PERPETUITY: The Creed of Land Conservation

or,

"Conservationists have to win again and again"

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Conservation land isn't free land. It is land that has been set free. If it is to have meaning at all as protected open space, land must be immune from pressures to "do something" with it. In our increasingly cramped and crowded Southeastern Massachusetts, where there is less and less land up for grabs, these threats will come from all angles and be relentless.

We will spend the future fighting rearguard actions to fend off challenges to our hard-won conservation land. We will spend the 21st Century trying to preserve that which we thought we had preserved in the past century. Indeed, the biggest threat to open space in this century will not be from commercial developers, but from ourselves and local leaders searching for real estate-based solutions to social problems. We need to save land not only from residential subdivisions, but from <u>everything</u>.

In 1971 David Brower, long-time leader of the Sierra Club, said, "Conservationists have to win again and again and again. The enemy only has to win once. We can't win. We can only get a stay of execution." What he meant was that our job is not done when we stop a subdivision or even buy the land for conservation. We have to preserve the land from all sorts of good intentions to devote it to other uses. And here I am speaking of both land owned by the government and land owned by non-profit conservation groups.

Let's look at public open space first. Article 97 of the State Constitution requires a two-thirds vote of town meeting and the state legislature to approve any disposition of publicly-owned open space. Sadly, that constitutional duty is only a paper-tiger. Bills to convert open space are passed routinely and unanimously in the House and Senate. Already, on Cape Cod there is a fire station and softball field that sit on land acquired for conservation years ago. A study of bills passed by the state legislature between 2005-2008 found that 61% of all conversion

approvals involved parks and conservation land being directed to other uses. In 2009, statewide, 319 acres of public conservation land were converted to other uses, such as senior centers, affordable housing, water towers, and other "worthy" municipal purposes.

Threats in the guise of "opportunities" abound. There is no end to the list of beneficial community needs that conservation land is looked at to solve. New ones arise all the time, particularly from those who think they need a subsidy in the form of "free, unused" (read: conservation) land to make their enterprise work. It has regularly come from proponents of wellfields and ballfields. Now, it is farmers and alternative energy advocates. A farmer suggests "using conservation land for sustainable farming" to encourage the locally-grown food movement. Three Cape towns voted in the past two years to site municipal wind turbines on land acquired as open space habitat and wellfield protection. (Interestingly, all three proposals have since died on the vine for reasons having to do with turbine opposition but not open space protection.) A promoter of solar gardens is pitching land trusts. An acre of meadow would be devoted to solar panels. And wait until you see the pressure coming from sewer planners on the Cape. They will plan sewers and package treatment plants in the most densely-developed parts of town, precisely where there is limited open space to site their pumps and plants. Land trusts might own the only spot of vacant land. Already, one land trust has agreed to place a sewer pump station on its property.

Let's hear from David Brower again: "All a conservation group can do is defer something. There's no such thing as a permanent victory. After we win a battle, the wilderness is still there, and still vulnerable. When a conservation group *loses* a battle, the wilderness is dead."

By Cape Cod standards, there is little true wilderness left. What we have is what has been entrusted to us, small parcels often scattered here and there throughout a community, little breathing spaces among the subdivisions. The average land trust parcel is five acres in size. But as with Boston Common, the first bit of green around which a city has grown up, these little open spaces become more precious each year by their increasing rarity. Local land trusts have participated in the protection of more than 8,000 acres of Cape Cod open space since 1962 when the Chatham land trust, the Cape's first, was formed.

Owing to the anxiety caused by rapid growth, Cape Cod voters have repeatedly been strong supporters of the need to buy and protect open space. Between 1999 and 2007, Cape taxpayers in all 15 towns bought 4,450 acres through the Land Bank program, $213 million dollars worth of property. This was a heavy lift, as they say, but we know that without our open spaces there is no Cape Cod. Keeping faith with the voters means keeping these lands free from other uses, no matter how worthy. Otherwise, this Golden Age of Open Space Protection would be in danger of becoming the next cynical "bait and switch" program. *Land Bank* meant a funding source for open space, not a bank of land to make withdrawals from.

So, what do we do, to ensure that the land we love and that we have all fought so hard to protect, will remain open and wild? Let's take up public lands initially.

First, we need to compile the best, most exhaustive inventories we can of all protected open space. Several Cape communities, including Harwich, Eastham, Brewster and Falmouth, have recently embarked on comprehensive analyses of all parcels that purport to be "Town conservation land." I am participating in one of these studies and it is frankly shocking to see the variety of anomalies in the taking in of land for conservation by the town: deeds without a land use purpose, town meeting votes not recorded, state grants not indexed to deeds, custody undetermined, no formal acceptances. I know of three instances in the past twelve years where a Cape town has had to "buy back" lands it thought it had preserved, owing to title problems. The Hanover, Mass. case in 2005 is instructive: the town sold a parcel for a private home that town meeting had dedicated to conservation, but had neglected to record the vote in the Registry of Deeds. We have learned the legal ways to clean up these anomalies, but first you need to know which parcels have problems.

Second, map the hell out of everything. If you think it is conservation land, but it is not mapped, then it is not likely to exist in practice. The State and Barnstable County have made great strides in the past decade in sorting out the "protected open space" data layer for GIS, the computerized mapping systems, but they are still flawed. Don't use short cuts like assessors codes solely to collect your data. Don't forget that conservation restrictions don't show up in lists of assessors' codes. Go through the town map with a fine-tooth comb, making sure protected open space is all there on the map and that what is there is accurate.

Third, support the "No-Net-Loss of Open Space" legislation, currently pending in the state legislature. Now known as the Public Lands Protection Act, it would set up a more rigorous framework for decisionmaking when towns and state agencies come calling to convert public open space to other uses.

Fourth, consider the use of conservation restrictions as a protective overlay for town open space. The Community Preservation Act calls for towns to place permanent restrictions on all conservation land acquired through that funding source, but the implementation of this requirement is variable, depending on the town and its legal advisors who report to Selectmen. A conservation restriction held by a land trust over town land adds a great political and legal obstacle to conversion to other uses for the land because not even the legislature can override the contractual restriction. There is a legislative path to add restrictions retroactively to older town conservation land, though it is cumbersome.

Now, let's consider non-profit land trust land.

I labored in this vineyard for a long time before coming to fully understand that ownership of land by a land trust does not protect the land. There is a moral argument to be sure, but legally an unrestricted parcel owned by a land trust can be lost through sale, condemnation, or court award for liability damages. Before the IRS changed the rules in 1986, property came into land trusts with deed restrictions requiring the land to stay in a natural state. Now, that is rare, owing to tax deduction considerations. So, if we want to keep faith with our land donors, our members and the public, we need to apply a fix after-the-fact. As our tax guru Steve Small says, "Never trust a piece of unrestricted land." That goes for land trust land as well as for town land or private property. Unless we are willing to bind up a property as much as we legally can, how can we say we have truly preserved it? Indeed, it is instructive to note that the State does not recognize regular land trust property as preserved because it has no Article 97 constitutional protections. It is still a convertible asset, granted that it is owned by a group that has no motivation to profit off of it.

Fortunately, we have legal tools to truly preserve land trust parcels. Land trusts can and sometimes do grant conservation restrictions on their properties to their town, the state or other land trusts. We have done that many times here on the Cape, often as part of a project

partnership with a town, leveraging monies by adding to protected acreage. The Compact and the Orenda Wildlife Land Trust have pioneered the use of charitable trusts as an elegant alterative to windy and unwieldy conservation restrictions. All but two Cape land trusts (and Sippican Land Trust in Marion) have added charitable trust language to their deeds, a simple but powerful statement: "The premises shall be held in an open and natural condition exclusively for conservation purposes forever." The intentional use of the word "forever" legally creates the perpetual character of the charitable trust. If it is absent, the clause merely indicates a desire, not a fact.

Remember that most land trusts got started 30-40 years ago as an alternative for landowners who did not trust their land to the political whims of their town government. Our land trusts have a duty first, last, and always to the land entrusted to them, not to other pressing social needs. Land trusts are intended to be exempt from political pressures. So too is the property of land trusts to be exempted from conversion pressures. As the Land Trust Alliance says in its recent Strategic Plan, "When landowners donate land or an easement, they expect land trusts to protect that land for all time." We need to take active steps to ensure that our conservation land has the type of full-metal jacket protection everyone expects of us. Otherwise, our land trusts may be no better than our quirky, distracted town halls.

Ultimately, though, there is no legislation strong enough to prevent conservation land from being diverted to other uses. As President Theodore Roosevelt told John Muir in 1907, "I will do everything in my power to protect not only the Yosemite, which we have already protected, but other similar great natural beauties of this country; but you must remember that it is out of the question permanently to protect them unless we have a certain degree of friendliness toward them on the part of the people of the State…" There is only the political will of the voters and the might of the public continually to demand that our open space be left alone, for all to enjoy, for all time.

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David Brower, Sierra Club Executive Director, 1952-1969, quoted in Encounters with the Archdruid, by John McPhee, 1971.