

6.6.4 Open Space Findings and Conditions

It is important to make sure that any agreements with regard to open space are adequately addressed in subdivision or wetland permit conditions so they will not be forgotten. If an applicant has offered to provide open space, this should be noted in the findings of the decision. The conditions in the decision should address the timing of any open space conveyance, and who will be responsible for preparing any deed or conservation restriction, survey plan and other details of the conveyance, and who will cover the expenses associated with such conveyances. If the corners of the open space parcel are required to be monumented with boundary markers, this should also be noted in the decision. Note that it is not sufficient to note “conservation restriction” or “open space parcel” on a site plan without an accompanying deed, recorded in the Registry of Deeds, that transfers ownership of the parcel (or a conservation restriction) to the municipality or non-profit organization.

6.6.5 Tracking Open Space Conveyances

Communities that expect to receive open space through the development review process should create and implement a system for tracking such conveyances. This is particularly important in communities without professional staff (because of turnover on local boards). The Conservation Commission, planning board, and any other relevant boards should coordinate their efforts to make sure that open space is provided as required by applicable permit conditions. Often a member of the Commission or planning board will need to serve as the “point person” to make sure that conveyances occur in a timely manner.

6.7 Assuming Control of Other Municipal Land

A city or town may acquire land “for any municipal purpose” (G.L. Ch. 40 §14), including public use (G.L. Ch. 40 §3). Land held for general municipal purposes is in the custody of the selectboard (G.L. Ch. 40 §3) or city council. So is land that has simply not been assigned to other boards. In addition, other municipal agencies or officials, such as the water commissioners, may have custody of land available for conservation or recreation use.

The “care, custody, management and control” of such land may be transferred to the Conservation Commission by a two-thirds vote of town meeting or city council under G.L. Ch. 40 §15A, providing the managing agency votes to agree to the transfer. A sample transfer vote appears in HB §20.2.5.2.

Because a town or city cannot write a deed to one of its own departments, a transfer of this sort leaves no record in the Registry of Deeds, and can easily be forgotten in later years. To avoid inadvertent sale or other diversion, MACC recommends that a certified copy of the town meeting/city council vote transferring custody be recorded at the Registry, together with an affidavit of the town/city clerk under G.L. Ch. 183 §5B, and a lawyer’s certificate stating the address of the property and cross referencing the vote to the original source of title. A sample affidavit and lawyer’s certificate are included in HB §20.2.5.3. Commissions should check the records for old transfers and get them recorded this way.

In **Board of Selectmen of Hanson v. Lindsay**, 444 Mass. 502 (2005) the state’s top court shows the dangers of ignoring this step. In 1971, the Conservation Commission of Hanson acquired taxtitle land by a vote of town meeting that called for a deed that would confirm the parcel’s new status as conservation land, but none was ever prepared or recorded. In 1998, the treasurer sold the land. The selectboard and the Commission tried to invalidate the transfer. The Supreme Judicial Court ruled for the buyer as a bona fide purchaser.

If a department having custody of open space land will not approve formal transfer of the land, the Commission should negotiate an informal working arrangement. “Control” is not a very active matter for woodlands or wetlands. Commissions are authorized to establish rules and regulations for land under their control (HB §§1.1.2, 8.2.3). The Commission and the other department should arrange, by an exchange of letters, that the Commission has control of the land, terminable at the will of the other department.

Control of a parcel can also be divided between the Commission and another agency such as the park or recreation department by written agreement. Be aware, however, that under Article 97 of the Massachusetts Constitution, such informal arrangements may not protect the land from sale or diversion to another public use: Some formal dedication is needed to give land protection under the Massachusetts Constitution (**Muir v. City of Leominster**, 2 Mass. App. Ct. 587 (1974)).