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PRESERVING OPEN SPACE ON CAPE COD: PUBLIC AND PRIVATE MECHANISMS FOR OPEN SPACE PROTECTION

PATRICIA DALEY*

INTRODUCTION

This article discusses how the Cape Cod Commission and many other Cape Codders use public and private mechanisms to permanently preserve open space on Cape Cod. The Cape Cod Commission through its planning and regulatory programs,¹ Barnstable County through the Pathways Project,² Cape Cod voters through their support of regional land bank legislation,³ and private land trusts and towns are working to preserve the remaining open spaces on Cape Cod. The Cape Cod Commission estimated that thirty-eight percent of the Cape's land area has been developed, twenty-one percent of the land is protected from

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¹ The Cape Cod Commission was established by the General Court of Massachusetts "as the regional planning and land use commission with authority to prepare and oversee the implementation of a regional land-use policy for all of Cape Cod." An Act Establishing the Cape Cod Commission, ch. 716, § 1(b), 1989 Mass. Acts 1195, 1196.

² The Pathways Project was initiated in 1993 by Barnstable County and the Cape Cod Commission in an attempt to link all 15 towns on Cape Cod by a network of walking trails and provide a year-round recreational opportunity for both residents and visitors. See *1996 Final Regional Policy Plan*, ch. II, § 2.5 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>; see also *Cape Cod Pathways: Questions & Answers* (visited Oct. 14, 1999) <<http://www.capecodcommission.org/pwayfaq.htm>>.

³ The Cape Cod Land Bank Fund was established in 1998 "for the purpose of acquiring land and interests in land for the protection of... open space and conservation of land, the creation of walking and bicycling trails, and the creation of recreational areas." *An Act Relative to the Establishment of the Cape Cod Open Space Land Acquisition Program ("The Land Bank Act")* §2 (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/act.htm>>.

development, leaving, exclusive of wetlands,⁴ approximately twenty-eight percent of the Cape's land area unprotected and available for future development.⁵ The legal mechanisms used to preserve this remaining open space include conservation restrictions, easements, land acquisition by municipalities using both land bank and local funds, and private land trusts.

I. THE CAPE COD COMMISSION

The Cape Cod Commission (the "Commission") is the land use planning and regulatory agency for Cape Cod. It was established by state statute in 1990⁶ to protect and preserve the unique natural, coastal, scientific, historical, recreational, and other values of the region, including the promotion of affordable housing and balanced economic growth,⁷ and is one of only two regional planning agencies in Massachusetts with authority to both plan for and regulate development.⁸ The Commission operates as part of Barnstable County government⁹ and therefore the budget, regulations, and master plan for the

⁴ The Commission estimates that wetlands comprise 13 percent or 16,250 acres of the Cape. See *Cape Cod Land Statistics Summary, October 8, 1998* (visited July 26, 1999) <<http://www.capecodcommission.org/landstats/summary.html>>; *Cape Cod Land Statistics by Town, October 7, 1998* (visited July 26, 1999) <<http://www.capecodcommission.org/landstats/bytown.html>>.

⁵ See *Cape Cod Commission Updates Open Space Statistics, October 8, 1998* (visited July 26, 1999) <<http://www.capecodcommission.org/landstats/index.html>>. This unprotected land is considered "essentially up for grabs." Jeff McLaughlin, *Winter Task: Think Summer; Cape Hands Get Grip on Growth*, BOSTON GLOBE, Nov. 3, 1994, at 1, available in LEXIS, News Library, Bglobe File (quoting then chief planner for the Commission, Margo Fenn).

The 1996 Final Regional Policy Plan established the goal of protecting 50 percent of the remaining developable but presently unprotected land, amounting to roughly 37,500 acres Cape-wide. See *1996 Final Regional Policy Plan*, ch. II, § 2.5 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>.

⁶ After the Cape Cod Commission Act was passed by the state legislature in 1989, it was approved by a majority of Cape voters in a countywide referendum on March 27, 1990. See *1996 Final Regional Policy Plan*, ch. I (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/rpp96.htm>>; McLaughlin, *supra* note 5, at 1.

⁷ See An Act Establishing the Cape Cod Commission, ch. 716, § 1, 1989 Mass. Acts 1195, 1195.

⁸ See McLaughlin, *supra* note 5, at 1. The first such agency was established in Martha's Vineyard over 20 years ago. See Act of Dec. 21, 1977, ch. 831, 1977 Mass. Acts 1083.

⁹ See ch. 716, § 3, 1989 Mass. Acts at 1199.

region, the Cape Cod Regional Policy Plan,¹⁰ are adopted as county ordinances by the County Assembly of Delegates and County Commissioners.¹¹

The Commission, through its planning programs and regulation of Developments of Regional Impact (“DRIs”), encourages the preservation of open space to further public interests including watershed protection, habitat protection, recreation, agricultural uses, scenic and historic preservation and other public purposes.¹² A DRI is a development that, due to its “magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality.”¹³ DRIs are reviewed for consistency with the Cape Cod Regional Policy Plan, local comprehensive plans and local development regulations.¹⁴

¹⁰ The Cape Cod Regional Policy Plan, which is prepared by the Commission and updated every five years, is a planning and regulatory document that is meant to provide a “coherent set of planning policies and objectives to guide development on Cape Cod and to protect its resources.” *1996 Final Regional Policy Plan*, ch. I (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/rpp96.htm>>; see also ch. 716, § 8, 1989 Mass. Acts at 1206–07 (detailing the procedure for the development and preparation of the Regional Policy Plan). The first five-year review of the plan was initiated by the Commission in the summer of 1995. See *1996 Final Regional Policy Plan*, ch. I (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/rpp96.htm>>.

The Regional Policy Plan also encourages towns within Barnstable County to develop their own Local Comprehensive Plans (“LCPs”) for development, and provides a framework to ensure that the LCPs are consistent with the Cape Cod Commission Act and the policies and objectives outlined within the Regional Policy Plan. See ch. 716, § 9, 1989 Mass. Acts at 1207–09. The Regional Policy Plan also identifies certain areas on Cape Cod that are particularly sensitive to development and in need of special protection as Districts of Critical Planning Concern. See *id.* §§ 10–11, at 1209–14.

¹¹ See, e.g., ch. 716, § 3(a), 1989 Mass. Acts at 1199 (establishing the Commission as an agency within the structure of the Barnstable county government); *id.* § 6(a), at 1204 (providing for adoption of the Commission’s regulations as ordinances); *id.* § 7(a), at 1205 (providing for adoption of regional policy plans as ordinances). The procedure for the adoption of ordinances is set forth in the Barnstable County Home Rule Charter, ch. 163, 1988 Mass. Acts 318.

¹² See *1996 Final Regional Policy Plan*, ch. II, § 2.5.1 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>.

¹³ ch. 716, § 2(h), 1989 Mass. Acts at 1197.

¹⁴ See *1996 Final Regional Policy Plan*, ch. II, § 2.5.1.4 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>; see also ch. 716, §§ 11–12, 1989 Mass. Acts at 1211–18. Generally, the Commission must approve a DRI (and therefore allow the relevant municipality to grant a permit for the project) if: (1) the

The current Cape Cod Regional Policy Plan requires that a proposed DRI include a certain percentage of the project site as open space¹⁵ or obtain equivalent open space "credit[s]."¹⁶ For most developments, fifty percent of the project site must be preserved as permanent open space.¹⁷ For redevelopment projects, the pre-expansion percentage of open space on the site must be maintained,¹⁸ and developments within a "Significant Natural Resource Area" must preserve sixty-five percent of the site as permanent open space.¹⁹ These percentages can be

benefits of the project outweigh the detriments; (2) the DRI is consistent with local and regional plans; and (3) the project does not violate local by-laws or does so only in the interest of promoting the purposes of the Cape Cod Commission Act. *See id.* § 2(h), at 1197. However, "where a municipality's by-laws, ordinances, rules or regulations would be more restrictive than the conditions imposed by the commission on a development or regional impact, nothing in [the] act . . . prevent[s] the municipality from enforcing its by-laws, rules or regulations." *Id.* § 13(h), at 1220.

¹⁵ *See 1996 Final Regional Policy Plan*, ch. II, § 2.5.1.3 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>. The Plan defines "open space" as:

Land set aside and permanently restricted for conservation, agriculture or recreation purposes by a municipality, nonprofit conservation organization or land trust, homeowners association, or person. As appropriate to the site, open space may include woodlands, pasture, landscaped areas, garden or play areas, golf courses, walking and riding trails, and similar areas, but shall not include structures such as tennis courts, buildings, swimming pools, or other impervious areas. Open space may be open for public use or access to such areas may be restricted.

1996 Final Regional Policy Plan, ch. I (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/rpp96.htm>>.

¹⁶ *1996 Final Regional Policy Plan*, ch. II, § 2.5.1.3 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>. *See infra* notes 22-28 and accompanying text.

¹⁷ *See 1996 Final Regional Policy Plan*, ch. II, § 2.5.1 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>.

¹⁸ *See id.* at ch. II, § 2.5.1.4. The plan defines "redevelopment" as:

The reconstruction, reuse or change in use of any developed property, including but not limited to the following: any increase in the intensity of use of already developed land, such as an increase in the number of dwelling units in a structure or change to a commercial or industrial use from a less intensive use; enlargement of a structure; additions to usable interior floor area within residential, commercial and industrial buildings; and the conversion of a seasonal use or dwelling to year-round use.

1996 Final Regional Policy Plan, ch. I (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/rpp96.htm>>.

¹⁹ *See 1996 Final Regional Policy Plan*, ch. II, § 2.5.1.3 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>. "Significant Natural Resource Area[s]" are mapped by the Commission and include "wellhead protection areas,

modified, at the option of the developer, through the use of a formula that encourages certain types of open space.²⁰ For example, under the formula the percentage of open space is reduced if the open space is made accessible to the public for recreation.²¹

Developers have several options for meeting the Commission's DRI open space requirement.²² Depending upon the resources present on the project site, all or most of the open space may be provided on-site.²³ Alternatively, in some circumstances, equivalent open space can be provided off-site, or the developer can make a cash contribution to a local land trust or a municipality for open space acquisition.²⁴ The off-site open space must be in the same town and may be limited to the same watershed or the same quality habitat as the project site.²⁵

Developers choosing to meet the open space requirement on-site have further options.²⁶ Depending upon the present state of the project site, the Commission accepts as open space natural and undisturbed land for watershed and habitat protection, golf courses, and land for other private and public recreational use, farmland, and land dedicated to landscaped and natural buffer areas.²⁷ On-site open space must be at least fifty percent undeveloped.²⁸

designated potential public water supply areas, rare species habitat, priority natural communities, wetlands, critical upland areas, unfragmented forest habitat, and land within 350 feet of vernal pools and 300 feet of ponds." *1996 Final Regional Policy Plan*, ch. I (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/rp96.htm>>. Furthermore, both developments and redevelopments within significant natural resource areas must be "clustered away from sensitive resources and maintain a continuous corridor to preserve interior wildlife habitat." *1996 Final Regional Policy Plan*, ch. II, § 2.5.1.1 (visited July 26, 1999) <<http://www.capecodcommission.org/rpp/open.htm>>.

²⁰ See *id.* at ch. II, §2.5.1.3 (showing the methods for calculating point requirement and credit calculations).

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.* at ch. II, § 2.5.1.4.

²⁵ See *id.* at ch. II, § 2.5.1.3.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

II. CONSERVATION RESTRICTIONS, EASEMENTS AND LIMITATIONS ON LANDOWNER LIABILITY

The Commission accepts as permanently protected open space only property subject to restrictions that qualify as legally defensible, permanent restrictions as per the statutory requirements of chapter 184, sections 31–33 of the General Laws of Massachusetts.²⁹ These statutes allow for, inter alia, permanent preservation of open space for the purposes of conservation,³⁰ preservation,³¹ agriculture,³² watershed preservation,³³ and affordable housing,³⁴ notwithstanding the rule against perpetuities.³⁵ For any such restriction to obtain such permanent protection, however, specific criteria must be met and procedures followed.³⁶ For example, under the terms of

²⁹ MASS. ANN. LAWS. ch. 184, §§ 31–33 (Law. Co-op 1996 & Supp. 1999).

³⁰ A "conservation restriction" is defined as:

[A] right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument . . . appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to permit public recreational use, or to forbid or limit any or all (a) construction or placing of buildings [or] roads, . . . (c) removal or destruction of trees, shrubs or other vegetation, . . . (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition

Id. § 31.

³¹ A "preservation restriction" is "a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument . . . appropriate to preservation of a structure or site historically significant for its architecture, archeology or associations." *Id.*

³² An "agricultural preservation restriction" is defined as "a right . . . appropriate to retaining land or water areas predominately in their agricultural farming or forest use, to forbid or limit any . . . acts or uses detrimental to . . . agricultural use." *Id.*

³³ "[W]atershed preservation restriction[s]" serve "to protect the water supply or potential water supply of the [C]ommonwealth" of Massachusetts. *Id.*

³⁴ Affordable housing restrictions serve to secure for persons or families of low or moderate income affordable housing in the forms of rentals or ownership. *See id.*

³⁵ The statute states that no qualifying restriction:

shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes, or on account of the governmental body the charitable corporation or trust having received the right to enforce the restriction by assignment.

Id. § 32.

³⁶ *See id.* §§ 31–33.

the statute, "conservation restriction[s]" must be kept in a predominantly "natural, scenic, or open condition."³⁷ And while the restriction may be held by a governmental unit or by a charitable corporation or trust,³⁸ the statute further requires various approvals, including, in the case of a restriction held by a charitable corporation or trust, local approval by boards of selectmen or city council, approval by the entity holding the restriction including private entities, or boards of selectmen or local conservation commissions, and, in all cases, approval by the State Secretary of Environmental Affairs.³⁹ Similarly, restrictions for the purposes of watershed or agricultural protection or those providing affordable housing also require the signature of the appropriate state secretary or commissioner.⁴⁰ Not only must a restriction be recorded, but once effective, the restriction can only be modified or released through compliance with detailed statutory provisions.⁴¹ Finally, these statutes also provide for the creation of "Public Restriction Tract Indexes"—maps that not only show the existence and location of such restrictions, but also contain other relevant details regarding them.⁴²

Because statutory conservation restrictions are so broadly defined and difficult to modify, the Commission accepts various forms of restrictions, all of which ultimately provide similarly limited flexibility for development potential within the restricted

³⁷ *Id.* § 31.

³⁸ *See id.* § 32.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.* Among the steps necessary for release or modification may be a public hearing, agency approval, a two-thirds vote of both branches of the Massachusetts General Court, or a determination that the land is no longer suitable for the purpose served by the restriction. *See id.*

⁴² *See id.* § 33. This section states:

Such indexing shall indicate sufficiently for identification (a) the land subject to the restriction, (b) the name of the holder of the restriction, and (c) the place of record in the public records of the instrument imposing the restriction.... Such maps may also indicate similarly, so far as practicable, (a) any order or license issued by a governmental body entitled to be recorded or registered, (b) the approximate boundaries of any historic or architectural control district... (d) any other land which any governmental body may own in fee, or in which it may hold any other interest, and (e) such additional data as the filing governmental body may deem appropriate.

area.⁴³ These restrictions, however, must in all cases contain a description of the limitation sufficient to meet the requirements of chapter 184.⁴⁴

Easements may equally qualify as conservation restrictions,⁴⁵ and therefore the Commission often accepts easements as permanent protection for open space. Specifically, easements are used in the regulatory program to secure ways for non-motorized vehicular access, for recreational uses such as walking, bicycling and horseback riding, and to permanently protect landscaped and buffer areas to a natural resource. Easements will also play a critical role in the successful completion of the Cape Cod Pathways project, which was established to further protect open space on the Cape through the creation of a regional network of walking trails and which will require extensive access across private property.⁴⁶

Through its Pathways Project, Barnstable County intends to link walking trails through all fifteen towns from Provincetown to Bourne with additional spurs leading deep into various communities along the way.⁴⁷ Logistically, the project has been developed as follows.⁴⁸ First, the Commission's Geographic

⁴³ For example, in limited instances the Commission accepts deed restrictions to preserve open space, and although in Massachusetts deed restrictions ordinarily expire in thirty years unless re-recorded, restrictions qualifying under section 32 are exempt from this rule. See MASS. ANN. LAWS. ch. 184, § 23 (Law. Co-op 1996).

Furthermore, it is worth noting that chapter 184, section 31 of the General Laws of Massachusetts—the provision defining the term “conservation restriction”—does not distinguish among the various forms of protection that will qualify as a conservation restriction. See *id.* § 31.

⁴⁴ See *id.* § 31.

⁴⁵ See *id.*

⁴⁶ The Commission notes that although it intends to use existing protected land to establish the trail network “[w]herever feasible,” cooperative work with private landowners will be necessary to successfully establish and complete the network. *Cape Cod Pathways: Questions & Answers* (visited Oct. 14, 1999) <<http://www.capecodcommission.org/pwayfaq.htm>>. The importance of the Commission's successful procurement of easements is heightened in light of the fact that the Commission plans no land takings from private landowners. See *id.*

⁴⁷ See *id.*

⁴⁸ Administratively and financially, the project is seemingly far more complicated. While the Commission provides staff coordination, an advisory committee oversees the project. See *id.* Technical assistance is provided by the National Park Service Rivers, Trails and Conservation Assistance Program. See *id.* To finance the program, grants have been obtained from the Dupont Greenways Grant Program, the Massachusetts Department of Environmental Management and the Jessie B. Cox Charitable Trust. See *id.* The project is also eligible for state Open

Information System's ("GIS") mapping capabilities were used to identify existing public lands and develop a framework for a regional trail network.⁴⁹ Once the framework of public lands was identified and mapped,⁵⁰ the Commission, through the further use of GIS technology, assisted in identifying ownership of the privately owned parcels that are integral to linking the regional trail system.⁵¹ The county then worked (and continues to work) closely with, inter alia, towns, local open space committees and land trusts, and the Compact of Cape Cod Conservation Trusts in identifying and securing access to both public and private parcels.⁵² In the case of public parcels, easements are often the only available tool to secure public access.⁵³ As Pathways planners focus on the privately owned parcels that will provide the most vital links between publicly owned trails, successful completion of the project greatly depends upon the procurement of easements.⁵⁴

Critical to obtaining such private landowner permission for public recreational uses, whether in the form of easements or otherwise, is chapter 21, section 17C, of the General Laws of Massachusetts which expressly limits the liability of landowners permitting recreational use of their land by the public free of

Space Bond funds. *See id.* Additionally, "[s]ubstantial volunteer assistance has also been provided." *Id.*

⁴⁹ *See id.*

⁵⁰ Although the GIS system was uniquely useful in identifying lands available for the network, ultimately "[d]ecisions about the location of the trails are made by landowners and land managers in cooperation with town officials and the Cape Cod Commission." *Id.*

⁵¹ *See id.* Because the project is ongoing, the Commission and its GIS technology continue to provide this invaluable service. *See id.* As of early 1999, nearly 50 miles of the trail were complete. *See id.*

⁵² *See id.* (enumerating a complete list of supporters of the project).

⁵³ Leases and outright acquisitions of private lands are also employed to secure access. *See id.* However, their expense and lack of permanence often serve to thwart their utility. *See infra* Part III (discussing the role of land acquisitions in open space protection).

⁵⁴ The procurement of easements is also facilitated by the Cape Cod Open Space Land Acquisition Program and its Land Bank Fund which expressly provides funding for, inter alia, the purchasing of easements for trail creation. *See An Act Relative to the Establishment of the Cape Cod Open Space Land Acquisition Program ("The Land Bank Act")* § 3 (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/act.htm>>. *See infra* notes 56-61 and accompanying text (discussing extensively the land acquisition program and the fund).

charge.⁵⁵ Landowners are thus shielded from suit for injury incurred by the public in the easement area, so long as they do not charge admission to enter or use the property.⁵⁶

III. PURCHASING FEE INTERESTS IN LAND

Perhaps the most obvious method available to Cape Codders to protect their open space is to outright purchase it and thereby stave off any potential development. To this end, Cape Cod voters approved in 1998 the Cape Cod Open Space Land Acquisition Program, which included the establishment of the Cape Cod Land Bank Fund.⁵⁷ The purpose of both the fund and the program is to acquire fee interests and other real property interests in open spaces.⁵⁸ And perhaps most indicative of Cape

⁵⁵ MASS. ANN. LAWS. ch. 21, § 17C (Law. Co-op 1996 & Supp 1999). More specifically, landowners are shielded from liability for injuries to both person or property insofar as the damage does not stem from "willful, wanton, or reckless conduct by such person." *Id.*

⁵⁶ *See id.* § 17C(b). Although the imposition of a mandatory admission fee will negate the protection afforded by this statute, as of 1991 by amendment landowners may request voluntary contributions for public use of their land without loss of the statutory protection. *See id.*

It is also worth noting that this statute, when read in conjunction with the Massachusetts Tort Claim Act, MASS. ANN. LAWS. ch. 258, § 2 (Law. Co-op 1996), which provides that governmental entities are to be liable "in the same manner and to the same extent as a private individual under like circumstances," has been held to extend this limitation on liability to municipalities. *See Anderson v. City of Springfield*, 549 N.E.2d 1127, 1128 (Mass. 1990) (holding a municipality protected from liability for injuries allegedly sustained as a result of a defect in home plate on a softball diamond in a public park); *see also Catanzarite v. City of Springfield*, 592 N.E.2d 752, 752-53 (Mass. App. Ct. 1992) (interpreting the statute's use of the term "recreation" broadly).

⁵⁷ The Cape Cod Open Space Land Acquisition Program was enacted by the state legislature on August 11, 1998 subject to the "approval by a majority of all votes cast in each town." *An Act Relative to the Establishment of the Cape Cod Open Space Land Acquisition Program ("The Land Bank Act")* § 12 (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/act.htm>>. So although each town was free to approve or reject its participation in the program, every town on Cape Cod approved its participation by way of a referendum placed on the ballot in November 1998. *See Cape Cod Land Bank Questions and Answers* (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/QA.htm>>.

⁵⁸ It should be noted that the fund purchases are not limited to fee interests, as the Land Bank Act authorizes the purchase of "[a]ny real property interest" and expressly includes the purchase of "easements for trails." *An Act Relative to the Establishment of the Cape Cod Open Space Land Acquisition Program ("The Land Bank Act")* § 3 (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/act.htm>>. *See supra* notes 44-55 and accompanying text (discussing the role of easements in protecting open space on Cape Cod).

Codders support for open space protection is their support of the program in light of the fact that money for the Land Bank Fund will come from an additional three percent surcharge on real estate property tax bills in each community.⁵⁹ These funds are collected and then expended by the town in which they are raised.⁶⁰ Ultimately, these funds may be used for a wide variety

The idea of fee acquisitions for the purpose of open space preservation is not novel. Local land trusts and their umbrella organization, the Compact for Cape Cod Conservation Trusts, have worked diligently for many years to acquire fee simple and other interests in land to preserve the special places that make Cape Cod unique. However many recent acquisitions enabled by the Land Bank Fund "probably would have never come about without passage of the land bank legislation." Bruce Mohl, *Cape Towns Dip Into Land Bank; Questions Remain on What's 'Open Space,'* BOSTON GLOBE, June 13, 1999, at A1, available in LEXIS, News Library, Bglobe File.

⁵⁹ See *An Act Relative to the Establishment of the Cape Cod Open Space Land Acquisition Program ("The Land Bank Act")* § 6 (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/act.htm>>. Although funding for the program will not begin until the fiscal year 2000, towns are free to make acquisitions based on anticipated revenue. See *id.* § 7; *Cape Cod Land Bank Questions and Answers* (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/QA.htm>>. Funding for these early purchases may come from the issuance of general obligation bonds or notes. See *An Act Relative to the Establishment of the Cape Cod Open Space Land Acquisition Program ("The Land Bank Act")* § 7 (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/act.htm>>. In the first six months of 1999, eight of Cape Cod's fifteen towns had already authorized expenditures totaling \$15.4 million for the purchase of 627 acres. See Mohl, *supra* note 58, at A1. The largest purchase to date amply demonstrates the potential effectiveness of the Land Bank Fund. In Sandwich, Massachusetts, just as a developer was about to purchase 218 acres of wooded property for the construction of 75 homes, the town stepped in and expended \$6 million dollars to prevent the development. See *id.*

Furthermore, the legislation also provides for \$15 million in state matching funds and donations which may be accepted into the Land Bank Fund. See *Cape Cod Land Bank Questions and Answers* (visited Oct. 14 1999) <<http://www.capecodcommission.org/landbank/QA.htm>>.

⁶⁰ See *Cape Cod Land Bank Questions and Answers* (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/QA.htm>>. "[T]he beauty of this," said Representative Eric T. Turkington, a Democrat from Falmouth, [is that] "[i]t allows 15 towns to do it 15 different ways." Mohl, *supra* note 58, at A1.

Each acquisition of interests in land must be approved by a municipality's town meeting or, in the case of the Town of Barnstable, the town council. See *Cape Cod Land Bank Questions and Answers* (visited Oct. 14 1999) <<http://www.capecodcommission.org/landbank/QA.htm>>. Ordinarily, a simple majority will constitute approval, however in the case of an acquisition involving borrowing, a 2/3 vote is required. See *id.*

Interestingly, the statute does not require that the funds be spent on acquisitions of land within the town in which they were collected. See *id.* In the case of such extra-township purchases, the acquired land becomes owned and managed by the town that acquires it. See *id.*

of purposes, including the purchase of open space for watershed protection, natural resource protection, preservation of scenic and agricultural resources, and recreational uses.⁶¹

CONCLUSION

As open space on Cape Cod continues to disappear at an alarming rate, the Cape faces the loss of one of its strongest economic and aesthetic assets—its rural character. In order to permanently protect the remaining open spaces that give Cape Cod its unique character and thereby preserve the rich heritage of open space resources on Cape Cod, it will take the efforts of many. And while the steady acquisition of open space through restrictions, easements, and fee acquisitions will undoubtedly help to preserve the character, environment and, ultimately, the economy of Cape Cod, these methods represent only some of the tools which will be necessary to meet the open space challenge.

⁶¹ See *An Act Relative to the Establishment of the Cape Cod Open Space Land Acquisition Program* ("The Land Bank Act") § 3 (visited Oct. 14, 1999) <<http://www.capecodcommission.org/landbank/act.htm>>. The acquisitions already made with Land Bank funds amply demonstrate the broad spectrum of purposes served by the statute. For example, Yarmouth, Massachusetts, acquired a 2-acre parcel slated to be developed into a pocket park with a boardwalk on a heavily developed route situated between a grocery store and a motel and across the street from a gas station. See Mohl, *supra* note 58, at A1. Harwich, Massachusetts, even considered the purchase of a golf course which would have been legal under the statute's definition of recreational use. See *id.*