to 25 years, or in perpetuity. The agreement will usually name a third party to enforce the terms. Frequently, a land trust is involved in conservation easements. To learn of land trusts in your area visit the Land Trust Alliance website at: <http://www.lta.org/>

Designated Growth Area

The idea behind this *Smart Growth* tool is to designate areas where growth will be concentrated and other areas to remain rural. On the west coast designated growth areas are established with Urban Growth Boundaries. In Maryland they are called Priority Funding Areas. Regardless of the terminology used, they grew out of water and sewer service areas.

Good designated growth areas call for densities of at least four housing units per acre, while no more than one unit per 20 acres is permitted in rural areas. The boundary is usually established through the master plan or comprehensive land use planning process and implemented through zoning. Normally, sufficient land is included within the designated growth area to accommodate anticipated development needs for the next 20 years.

Discourage New Roads

Growth tends to follow the construction of new roads. This is because people prefer to live where traffic congestion is minimal, so extending a road into undeveloped areas can dramatically accelerate the pace of growth. This phenomenon is called *induced growth*. Smart growth principles dictate that public funds previously used to extend roads into rural areas be used instead to improve

transportation within existing developed areas.¹²¹ If a road must pass through a rural area, and the intent is not to accelerate growth, then measures must be in place to ensure that sprawl will not follow. These measures may include downzoning, TDRs or PDRs, and so forth. But even with these measures, extending a new road into a rural area can lead to tremendous pressure on local decision-makers to allow development. For example, imagine a situation in which a major employer proposes to move to your area, but only if they can upzone a site along the new road. And, oh by the way, could they also get another large chunk of land upzoned for residential development to house their employees?

Forests Conservation

If you can gain access to the site, then look for any factors which may cause existing forest to be of unique importance. Look for *old-growth forest* (more than 150 years old), trees that are unusually large, or forests that support unique wildlife populations. Some local jurisdictions and states have mandated the protection of existing forests.¹²² If such a mandate exists in your area, then determine if the project fully complies with a strict interpretation of forest conservation requirements. If forest conservation is not mandated in your area, then consider lobbying for the enactment of such a law (*See Change the Law in Part III of this book*).

Limited Development Venture

The purpose of this option is to do just enough development on a site to cover the cost of acquisition and other expenses. For example, let's say a hundred acre farm could be developed as 20 five-acre lots under current zoning. If we clustered the 20 houses on one-acre lots then 80% of the site could be saved. But maybe we only need to sell five houses to generate the income needed to cover site acquisition and development costs. If the five lots are an acre each then the remaining 95% of the site could be preserved in a natural state. To learn more about how a limited development venture might work in your area contact the [American Farmland Trust](#), the [Land Trust Alliance](#), or the [Trust for Public Lands](#).

Public Subsidies

One study showed that each new home costs taxpayers \$20,000 to \$30,000.¹²³ About half of this is for schools and the rest is for water, sewer, roads, and other public services. In the past, tax dollars would be used to cover much of the cost for the new schools, roads, sewers, and other services necessitated by rural development. Under *Smart Growth* public subsidies are only used to foster more compact development - a minimum of four or five housing units per acre. This provides a strong disincentive to rural sprawl and encourages development within or next to existing towns and

¹²¹ For further detail on how road construction accelerates loss of open space see the TPL report *Taking the High Road*, which is available for download at http://www.tpl.org/tier3_cd.cfm?content_item_id=10863&folder_id=175

¹²² For an example of a State mandated forest conservation program implemented at the local level view: <http://dnrweb.dnr.state.md.us/download/forests/fca.pdf>

¹²³ *Better Not Bigger* by Eben Fodor, New Society Publishers.

other population centers. If a developer wishes to create a new bit of rural sprawl, then they must pick-up the cost - not the taxpayers.

Purchase or Transfer of Development Rights

PDRs and TDRs are two closely related approaches for preserving open space. Through PDRs a government agency purchases the development rights associated with a tract of land. The amount paid is usually the difference between the appraised value if sold to a development company minus the value of the land if it were sold to a farmer. The source of government funds used to purchase development rights may come from general revenue or specialized taxes, such as on the transfer of land. About 400,000 acres of land have been preserved in the United States through PDRs.¹²⁴

Through TDRs developers are either encouraged or required to purchase development rights from owners of rural land. The development right is then transferred to a parcel within a designated growth area. Some jurisdictions allow increased (bonus) density when TDRs are used. Fifty local jurisdictions (counties-towns) in 17 states have enacted TDR programs.¹²⁵ Nearly 90,000 acres have been protected nationally, though half of the preserved acres are in Montgomery County, Maryland.¹²⁶ TDRs work best when development activity is high and their use is mandatory. But care must be taken to protect existing residents within designated growth areas (receiving zones) from the impact of excessive growth - allowing development to outstrip public services.

Right-To-Farm Programs

A key to preserving rural lands is to help farmers keep suitable lands in production. If residential development sprawls into farming areas then conflicts build. Newcomers complain about odors and noise as well as getting stuck behind slow moving farm equipment. A number of jurisdictions have enacted right-to-farm laws which protect farmers from complaints or lawsuits regarding normal agricultural practices.¹²⁷

Zoning

Through zoning local government regulates what uses may be made of a parcel of land. The intent is to protect adjoining property owners from incompatible uses and to increase the likelihood that a community grows in a way which enhances overall quality of life. The zoning tools most important to open space preservation are density or minimum lot size. To preserve farmland, AFT

¹²⁴ The acreage of lands protected through PDRs is based upon a factsheet prepared by 1000 of Minnesota and available for viewing at: <http://www.1000fom.org/lctools4.htm>

¹²⁵ See the American Farmlands Trust factsheet on TDRs at: <http://www.farmlandinfo.org/>

¹²⁶ Ibid.

¹²⁷ For further detail see the American Farmlands Trust Right-To-Farm factsheet available for download at: <http://www.farmlandinfo.org/>

suggests no more than one house per 20 acres, though some agricultural preservation zones in the west allow as little as one house per 640 acres (a square mile).

Zoning must be coupled with other measures to preserve working farms. For many agricultural operations, farm fields must be of a certain minimum acreage for the operation to remain viable. Downzoning farmland to one house per 20 acres could result in a transformation of the countryside from pasture and cropfields to expensive houses on big lots (McMansions). The most effective preservation programs make it possible for farmers to keep their land in production without unduly sacrificing the equity in their land.

For obvious reasons, a proposal to downzone land from, say, one house per acre to one per 20 acres will meet with considerable opposition from property owners and the real estate-development community. The likelihood of a successful downzoning effort increases if some form of compensation can be provided to property owners, such as reduced property taxes or cash payments through programs such as transfer or purchase of development rights (TDR or PDR).

PRESERVING A POTENTIAL DEVELOPMENT SITE

In the remainder of this chapter I will explain how to research preservation options for a farm, a vacant lot, or some other tract of land. But first allow me to explain a problem of timing with several of the preservation techniques described above.

It can take six-months to two-years to get a preservation technique in place at the local level. Unless the necessary legal authority is already established, several of these techniques may not be of much help where development of a site is imminent. The trouble will be that the law enacting the preservation technique will likely grandfather (exclude) any project which is already in the review process. However, you may succeed in structuring the law so it applies to all projects which have not yet reached the final stage of the process, usually building permit issuance. See *Chapter 41: Changing The Law* for further advice on winning the adoption of an open space preservation technique.

The purpose of the land preservation research is to determine:

- who owns the site;
- if the site has already been preserved;
- how likely it is that the site will be developed;
- what factors make the site attractive for preservation;
- what preservation options are most applicable to the site;
- how to find a solution which is attractive to the land owner; and
- how to negotiate with the owner.

Following is a description of how to carry-out this research.

Determine Who Owns The Property

In some states you can find out who owns property online. To see if this information is online for your area visit the home page for your town, county, or state and look for an assessor's office or an assessments and taxation office.

If ownership information is not online then visit the local land records office, which is usually in a town hall or a courthouse. There should be a set of maps at the office showing deed references - liber (book) and folio (page) numbers - for all the units of land in your local jurisdiction.

Ask the land records office staff to help you pull the deed for the property. To do this they will need the liber and folio number so be certain to write it down.

If the property is owned by a development or land speculation company then preservation is likely to be considerably more difficult and expensive. But don't give up. We have helped a number of groups around the country preserve sites already in the hands of developers.

Deed Restrictions That May Limit Development

The deed will tell you who currently owns the property, whom they purchased it from, the liber and folio number for the prior deed, how much was paid for the land, when the transaction occurred, the number of acres purchased, the boundaries of the tract as defined by metes and bounds, any restrictions (covenants) on the use of the property, rights-of-way, and other information. Occasionally, a deed will contain a covenant restricting use of the property, perhaps even precluding development. See if the deed contains anything like this. Look at prior deeds as well. However, finding such a restriction is not necessarily victory. The courts have overturned covenants that are too restrictive or have other legal shortcomings. If you find a restriction in the deed then get an opinion on how effectively it preserves the site from a good land use or title attorney. See *Chapter 40: Legal Action* for advice on finding attorneys.

Likelihood of Development

Ask the land records staff how you can determine if any easements or other agreements have been filed on the property. Perhaps the owner sold development rights through a PDR/TDR program or granted a conservation easement.

Next, visit the local planning and zoning office and:

- Check the applicable comprehensive plan to see what uses are called for on the site. Perhaps it is already slated for preservation or a major new road may be shown passing through the site. Either way, this information is critical to preservation.

- Take a look at other planning documents, such as those for transportation, historic resources, green space, and so forth. Do any of these plans single out the site for any reason?
- See what the water and sewer plan shows for the site. Does it already have public water and sewer service or is the site slated to receive service? The availability of public water and sewer will inflate the value of the property.

Find out what zoning applies to the site. If you are lucky zoning will limit development to a few houses on the property while a minimum of 80% of the site must be preserved as open space. If you are not so lucky then the site will be zoned for heavy industrial uses, which means it will be very expensive to purchase, difficult to rezone, and a number of not so pleasant uses could be made of the land.

Ask to speak with the planner familiar with development activity in the vicinity of the site. Inquire about any proposals made to develop the site. If there are active applications then learn where they stand in the process and go through the steps suggested in *Chapter 1: The Easy Solution*. If there are not any current applications but prior, inactive proposals are on file, then ask why they have not progressed further. There may be some aspect of the site which restricts development, such as a lack of adequate road access or soils which do not meet septic system requirements (won't perk). Ask if there are any requests to rezone the property. Also, ask if the property might already be preserved through easements or other mechanisms and how one would go about checking on this. Finally, ask the planner's advice on how they would proceed if they wanted to preserve the site or at least the most valued features on the property.

Factors Elevating the Need to Preserve the Site

The likelihood of preservation increases if you can show that the site is uniquely important or that developing the site would have unusually severe negative impacts.

Factors Contributing To Unique Importance: If you think the property might be valuable because of the plant or wildlife it supports then contact your state fish, wildlife, conservation, or natural resources agency to see if they have any data supporting the value. Begin with the unit of the agency overseeing threatened and endangered species. To locate this unit visit the following NatureServe website: <http://www.natureserve.org/visitLocal/> For further detail on this topic see *Chapter 26: Wildlife*.

If you feel the site is of historic significance then contact your local or state historic preservation officer (SHPO) for documentation. To locate the SHPO for your state visit the National Conference of State Historic Preservation Officers website at: <http://www.ncshpo.org/stateinfo/> For further detail on this topic see *Chapter 11: Historic & Archaeological Resources*.

Contact the local recreation and parks agency to ask if there is a deficit in the area. If there is a deficit then explore their interest in acquiring the site as a new park. For further detail see *Chapter 17: Parks & Recreation*.

Factors Contributing To Unusually Severe Impacts: If the site is composed of highly-erodible soils situated on steep slopes then sediment pollution may be unusually high during the construction phase. The severity of this impact would be accentuated if the site lies above a water supply reservoir. If the site lies in the viewshed of the most famous scenic vista in your area, then development may degrade the aesthetics, possibly costing the local economy revenue from tourists.

Seek Advice from Preservation Groups

Contact land preservation groups active in your area. Begin with national organizations such as:

- American Farmlands Trust <http://www.farmland.org/>
- Land Trust Alliance <http://www.lta.org/>
- Nature Conservancy <http://www.nature.org/>
- and Trust for Public Lands <http://www.tpl.org/>

Numerous local land trusts exist throughout the nation. These organizations were formed to preserve lands ranging from a single parcel to those encompassing thousands of acres. To find a local land trust in your area visit the *Land Trust Alliance* website: <http://www.lta.org/>

As you make contact with land preservation organizations keep in mind that the most valuable thing each can provide is advice. If you were to call an organization and simply ask if they were interested in buying a tract of land, then most will give you a polite no. Instead, say you are looking for advice; not someone to champion the preservation effort for you.

Begin the request for advice with a brief description of the land you hope to save. Ask if there is someone who could give you guidance on preservation options and strategy. If you are linked with such an advisor then summarize what you want to accomplish, why you think the site is worthy of preservation, and ask what suggestions they have. If you peak their interest then they will ask for details. The advisor may even become sufficiently intrigued to serve as a mentor while you work through preservation strategy options.

Negotiating A Solution the Land Owner Finds Attractive

You should have a fairly clear idea of what preservation options are open to you after completing the research described above. Most options will go far more smoothly if you can win the cooperation of the land owner. To do this you need to come up with preservation options the owner finds attractive. For example, most owners of working farms view their land as their retirement fund. When they can no longer work their farm they will sell the land and use the proceeds for their retirement. Many farmers hate the idea of selling their land for development, but feel they have little choice. An attractive solution would provide the farm owner with income comparable to what they

might receive from a development company while preserving a portion or all of the land. Several potentially attractive options were presented earlier in this chapter, such as the *Purchase or Transfer of Development Rights*, sale of an *Agricultural Land Preservation Easement*, a *Limited Development Venture*, or *Acquisition*. Downzoning the property without compensation would not be very attractive to the land owner. It would also be difficult to achieve and ethically undesirable.

Once you have an attractive solution or two then look around for someone who has a good relationship with the land owner or someone whom the owner is likely to view with a bit less suspicion than a total stranger, such as you. Ask this person if they would be willing to request a meeting with the property owner. Land trust staff frequently have extensive experience making this initial contact and can offer valuable advice.

A word of caution is in order here. Early in your first conversation with the land owner ask if they have entered into an agreement to sell their property to someone else. If they have then consult with a good attorney before proceeding any further. Should the owner break the agreement because of your discussions, then you may be exposed to a lawsuit because of tortious interference.

Review the advice offered in *Chapter 37: Negotiate With The Applicant* for suggestions on how to make the discussions with the land owner go smoother. If the land owner feels your solution is not attractive enough, then use the suggestions in *Chapter 39: Lobbying Final Decision-Makers* to see if you can get government to kick in additional funds to make the offer more attractive. And, as always, please don't hesitate to contact me for advice at 1-800-773-4571 or Rklein@ceds.org. We've supported a number of successful land preservation efforts.