APPENDIX A

A Primer on Growth Management Tools and Techniques

Traditional elements in the growth management process include:

- Planning, such as preparing a comprehensive plan, which may include specific small area plans such as a downtown plan or a commercial corridor plan, and specific functional elements or plans such as housing, open space, historic preservation, recreation, and transportation elements;
- Implementing regulations and strategies, such as zoning regulations, subdivision ordinances, and land acquisition programs; and
- Capital improvements planning and budgeting, and scheduling future investments in public facilities such as streets, sewer collection and transmission lines, and parks.

The growth management process can involve the following:

1. Determination of community goals, objectives, and policies;
2. Analysis of the community's existing or de facto growth policies;
3. Inventory of available growth management tools and techniques;
4. Adaptation of appropriate tools and techniques for the community;
5. Synthesis of selected tools into a system for managing growth; and
6. Continued monitoring of and refinements to the system over time.¹

The effect of implementing growth management tools and changing market conditions creates the need to reevaluate and modify the land use plan, which in turn leads to further refinements to the various growth management tools. This process varies considerably from place to place and rarely proceeds in the orderly manner intended; growth management tools are often implemented long before plans are adopted; permit decisions are made that undermine local plans.

Planning

"Land use planning" is a broad term. According to the American Planning Association:

Planning is a comprehensive, coordinated and continuing process, the purpose of which is to help public and private decision makers arrive at decisions which promote the common good of society. This process includes:

1. Identification of problems or issues;
2. Research and analysis to provide definitive understanding of such problems or issues;
3. Formulation of goals and objectives to be attained in alleviating problems or resolving issues;
4. Development and evaluation of alternative methods (plans and programs) to attain agreed-upon goals and objectives;
5. Recommendation of appropriate courses of action from among the alternatives;

¹ Continued monitoring of and refinements to the system over time.
Ideally, a local comprehensive plan is a product of this planning process. Additionally, a comprehensive plan is not static, but must be updated regularly in response to the effects of growth management strategies and changing community conditions.

A comprehensive plan should embody a community's vision of what it wants to become and how it intends to get there. This vision should serve as an overall policy guide for public and private decisions that affect community development, including the implementation of land use regulations and other growth management strategies.

In fact, however, this process rarely proceeds as rationally as intended. Zoning ordinances and other growth management strategies are often revised or implemented without the benefit of prior revision to a comprehensive plan. Permit decisions that undermine community plans and goals are common. However, the degree of inconsistency between plans and other growth management techniques varies considerably from state to state and community to community.

A representative table of contents for a plan for a small community might include the following elements:

- Description of the planning process;
- Statement of community goals, objectives, and policies;
- Inventory of the community's natural and cultural assets, and assessment of possible threats to these assets;
- Description of existing community conditions, with special focus on the downtown, principal commercial corridors, and other key areas of the community;
- Description of existing and projected land use patterns;
- Transportation and traffic circulation conditions;
- Public safety conditions and facilities;
- Housing supply, mix, and future housing demand;
- Utility service conditions and facilities (water, sewer, solid waste, and energy);
- Open space and natural resource conditions;
- Recreation conditions and facilities;
- Economic conditions and assets, and economic development and redevelopment prospects;
- Historic preservation efforts;
- Projections of how development at permitted densities will affect the community's appearance, character, natural resources, cultural assets, economic development, fiscal conditions, and public services;
- Description of environmental constraints to development; and
- Descriptions of future-capital facilities planning and budgeting.

In many states, the minimum contents of local plans are mandated by state statute. While qualitative measures of the adequacy of local plans are difficult to legislate, evaluation of the adequacy of a comprehensive plan should focus on such questions as:

- Are planning goals, objectives, and policies clearly articulated with priorities set forth?
- Are the goals, objectives, and policies internally consistent?
- Is there coordination between the various elements?
- Is the plan based upon the results of a broad and meaningful public participation process?
- If maps are included, do they clearly identify land uses and the geographic aspects of the plan? Do the maps accurately capture local geography and existing physical conditions?
- Are the economic, environmental, and public service assumptions underlying the plan clearly identified?
- Are they realistic?

**Specific Growth Management Techniques**

Planning is but one of the numerous local tools available to manage growth. The preparation and adoption of a comprehensive plan is, in fact, only the beginning of the growth management process. Plans are not self-executing, they can be implemented only through land use regulations, capital facilities spending, land...
acquisition, and other strategies. These growth management techniques can be grouped into four basic categories:

- Land use regulations;
- Public spending and taxing policies;
- Land acquisition; and
- Private voluntary preservation and development techniques.

Although these techniques commonly appear as discrete options, most successful growth management programs, in fact, combine several separate techniques. Successful communities continually experiment with adapting various complementary strategies and techniques to meet their particular needs, which are constantly evolving.

**LAND USE REGULATIONS**

The authority for local land use planning and regulation is derived from the "police power" that authorizes states to enact laws to protect the public health, safety, and general welfare. States have delegated substantial portions of this broad regulatory authority to local governments. The most important and promising regulatory techniques for managing growth include zoning (in its numerous permutations); height limits; cluster zoning and planned unit development; subdivision regulations; exactions; adequate public facilities ordinances; transfer of development rights; and moratoria.

**Zoning**

Zoning is the most commonly used local device for regulating the use of land. Initially developed in the early part of this century basically to insulate residential neighborhoods from the negative impacts of industrial development, the essence of the traditional "Euclidian" zoning ordinance remains the physical separation of potentially incompatible land uses.* Zoning regulates the use of land and structures—for example, commercial versus residential—and the dimensional characteristics of permitted uses, such as minimum lot sizes, the placement of structures on lots (i.e., minimum setbacks from street or property lines), the density of development, and the maximum height of buildings. In addition, zoning ordinances increasingly regulate land use aspects of development such as landscaping, architectural design and features, signage, traffic circulation, and storm-water management.

Zoning ordinances consist of a text and a zoning map. The text describes permitted uses in the various districts, establishes standards for uses within those districts, and provides for administration and enforcement. The map divides the jurisdiction into districts. Changes to a zoning ordinance text or map occur through an amendment process that is initiated either by the local government, a landowner, or, in some cases, by local residents.

Conventional zoning promotes strict segregation of uses and predictable dimensional and density regulations. From this orderly and static pattern, land use regulation has evolved into a system of numerous techniques designed to balance the predictability of conventional zoning with administrative flexibility, discretionary review of individual developments, and specialized techniques to meet particular local needs.

**Special Permits.** Special permits (also referred to as conditional uses or special exceptions) are the most widely used device allowing individual review and approval of proposed developments that require individual scrutiny to avoid or alleviate particular problems. In most zoning ordinances, uses are permitted within a district either "by right," with no individual discretionary review of the proposed development, or by special permit. In which case a zoning board reviews individual proposals in accordance with standards set forth in the ordinance. The special permit is available if the proposal adequately complies with the provisions in the ordinance, which typically deal with traffic and other impacts of the proposal. A special permit should be distinguished from a variance, which is an individual exception from zoning requirements. Variances typically are allowed when the impact of a zoning requirement would impose an undue hardship on a landowner due to unique conditions of the individual parcel. In many cases, variances may be granted from dimensional standards, but not use limitations.

**Floating Zones.** Floating zones serve the same purpose as special permits, but provide the locality with more discretion. The standards for a floating zone are set forth in the text of a zoning ordinance, but the districts are not mapped; rather the district "floats" above the community until a second, later ordinance amendment brings the zone to the ground. The second ordinance affects the floating zone to a particular par-

* So named because the zoning ordinance of the Village of Euclid, Ohio, was the subject of an early landmark decision from the U.S. Supreme Court that upheld the validity of zoning. City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
cel that meets the standards set forth in the zoning text for the district.

The floating zone technique gives a locality greater discretion over a proposed use that does a special permit or a decision on a proposed rezoning to apply the floating zone is a legislative function in most states and is rarely overturned by the courts; while a special permit application is an administrative function and must be granted if the proposed use is shown to meet the stated criteria.

**Conditional Zoning and Development Agreements.** Sometimes a landowner may seek a rezoning, but the locality is unwilling to permit the whole range of uses or densities that the proposed zoning classification would allow. Instead of denying the rezoning, the local government may wish to impose conditions on the prospective rezoning. With conditional zoning, a local government may make rezoning conditional on an applicant's acceptance of concessions or conditions that are not otherwise imposed in the proposed zoning district. The applicant makes a unilateral commitment to these concessions in exchange for the rezoning; however, the local government makes no reciprocal obligation to rezone the property. Many states have upheld the use of conditional zoning, while several others have rejected its use.

Contract zoning also permits a locality to impose individual conditions on a rezoning but—unlike conditional zoning—the municipality, in exchange, enters into an enforceable agreement to grant the desired zone change. In many states, contract zoning has been held invalid, because the locality bargained away its police power without state enabling legislation to do so.

A growing number of states (including California, Maine, Hawaii and others) have enacted legislation authorizing contract zoning or "development agreements" to regulate large-scale development. Development agreements typically are enforceable agreements between a developer and a local government, which lay out precisely the land uses and densities a developer may place on a large parcel and the public benefits the developer must provide as a condition of approval. The use of development agreements allows a single "master" approval for a large-scale, phased development. This approach provides developers and leading institutions the certainty of knowing early in the development process the amount and type of development authorized. Development agreements often also provide that the developer's right to complete all phases of a project rests earlier than it would in the absence of the agreement, which benefits developers when arranging financing. In exchange for this regulatory certainty, the local government may negotiate with the developer for a better package of public benefits than it could otherwise obtain.

**Bonus or Incentive Zoning.** Bonus or incentive zoning allows a developer to exceed a zoning ordinance's dimensional limitations if the developer agrees to fulfill conditions specified in the ordinance. The classic example is when an ordinance authorizes a developer to exceed height limits by a specified amount in exchange for providing open spaces or plazas adjacent to the building.

**Overlay Zones.** This zoning technique differs from conventional mapped zoning districts. An overlay zone applies a common set of regulations and standards to a designated area that may cut across several different preexisting conventional zoning districts. These regulations and standards apply in addition to those of the underlying zoning district. Two common examples of overlay zones are the flood zones established under the National Flood Insurance Program and many historic districts.

Flood zones are often described in local zoning ordinances, but are not initially mapped on the zoning map. Rather, the ordinance provides that the flood district regulations apply to areas within the 100-year floodplain, as designated in federal Flood Insurance Rate Map. An overlay flood zone may allow the uses and densities permitted in the underlying zone, but imposes additional construction and flood-proofing requirements.

**Overlay historic districts often permit the uses and densities permitted in the underlying zone, but require that structures within the historic district be built or maintained in conformance with regulations to ensure historic compatibility.**

**Large Lot Zoning.** Large lot zoning or minimum lot size zoning—requiring that lots in a residential zone be at least, for example, 5 acres and in some cases as much as or more than 40 acres—is often used to reduce the density of residential development. The environmental and economic effects of large lot zoning vary with the specific situation. When used judiciously in areas with significant development constraints, large minimum lot size zoning can effectively reduce the negative impacts of development on sensitive landscapes or natural resources. To work effectively, large lot zoning must usually be used in combination with regulations that accommodate market demand in other more suitable areas. Overreliance on large lot zoning, however, often encourages land consuming and inefficient low-density sprawl.

**Agricultural Zoning.** Agricultural zoning establishes minimum parcel sizes large enough to ensure...
that each parcel can sustain a viable agricultural operation. Some districts require minimum lot sizes of as much as 160 acres. Agricultural districts often also prohibit land uses that are incompatible with agriculture. (This technique is discussed in chapter 7, Agricultural Land.)

Zoning Based on Performance Standards. Zoning regulations often use performance standards to regulate development based on the permissible effects or impacts of a proposed use rather than simply the proposed use itself. The complexity and cost of calculation of these standards vary widely depending on the objectives of the program and the capacity of the locality to administer a complex program. Performance zoning may supplement or replace traditional zoning districts and dimensional standards. Under performance zoning, proposed uses whose impacts would exceed specified standards are prohibited.

Performance standards are widely used to regulate noise, dust, vibration, and other impacts of industrial zones, and are increasingly used to regulate environmental impacts, such as the timing of storm-water runoff resulting from development.

Point Systems. Some communities use performance standards in combination with point systems. A proposed project must amass a minimum number of points in order to receive a permit. As opposed to the self-executing nature of conventional zoning, where a landowner can determine if a project is permissible by reading the zoning map and text, point systems require case-by-case review to determine if a specific land use is permissible. Permissible uses and densities of a parcel are determined at the time of permit application, with the applicant providing documentation that the proposal will comply with the various standards. Breckenridge, Colorado, has implemented a well-known development point system.

Height Limits
Locallty limit building heights either downtown or by zoning district. In addition, height restrictions are sometimes used in conjunction with site-specific standards to prohibit structures that would be visible from scenic points or would block scenic views. (This technique is discussed in chapter 4.)

Cluster Zoning and Planned Unit Development
"Cluster zoning" (also known as "open space zoning") and the "planned unit development" (PUD) describe land use control devices that allow flexible design and clustering of development in higher densities on the most appropriate portion of a parcel in order to provide increased open space elsewhere on the parcel. These techniques, which exist in many forms, have become increasingly popular as more communities realize that conventional zoning and subdivision regulations often result in unsightly low-density sprawl with no intervening open space. These alternative clustering techniques can offer several benefits relative to conventional zoning, including:

- Limiting encroachment of development in and adjacent to environmentally sensitive areas;
- Reducing the amount of open land disturbed by development, thereby encouraging the preservation of agricultural lands, woodlands, and open landscapes;
- Reducing the amount of roads and utility lines needed for new development, which can reduce the cost of housing and public services.

Cluster development techniques typically do not allow increased overall development density, but simply rearrange development to preserve open land and improve site design. The concept can be demonstrated by a simple example of cluster development: a developer has 100 acres in an area zoned for one-half-acre residential lots, which could be developed into around 200 buildable lots, using up the entire 100 acres. Under a cluster zoning program, the developer could cluster the 200 units on 50 acres, for example, and permanently dedicate 50 acres of open space for public use.

A recent publication of the Center for Rural Massachusetts, a group that works with the state of Vermont, shows a series of graphics illustrating how cluster development can improve the landscape relative to development under conventional zoning regulations.

Subdivision Regulations
Division regulations are widely used to regulate the conversion of land into building lots. In rural communities, they are often the principal or only means by which a community regulates residential development. Subdivision regulations were originally enacted primarily to facilitate land transfer by providing a method for landowners to divide a subdivision plat with numbered lots, rather than with the traditional metes and bounds lot descriptions. In the 1920s and 1930s, cities began to use these regulations to manage the quality of streets, storm drainage systems, lot layout, and the adequacy of utility services. Typically, subdivi-
vision ordinances articulate design standards and ma-
terials for streets and utility systems, site topography,
sidewalks, curbs and gutters, storm-water manage-
ment, landscaping, open space, and recreational facili-
ties. More recently, subdivision regulations have been
widely used not only to improve the engineering and
physical design of on-site public improvements, but
also to require the provision of dedicated recreational
lands, off-site road improvements, and other public
services.

**Development Exactions and Impact Fees**

"Development exaction" is a generic term that de-
scribes a variety of mechanisms by which commu-
nities require dedication of land or facilities or
payment of a fee in lieu of land or facilities. Exactions are
referred to by many names, including "dedica-
tions," "linkage requirements," "mandatory titling,"
and "mitigation requirements." Exactions are either ex-
plicitly mandated in development regulations or im-
posed informally on a case-by-case basis in rezoning
or special permit negotiations. Impact fees require
a developer to pay an amount of money determined
by a uniform formula rather than by negotiation or
tradition.

Traditionally, exactions have required subdivision
developers to provide on-site infrastructure such as
roads, parks, sewer lines, and drainage facilities. Real-
izing the need to require certain on-site improvements
such as parks might be inefficient or inequitable, many
communities began to require developers to pay fees
in lieu of improvements in certain situations. These
fees are then earmarked for providing those facilities
to serve the development.

Recently, municipalities have begun imposing im-
pact fees to finance an expanding variety of public
facilities and services in virtually all regulatory con-
texts. Martin County, Florida, for example, has enacted
a Beach Impact Fee Ordinance, which requires
developers to contribute to a fund, based upon the
projected recreational demand resulting from the pro-
posed development, to purchase and maintain public
beachfront property.

Financially strapped large cities have been most
aggressive in imposing development exactions, requir-
ing developers of large projects to pay impact or link-
age fees for numerous public services. San Francisco,
for example, requires developers of large-scale down-
town projects to pay impact fees for affordable hous-
ing, transit, public parks, and child care. Boston
imposes fees for both housing and job training. In
Honolulu, developers of large projects commonly
must pay for off-site sewer improvements, park land
and facilities, on-site and off-site road and transporta-
tion system improvements, police and fire protection
facilities, school sites and buildings, on-site or off-site
affordable housing, water supply infrastructure (per-
haps including reservoirs), and employment programs
for area residents. San Diego finances capital facilities
for suburban development through "flexible benefits
assessments," which combine impact fees and special
assessments. These fees finance parks, roads, li-
braries, schools, utilities, drainage systems, transit
service, and police and fire protection. (The legal limi-
tations on the use of exactions and impact fees are
discussed in chapter 2.)

**Adequate Public Facilities Ordinances**

This type of ordinance conditions development ap-
proval upon a finding that adequate public facilities
are available to serve proposed development. The or-
dinance sets quantitative standards for required pub-
lic service levels and links development approval to
the ability of public services that serve the proposed
development to comply with these standards. The
public services that have the most significant impact
on development decisions are water, sewer, and the
traffic circulation network. Other public services
sometimes linked to development approval are storm-
water management facilities, parks and recreational
lands, emergency response time, and mass transit.
Florida requires all local governments to adopt ade-
quate public facilities standards. After the state ap-
proves a local plan and development regulations, the
local government cannot issue development permits
unless public services can be provided for the devel-
oment at the established level of service.

**Transfer of Development Rights**

Transfer of development rights (TDR) is an innova-
tive growth management technique based on the concept
that ownership of land gives the owner many rights,
each of which may be separated from the rest and
transferred to someone else. One of these separable
rights is the right to develop land. With a TDR system,
landowners are able to retain their land, but sell the
right to develop the land for use on other property.

Under a typical TDR program, a local government
awards development rights to each parcel of develop-
able land in the community or in selected districts,
based on the land's acreage or value. Persons can then
sell their development rights on the open market if
they do not want to develop their property or are pro-
hibited by regulation from developing the property at
a desired density. Land from which development rights
have been sold cannot be developed.

There are many possible variations on TDR, but a
system can work in the following way. Suppose A
owns four acres of land that has been allocated two
development rights. If local regulations require A to
have one right per acre in order to fully develop the land. A has three choices. A can develop just two acres and extend all the development potential for the parcel; A can buy two development rights on the market and develop the entire four acres; or A can sell the two rights at a market-development price and preserve any development of the property. If the land is in an agricultural or historic district, regulations may restrict development of the parcel, in which case A can only develop at a rate not in excess of the balance of the development rights for use on another site.

TDR can reduce substantially the value shifts and economic inequities of restrictive zoning. For example, it can allow the market to compensate owners whose land cannot be developed because of its environmental, scenic, or historic significance. By selling development rights, a landowner can receive profit from property appreciation without developing the parcel.

TDR requires a high level of staff expertise to design and administer. The novelty of the TDR concept and the sophistication required to make it work properly reduces its attractiveness and political acceptance in many communities.*

**Moratoria and Interim Development Regulations**

Moratoria and interim regulations are designed to substantially restrict development for a limited period. They can impose a complete temporary moratorium on all development or on specific types of intensive development. A moratorium can apply to zoning approvals, subdivision approvals, and building permits. Restrictive interim regulations must generally relate to one of two permissible goals. Either they must relate to planning—used to restrain development until a plan can be developed or a permanent growth management program implemented—or necessary to protect public safety, health, or the environment by preventing potentially hazardous overburdening of community facilities (such as a sewage treatment facility).

The duration of a moratorium should be specified when enacted, and should be tied to the time period necessary to develop a plan, implement a growth management program, or upgrade public facilities related to the relevant safety or environmental problem.

**LOCAL SPENDING AND TAXING POLICIES**

Although not traditionally viewed as methods of managing development, local expenditure and property taxation policies may have significant impacts on land use. Public facilities such as roads, water systems, sewers, and public transit can especially influence the level and characteristics of development in a community. A local growth management strategy is incomplete unless it accounts for these influences.

**Capital Improvements Programming**

The provision of municipal services is an important local tool for managing development. A municipal decision which is part of an extended general plan can limit the types of facilities. The provision of services is generally governed by a city's capital improvements program (CIP), a timetable in which a city indicates the timing and level of municipal services it intends to provide over a specified duration. Generally, the CIP covers a five- to ten-year period, although it may be shorter or longer depending upon the municipality’s confidence in its ability to predict future conditions.

Capital programming, by itself, influences land development decisions. By committing itself to a timetable for the expansion of municipal services, a locality influences development decisions to some extent, especially in areas where on-site sewage disposal or water supply is unusually expensive or inaccessible. A capital program may also be used effectively as part of a more comprehensive program to manage development. By properly coordinating its utility extension policy with its planning and growth management program, a community can control the direction and pace of development. Using a comprehensive plan to locate the location and type of development desired and a capital program to schedule the provision of services, a locality can inform developers when development of a particular parcel will be encouraged and the type of development that will be allowed. In addition, a municipality can regulate the pace of development to coincide with the availability of adequate public services.

**Preferential Assessment**

Most states have enacted preferential or use-value property tax assessment programs for farmland and open space land. With use-value assessment, property taxes for a parcel are based upon the value of the parcel only considering its current use, rather than its value based upon the property’s development potential. Use-value assessment can reduce the property tax assessments for lands whose market value is lower than its value for agricultural or forestry uses. Reduced property tax assessments can lessen the need to sell or develop sometimes caused by high property taxes. (These programs as they relate to agricultural resources are discussed in chapter 7.)

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* Montgomery County, Maryland, has implemented perhaps the most successful TDR program with approximately 25,000 acres preserved for farmland due to the program. The program is described in a model in chapter 1.
Special Assessments
The special assessment is the local taxation technique that has the greatest potential impact or growth management policy. A special assessment, while not technically a tax, is a method of raising revenue in which all or part of the cost of a facility is charged to the landowner who derives a special benefit from the facility. Special assessments are often used for road improvements, street lighting, water lines, and water systems. The fee is usually proportionate to the distance the facility abuts a parcel, the area of the land served by the facility or improvement, or the value added to the land served.

Improvement Districts
Special improvement districts have been created in many forms to raise revenue for traffic circulation improvements, aesthetic improvements, or other public improvements within a limited area. Landowners within a specified district are levied a special tax or assessment (sometimes through tax increment financing), which is used to make public improvements that benefit that district.

LAND ACQUISITION
Local governments enjoy broad authority under state enabling legislation to acquire real property interests, either through voluntary sale or condemnation, for any legitimate public purpose. Land acquisition is an important supplement to land use regulations as a means of managing growth and protecting critical resources. Although localities generally use land acquisition to directly control the use of the specific parcel acquired, several communities have used land acquisition to influence the community's general growth policies. For example, Boulder Colorado, has used the proceeds of local bond issues and a local sales tax to acquire a large amount of land in the foothills and farming districts surrounding the city to prevent environmentally destructive and fiscally unsound development of those areas. (This program is discussed in chapter 1.)

Local land acquisition programs are generally funded either by local property taxes, sales taxes, or real estate transfer taxes. Bond issues backed by one of these taxes are commonly used. Nantucket, Massachusetts, and Block Island, Rhode Island, for example, impose a 2 percent conveyance tax on most transfers of real estate to fund local open space acquisition programs. The federal Land and Water Conservation Fund and, more recently, state land acquisition programs have also been important revenue sources for recreational land acquisition and improvement programs.

Fee Simple Acquisition
The ownership of land is often analogized to ownership of a "bundle of rights." Including, for example, the right to control access to the land, the right to develop property, the right to mine coal from beneath the land, the right to hunt on the land, and so forth. (Each of these is subject to reasonable police power regulations.) When one person owns all the rights associated with a parcel (the entire bundle), this person is said to own the land "in fee simple"; however, these rights can be owned separately, in which case an owner is said to own a "less-than-fee interest."

Local governments generally acquire fee simple ownership for parks and other property needed for municipal use, such as for schools or libraries. Fee simple acquisition provides the greatest level of control over the use of a parcel; however, it is also usually the most expensive method of land acquisition. In addition to the substantial acquisition costs, fee simple acquisition removes property entirely from local tax rolls and can result in significant maintenance costs. For these reasons, localities and land trusts often prefer alternative land protection techniques to full ownership in fee.

Acquisition of Easements
The acquisition of easements constitutes a particularly useful tool for many local governments and land trusts. Easements are effective devices for preserving sensitive lands, providing public access along rivers or greenways, and allowing landowners to obtain income, estate, and property tax benefits for land stewardship while they continue to live on their land.

Easements are among the distinct property rights that may be sold separately from the other rights (in other words, "separated from the fee"). Easements can be divided into two categories: affirmative or negative. The owner of an affirmative easement has the right to do something with or on property belonging to someone else. An affirmative easement, for example, may authorize a utility company to place electric lines across someone's property or may authorize the public to pass over property to a riverside fishing spot. The owner of a negative easement has the right to prohibit certain activities on property belonging to someone else. A negative easement may prohibit a landowner from constructing a building that would interfere with a scenic view from a neighboring parcel. A negative easement—for instance, an easement that prohibits development but allows a landowner to continue to farm and live on a parcel—may provide many of the same public open space benefits as full fee acquisition, but can generally be acquired at a substantially lower cost than a fee interest. In addition, management costs are usually assumed by a large de-
gee by the private landowner, rather than by the pub-

cic agency or land trust that holds the easement. An-
other fiscal advantage of easements is that the land

remains on the tax rolls, albeit at a reduced value.
Negative easements, however, may create long-term
administrative, enforcement, and maintenance costs.
Easements may also be characterized as "appurten-
ant to the land" or "in gross." An appurtenant eas-
ment benefits one parcel of land (the "dominant
estate") at the expense of another parcel (the "servient
estate"). Usually these parcels are adjacent. For ex-
ample, an appurtenant easement may grant the owner
of the dominant estate access over an adjoining parcel to
a county road. An easement in gross exists for the
benefit of the person who owns the easement, regard-
less of whether that person owns any nearby land that
is burdened. There is a strong presumption that if an
easement is not clearly in gross, it is appurtenant.

The rules governing conveyance of appurtenant easements often differ from those governing easements in gross. When a parcel benefited by an appur-
tenant easement is sold, the benefits of the easement
pass with the land to the new owner, even if the dead
does not mention the easement. The benefits created
by an easement in gross do not, by comparison, pass
automatically to a new owner when the property is
transferred. In some states, easements in gross are not
recognized or are not transferable to another person.

Under traditional legal doctrines in many states, easements, and especially easements in gross, were dif-
cult to enforce for various reasons. Because of these
difficulties, almost all states have passed specific stat-
utes authorizing conservation easements.

Conservation Easement Statutes. Conservation easemen-
t states clarify the ambiguities and remove the
barriers to enforcement of certain easements. These
statutes set forth rules governing the definition, cre-
ation, transfer and enforcement of easements created
to conserve land or buildings. Although conservation
easement statutes vary from state to state, some of the
more important provisions typically found in conserva-
tion easement statutes include the following:

- Definitions. Most states define conservation easemen-
t to include a broad spectrum of property inter-
ests that restrict the development, management, or use of land. Typically, easements may be created to
retain land in its natural condition, to provide
recreational access, or to preserve and maintain the
land's historic or architectural character.

- Creation and Transfer. Conservation easements
must be created in writing. Some states require that
conservation easements must be held by govern-
mental agencies or be approved by a central author-
ity (for example, the secretary of environmental
affairs in Massachusetts) and that conservation easements held by nonprofit corporations or trusts be
approved by the relevant local government.

- Permitted Holders. Many states authorize only
certain types of entities to hold conservation easemen-
t. These entities usually include government-
mental agencies, land trusts, corporations, and other
entities whose purposes include conservation or
preservation.

- Enforcement. The most important benefits of con-
ervation easement statutes involve granting clear
validity to conservation easements and eliminating
most of the technical barriers to enforcement of
conservation easements.

- Relation to Nonstatutory (Common Law) Easemen-
ts. Some states are more comprehensive than
others. If a state statute does not address a common
law defense to enforcement, a conservation easem-
ent would still be subject to the defense, such as
the defense that an easement in gross cannot be
transferred.

PRIVATE VOLUNTARY LAND PROTECTION
TECHNIQUES

Land acquisition and conservation techniques avail-
able to local governments or private nonprofit organi-
izations can provide an important complement to local
regulatory and public spending measures. A public or
private land trust can use a range of land acquisi-
tion and conservation techniques, singly or in com-

bination, to meet local conservation and growth
management objectives. In towns such as Nantucket, Massachutes, Block Island, Rhode Island, and Doris,
California, municipalities have established local land
trusts as municipal or quasi-municipal entities. These
land trusts participate in the private real estate market
as representatives of the public interest and use the
range of voluntary land protection techniques available to private land trusts.

The two most important private land protection techniques used by land trusts to protect land or his-
toric buildings are fee simple acquisition and acquisi-
tion of easements. Although land or easement acquisition are the con-

servation techniques most commonly employed by
land trusts, there are many other private voluntary
land protection tools to consider. 

*This section is comprised, in part, of material reprinted by
permission of the California State Coastal Conservancy, from
Trusts (Oakland, CA: California State Coastal Conservancy, 1984).
of a parcel, it may be wise for its deeds and other title documents to provide for transfer of the title to a public agency or to a larger local, regional, or national land trust if the trust itself exists to exist or is unable to manage its holdings.

**Limited or Controlled Development**

Incentives typically entail clustered development or other limited development of a portion of a parcel in order to finance acquisition and preservation of the balance of the parcel. Limited development is generally limited to nonmesurable or previously disturbed portions of a parcel. Limited development (also called "controlled development" or "creative partial development") can permit land stewardship and substantial resource protection in situations when donation is not possible and acquisition for full preservation is not financially feasible. Limited development is often feasible because building lots or houses adjacent to restricted open space are frequently more valuable than otherwise.

This tool often lends itself to the formation of a partnership for joint development between the trust and a landowner. In such partnerships, the latter provides the land and the land trust provides planning and land protection expertise, community goodwill, assurance that the open space portions of the property will be permanently protected from development, and development capital (the profile of the Houstounia Valley Association in chapter 2 for an example of successful limited development).

When considering limited development, a land trust should obtain professional assistance from bankers, builders, real estate agents, and other development professionals to determine whether development at the density necessary to finance the acquisition is feasible from a financial perspective. This tool is only appropriate for parcels of sufficient size and with appropriate conditions to allow creative partial development without endangering the resources that are worthy of protection. Finally before undertaking limited development, a land trust should ensure that its proposed actions will not endanger its mission and public reputation as a conservation organization. The public that volunteers time and donates money may not readily accept the limited development concept, especially without an educational effort by the land trust.

**Conservation Investment**

Many real estate development ventures are financed through syndications, in which numerous individuals or entities join together to finance a project. In return, the investors receive some combination of periodic income, capital gain upon resale, and, perhaps, significant tax benefits. This technique can be adapted for land conservation. Although the Tax Reform Act of 1986 reduced the income tax advantages of some types of real estate investments, creative tax-saving arrangements are still possible.

In some cases, a land trust may sell property subject to appropriate deed restrictions or conservation easements to a buyer looking for an aesthetically pleasing place to live or own a vacation home. In other cases, "charitable investors" may be persuaded to invest in a working farm, fishing preserve, or ranch with deed restrictions to allow only agriculture, forestry, or other open space uses. Investors would receive a percentage of the operation's income and tax benefits (for example, through depreciation of capital assets, deductions for business expenses, or deductions for mortgage interest payments) as well as the satisfaction of knowing they have helped conserve open land.

**INFORMATION RESOURCES**


Updated version of a classic book on zoning and the land use regulation process. Provides case studies of 11 local and regional land use programs, their origins, development, legal aspects, and political history.


Provides a comprehensive overview of the use of growth management measures in small towns, including techniques based upon local land acquisition, public spending, taxation, and regulatory powers. Provides tangible guidance in assessing the need for growth management and in implementing specific techniques.


A leading land use planning textbook.


Explains the process leading to the development of a performance-based comprehensive planning
process and overlay zoning program for Sanibel Island, Florida. The basis for the program is mitigating the impacts of development on vegetation, wildlife, coastal process, geology, or hydrology of the barrier island.


This book contains the final report of the National Groundwater Policy Forum and a guide to problems, causes, and government responses to groundwater pollution.


Authoritative and well-written book that provides solid information about establishing and managing easement programs.


Provides an overview of private techniques to preserve open space and important wildlife and plant resources. Includes chapters on conducting natural heritage inventories, private land protection techniques, and lobbying state government to protect our natural heritage.


This thorough book discusses regulatory programs to protect floodplains, lake and stream shores, coastal zones, wetlands, rivers, areas of scientific interest, and similar sensitive areas. It discusses state resource protection programs and cases.


The Land Trust Exchange publishes this handout and others about land trusts.


A pioneering introduction to regional land use planning based upon the development constraints and opportunities presented by natural systems. Contains case studies showing how environmental and scenic inventories can be combined to indicate where development should be directed.


Provides an introduction to and analysis of flexible zoning techniques, including PUDs, special permits, floating zones, overlay zoning, transit zoning, incentive zoning, exactions, and TDR.


Provides detailed guidance on the design of cluster subdivision ordinances. Includes legal guidance and excerpts from several local zoning ordinances.


A lay person's general introduction to planning written by a veteran planner. Provides overviews of the planning process; the role of the local planning commission; the relationship between plans and regulations; and the connection between capital improvements and planning.


Provides a basic primer on all aspects of zoning and zoning administration, the citizens' role in zoning hearings, frequent problems with zoning, and emerging zoning techniques.


An early, comprehensive discussion of the use of performance standard regulations to protect environmental resources, including streams and lakes, aquifers, wetlands, woodlands, and hill-sides. Includes excerpts of illustrative performance control ordinances.


An early, but still valuable look at both the policies of planning and land use regulation and how specific techniques can be employed to protect specific resources.
Yaro, Robert D. et al. Dealing with Change in the Connecticut River Valley: A Design Manual for Conservation and Development. Amherst, MA: Center for Rural Massachusetts, University of Massachusetts, 1988. This valuable publication discusses the advantages of clustered development, provides practical planning standards for preserving distinctive local character while accommodating economic development, includes sample ordinance language for clustered development, and includes excellent aerial graphics showing various landscapes before development, after conventional development, and after creative site-sensitive development. This book builds a convincing argument for clustered development regulations.