

MODEL OPEN SPACE SECTION FOR MUNICIPAL SUBDIVISION REGULATIONS

With Explanatory Comments

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FOR A WORKSHOP ON
FEES IN LIEU OF OPEN SPACE
REGULATIONS
AND OPEN SPACE SET ASIDE
REQUIREMENTS FOR SUBDIVISIONS

Sponsored by:

- * The UConn Cooperative Extension Service
- * The Land Conservation Coalition for Connecticut
- * Conn Association of Conservation and Inland Wetlands Commissions
- * Connecticut Chapter - American Planning Association

SECTION X: OPEN SPACES AND RECREATION AREAS

INTRODUCTORY NOTE

This Section attempts to assemble all Open Space provisions (except those for cluster subdivision, often called "Open Space Subdivisions"), within one regulatory section. Many towns have Open Space provisions scattered throughout various parts of the regulations, and some even reference the zoning regulations. Strictly speaking, all Open Space provisions must be in the Subdivision Regulations; the only provision which can be in the Zoning Regulation is that relative to lot size/frontage reduction for cluster subdivisions.

One of the critical steps that a commission should undertake in using this model regulation is to check current definitions of relevant terms (such as "open space", "park", etc.) and to be sure that this regulation is compatible with other Sections of both the current Zoning and Subdivision Regulations. This model is not intended to constitute legal advice, and you are urged to consult your own land use counsel to determine the best way to integrate these provisions into your existing regulatory framework.

SECTION X.1 DEFINITIONS

For the purposes of this Section X, the following terms shall be defined as follows:

- a) Open Space: "Open Space" includes, but shall not be limited to: Land left in its natural, undisturbed state; agricultural land for which development rights have been assigned or otherwise alienated in perpetuity; land areas and facilities for non-commercial, non-profit recreation; and similar land areas for wildlife habitat, passive and active recreation, groundwater recharge, scenic preservation, and the like.
- b) Improvement, or Public Improvement: Any change or alteration to the existing conditions of the subdivision site: (i) for the purpose of complying with these Regulations, or any approval granted hereunder, or (ii) depicted on any Final Subdivision Plan approved hereunder, or (iii) rendering the site more suitable for development and/or habitation. As used in these Regulations, Improvements include but are not limited to: Construction and installation of roadways, paved streets, curbs, gutters, utilities, street signs, monuments, shade trees and drainage facilities; erosion and sedimentation control measures; buildings; earth filling or removal, seeding and grading; the establishment or construction of parks, playgrounds, recreational buildings, equipment, structures, fields, and similar facilities; and facilities designed to detain, redirect, store, or treat stormwater discharge.

- c) Land: Real property, including improvements thereof and thereon, and all estates, interests, and rights therein of any kind or description, including, but not limited to, easements, rights-of-way and water and riparian rights, provided that these interests run in perpetuity with the subject real property.
- d) Inland Wetland: Those areas designated and defined as inland wetlands by the {[name of town] Inland Wetlands and Watercourses Agency, pursuant to its Regulations} OR {the Connecticut General Statutes}, as the same may be amended from time to time.
- e) Watercourse: Those areas designated and defined as watercourses by the {[name of town] Inland Wetlands and Watercourses Agency, pursuant to its Regulations} OR {the Connecticut General Statutes}, as the same may be amended from time to time.

Comments:

The definition of "Open Space" deserves special consideration because it requires you to focus on what kinds of purposes you want Open Space to serve: For some towns, it denotes passive, natural wildlife preserves or similar undisturbed areas. For others, active public recreation activities (ball and soccer fields, playgrounds, etc.) are acceptable. In still others, commercial recreational uses, which would normally be found supporting themselves, without the benefit of lot sales, are acceptable (golf courses, commercial riding stables, aircraft landing strips, polo grounds, swim clubs/pools, etc.). Another question is whether to allow agricultural uses for Open Space: On the one hand it is land which is open and not covered by impervious surfaces; on the other hand, it is a commercial activity which generates profits, it does involve disturbance of the land and the use of chemicals, and it is not available for public use or enhancement of the environment. The nature of the community and the needs for different kinds of Open Space must be weighed in determining what a commission would be willing to accept as constituting "Open Space".

The definition of "Improvement" is also important because you want to be sure that "improving" open space does not authorize a subdivider to log, excavate, or otherwise damage it except to the extent required by its "improvement" into a ballfield, basketball court, picnic area, etc.

The definitions of "inland wetlands" and "watercourses" are important only because there are references to them in the formula approach to determining lot numbers. Note the two options: Many local inland wetlands regulations include so-called "buffers" within the the definitions of a "wetland". Technically, this is incorrect, because the Statutes define wetlands and watercourses; what those towns should be doing is expanding their definition of a "regulated area" to include the so-called "buffer". Regardless, the important thing to determine is: Do you want "buffers" excluded from the density calculation, or only the wetlands and watercourses themselves? The latter seems to be the fairest approach, in which case it might be simpler to reference the Statutory definitions, rather than the local ones.

SECTION X.2 DISPOSITION FACTORS

For any subdivision of land under these Regulations, the Commission may require of the subdivider the disposition and official dedication of appropriately located and sized Open Space areas. In determining the appropriateness of an Open Space area disposition, the Commission shall consider the Plan of Development objectives and map designations and the subject site's characteristics with respect to the following objectives: (i) The conservation and protection of wildlife and natural or scenic resources including lakes, ponds, rivers, streams, streambelts, inland wetlands, aquifers, significant woodlands, stands of unique or scenic trees, particular trees of special size or unusual type, ridges, ravines, stone fences and walls, ledge outcroppings and other unusual physical features; the protection of historic or archaeological sites; (ii) the expansion of existing Open Space and areas; and (iii) the meeting of neighborhood and/or community-wide recreational needs. In determining the location of Open Space, the Commission may consider potential for combination with existing or proposed Open Space on adjoining properties owned by any public or private institution.

Comments:

Every land use regulation must contain standards to guide each and every discretionary decision. You can't just say "the commission can require open space whenever and wherever it considers appropriate." Each town may have different objectives in requiring open space or recreational areas, so this list of criteria should be examined to make sure it comports with your values and goals. Be aware, however, that a reviewing court will probably hold you to whatever criteria you select, so be sure that they describe, with sufficient scope and detail, the situations in which you would want to require open space dedications.

SECTION X.3 SIZE

Where Open Space disposition is deemed appropriate, the size of the required areas shall be determined by the Commission based on the site's value and importance in meeting the objectives cited in Section X.2 and the scope of the subdivision proposal. Required Open Space [shall be of such a size as bears a reasonable relationship to the anticipated burden imposed by the subdivision OR may be up to _____ (%) percent of the property under consideration OR shall be fixed at _____ (%) percent of the property under consideration]. In determining the total land to be reserved as Open Space or recreation land, the Commission may consider not only the tract or tracts of land to be immediately subdivided, but also any other adjacent tract or tracts owned, controlled or under agreement to buy or option to buy by the subdivider. Areas to be reserved as Open Space land shall be shown on the subdivision map. [Optional: This provision shall apply to subdivisions of more than _____ () lots or _____ () acres or more, irrespective of the number of lots.]

Comments:

The amount of Open Space to be required can be done by a flat or maximum percentage, or need not include a percentage at all. The highest flat percentage used is Simsbury, with twenty (20%) percent; ten to fifteen (10% to 15%) percent is common; no percentage is also not unusual. The important thing is to remember that, if a percentage is used, it should be predicated upon some rational standard: Recommendations from some published state or national study; recommendations in the local plan of development (with supporting data contained therein); extension of patterns existing in previously-developed areas of the town; or some combination of these or other factors. An advantage of the flat percentage rate for all subdivisions (as opposed to the "up to" a certain percentage approach) is that it treats all subdividers equally and creates an incentive to them to utilize the Fees-in-Lieu of Open Space provisions below.

The consideration of all land owned by the developer is to prevent piecemeal submission of the land most desirable for Open Space preservation at the outset, leaving the less worthy parcels until later, when the better land is developed. The last optional sentence is a matter of local preference: Perhaps very small subdivisions should not have to bother with Open Space needs. Note, however, that even a 2-lot subdivision could include land which would form a vital part of an existing or proposed Open Space system; and that even small subdivisions could augment an Open Space acquisition fund via the Fees-in-Lieu of Open Space provisions discussed below.

SECTION X.4 SITES OF ARCHAEOLOGICAL SIGNIFICANCE

In all subdivisions of _____ (___) acres or more, all applicants shall make written inquiry of the State Archaeologist to determine if there is evidence of sites of archaeological significance within the subdivision. Any significant sites shall, where possible, be left undisturbed and may be considered in meeting the minimum Open Space requirements of this Chapter.

Comments:

This Section is entirely optional. For some communities, sites of archaeological significance can be an important part of an Open Space system. This section could also include other areas of special study, such as sites of historic significance, environmental assessments, habitats for threatened or endangered species, or detailed delineation of wetlands.

SECTION X.5 METHOD AND PROCEDURE OF DISPOSITION

- a) Method of Preservation, Entity Having Title. The Commission shall determine the most appropriate method of disposition after considering, among other things, the relationship of the subject area(s) and its specific characteristics to the Plan of Development and the objectives cited in Section X.2; the desirability

and suitability of public access and use and the scope of the subdivision proposal. The following disposition options may be utilized by the Commission:

- 1) Conveyance in fee simple to the Town.
- 2) Conveyance in fee simple to the State of Connecticut.
- 3) Conveyance in fee simple to a land trust (with the concurrence of the subdivider).
- 4) Conveyance in fee simple to a homeowners' association (see, Section X.8).
- 5) Conveyance of conservation easement(s), with or without public access, to the Town.
OR
Conveyance of conservation or preservation restrictions, as defined in Connecticut General Statutes §47-42a, with or without public access, to the Town.
- 6) Conveyance of a recreation easement to the Town, the State, or a private, non-profit recreational entity.
- 7) Conveyance of an agricultural easement to the Town, the State, or a private, non-profit farm preservation entity.
- 8) Private ownership with the appropriate severance and conveyance of development rights.
- 9) Any combination of the above or any suitable alternative approved by the Commission.

The applicant shall designate in its application which of the foregoing entities is proposed to own the Open Space, but, as part of the approval of such application, the Commission may modify such designation to require ownership by one of the public entities set forth above, provided, however, that the Commission may not require ownership by an entity described in Subsection (3), nor any conveyance to a private entity, which shall be approved only when consented to by the applicant. Furthermore, the Commission may modify any application so as to designate Open Space in locations other than those proposed. In determining whether the proposed entity is appropriate to own the proposed Open Space, or whether to require Open Space in locations different from those proposed, the Commission shall consider the following factors: (i) The ownership of any existing Open Space on adjacent properties, or the proximity to non-adjacent Open Space which might reasonably interconnect with the proposed Open Space in the future; (ii) the proposed use of the Open Space for active or passive uses, and the extent of maintenance, supervision, or management required; (iii) the potential benefits which the Open Space might provide to residents of the Town or the

State, if it were accessible to them; (iv) the size, shape, topography and character of the Open Space; (v) the recommendations of the [name of town] Plan of Development; and (vi) the reports or recommendations of any State or Town agencies, including, but not limited to, the [board of selectmen/town council or comparable body], the Inland Wetlands and Watercourses Agency, the Recreation Commission, the Conservation Commission, the [name of county] Regional Planning Agency, and the Connecticut Department of Environmental Protection.

Comments:

These are all the possible methods of disposition, but one need not use all of them. Easements have the advantage, especially for small parcels, of allowing preservation of land while retaining it as private property (and thus maintained and policed by the private owner). Easements can include public access along a particular trail or corridor; or can be completely private or completely public (which would be rare). Note that easements must still be monitored for continuing compliance. The obvious advantage to owning the land in fee simple is that the town can use it for any Open Space or recreational purpose. Note that (3) requires the concurrence of the subdivider: A commission cannot require a developer to bestow a benefit on a private entity, even a non-profit or charitable one. Most towns have form conservation easements, agricultural easements, or whatever, so that the town attorney does have to review and negotiate each individual conveyance. Note the alternative language for conservation easements: The referenced Statutes may be suitable and provide some uniformity among towns, but the risk of using them is that a Statutory change can alter local regulations and the town might not even know about it. Also, reference to Statutes requires constant cross-referencing.

- b) Alteration of Open Space. Any excavation, filling, regrading or other alteration of Open Space; any construction or expansion of any building, structure or other improvements thereon; or any paving or surfacing of Open Space subsequent to the date of approval of the Subdivision, other than work required by the plans as approved, shall require an amendment to the Subdivision approval granted in accordance with the applicable Sections of these Regulations.

Comments:

The commission has a right to expect that land to be preserved will not be tampered with once approval has been granted.

- c) Evidence of Acceptance. The application shall contain written evidence, satisfactory to the Commission, from the entity proposed to own the Open Space, stating that it is willing to accept ownership of and responsibility for the preservation and maintenance of the Open Space.

Comments:

The commission should have some indication that the intended agency is willing to accept the Open Space or easement. Even the State has been rejecting Open Space dedications of late. Unexpected rejection of the Open Space creates a legal tangle for the commission, the subdivider, and the general public.

d) Required Provisions. Regardless of the manner of ownership of the Open Space, the instrument of conveyance must include provisions satisfactory in form and substance to the Commission to ensure:

- 1) The Open Space is dedicated to its intended purpose in perpetuity;
- 2) The continuity of proper maintenance for those portions of the Open Space requiring maintenance;
- 3) When appropriate, the availability of funds required for such maintenance;
- 4) Adequate insurance protection; and
- 5) Recovery for loss sustained by casualty, condemnation or otherwise.

e) Recording. At the time the approved Subdivision Plan is filed, the applicant shall record on the [name of town] Land Records all legal documents required to ensure the aforesaid guarantees.

Comments:

One of the most serious potential problems occurs when Open Space is to be conveyed to a homeowners' association which is either never created by the subdivider, or created without adequate assessment and enforcement powers to actually maintain and improve the Open Space. Submission of documentation complying with the Connecticut Common Interest Ownership Act (CIOA) is essential.

f) Boundary Lines. The boundary lines of all Open Space shall be set in the field and marked by permanent, readily-visible markers where such lines intersect any lot line, road or perimeter line within the proposed Subdivision and at such other points as may be required by the Commission to ensure identification in the field.

Comments:

A common problem is that contractors or homeowners disturb or use Open Space for their own purposes, either by accident or design. The town cannot monitor such encroachments without clear field marking of such Open Space areas.

SECTION X.6 REFERRALS

The Commission may refer for review and comment any subdivision plan and proposal for the provision of Open Space land to the Conservation Commission, Recreation Commission, [name of county] County Soil and Water Conservation District, or any other appropriate agency. The Commission shall refer to the [board of selectmen, town council, or other comparable body] any proposal under which the Town would acquire a property interest in the Open Space.

Comments:

This is optional, but getting the widest possible input can never hurt. Just be sure that, where a public hearing is held, all such comments are made while the public hearing record is open. Comments received after the close of the public hearing may be acceptable in certain cases, but this practice is risky. Consult your land use counsel in such instances. Also note the referral to the selectmen/council: This is an effort to avoid dedication of land which the town does not want and will not accept.

SECTION X.7 CONDITION OF OPEN SPACES AND/OR RECREATION LAND

Open Space areas shall typically abut or have direct public access to a public street and, as appropriate, any existing park or public land. All such areas shall include access roadways to be graded and improved in a manner suitable for safe pedestrian and vehicular traffic. Access roadways shall have an adequate base, shall be adequately drained and shall typically be twenty (20') feet wide and have a slope no greater than twelve (12%) percent, except that the Commission may waive any of these requirements where access is less critical, such as in passive wildlife preserves or fragile ecosystems.

Land to be provided as Open Space for the purpose of conservation and protection of wildlife and natural or scenic resources shall typically be left in a natural state by the subdivider. Except for improvement or maintenance as may be expressly permitted or required by the Commission, Open Space areas shall not be graded, cleared, or used as a repository for brush, stumps, earth, building materials or debris. The Commission may require that any land to be dedicated for recreational use be cleared of brush, trees and debris; be graded to properly dispose of surface water; be covered with organic topsoil to a depth of four (4") inches; be seeded with low maintenance grass seed; and be otherwise improved so that the land is left in a condition appropriate to the intended use. [The Commission need not accept land composed entirely or substantially of inland wetlands in satisfaction of the requirements of this Chapter OR the ratio of the area of the proposed Open Space classified as inland wetlands to the total area of the Open Space shall not exceed the ratio of all inland wetlands in the subdivision to the total area of the subdivision], unless it considers such areas to have special habitat or other environmental value.

When site improvements are required, they shall be clearly shown on the final subdivision maps or alternatively on a separate site improvements plan and they shall be approved by the Commission prior to the filing of the subdivision plan.

Comments:

Public Open Space has little value if the public cannot reach it and municipal agencies cannot police and maintain it. Note the reiteration of non-disturbance, except as authorized/required. Note also the restriction on wetlands: The second version of the test is comparable to that used in Simsbury.

SECTION X.8 ENFORCEMENT BONDING

To ensure proper construction of any required Improvements, the Commission shall require the subdivider to post a performance bond, letter of credit, or other suitable security in an amount and with terms acceptable to the Commission. Unless modified by the Commission in accordance with Chapter [modification section] of these Regulations, all required Improvements of Open Space land shall be completed prior to the occupancy of fifty (50%) percent of the lots within the subdivision.

Comments:

Improvements to Open Space areas should be treated the same as any other subdivision improvements, and should be bonded. The completion requirement when fifty (50%) percent of the lots are occupied is optional, but prevents the subdivider from leaving Open Space improvements until last; it also reduces the potential for complaints by the first lot purchasers who may be waiting for years to see the developer's glowing promises become reality. The method of bonding should conform to that required for other subdivision improvements (such as roads, drainage, etc.)

SECTION X.9 PROPERTY OWNERS' ASSOCIATION

The Commission may, upon the request of the subdivider, permit the ownership and maintenance of the Open Space to be transferred to an association of property owners. Such transfer shall be in accordance with standards established by the Commission to include, but not be limited to, the following:

- 1) Creation of the association or corporation prior to the sale of any lot.
- 2) Mandatory membership in the association by all original lot owners and any subsequent owner; Non-amendable bylaws or other restrictions which require the association to maintain the land reserved for Open Space, park and playground purposes, with power to assess all members for all necessary costs.

- 3) Provisions/restrictions which will be perpetual and binding on all future property owners, and will not be affected by any change in land use.
- 4) The association or corporation shall have the power to assess and collect from each lot owner a specified share of, and, where necessary, provide reserves for the costs associated with maintenance, repair, upkeep and insurance of the Open Space.
- 5) Any deed of conveyance shall contain language providing the association with the right to obtain reimbursement for all costs it reasonably incurs, including attorney's fees, in any action to enforce its rights against any lot owner, in which the association is the prevailing party.
- 6) Association documents shall provide that if maintenance or preservation of the dedication no longer complies with the provisions of the document, the Town may take all necessary action to assure compliance and assess against the association all costs incurred by the Town for such purposes.

Any conservation easements or other Open Space covenants or restrictions shall be subject to the approval of the Commission in form and content. After approval by the [land use counsel] and the Commission, said document shall be filed by the subdivider in the Office of the Town Clerk.

Comments:

Note again the careful attention to homeowners' associations.

SECTION X.10 LEGAL TRANSFER

Properly executed legal documents, including warranty deeds for any title transfers, shall be prepared in accordance with the provisions of this Section and shall be submitted in triplicate with the final subdivision map to be endorsed and filed. All warranty deeds shall be accompanied by [owners title insurance, in the amount of the full value of the property interests conveyed, issued by a title insurance company licensed to do business in Connecticut] OR [a certificate of title, prepared by an attorney admitted to the bar of the State of Connecticut], certifying that such conveyance passes good title to the described property or property interest, and that it is free and clear of any defect or encumbrances, or that any such encumbrance has been subordinated to the conveyance. All documents must be acceptable to the Commission and its attorney, and shall refer to the subdivision maps by title. All warranty deeds for dedication of land to the Town shall be held in escrow by the Commission to be recorded on the Town Land Records upon acceptance by the [board of selectmen/town council or other body having the authority to accept property in the name of the municipality]. In the event that acceptance is rejected by the [board of selectmen/town

council or other comparable body], the deed shall be returned and the subdivider shall return to the Commission for determination of an alternative means of preserving the Open Space. In no case, shall the acceptance of any deed by the Commission or an employee of the Town be deemed as acceptance of the Open Space by the Town. [All Open Space preserved by means of easements or restrictions shall comply with the requirements of Connecticut General Statutes §47-42(a) through §47-42(c).]

Comments:

Note that deeds must be filed prior to endorsement of the plans. It is unwise to allow maps to be filed unless everything is in place for management of the Open Space. Pay special attention to the requirements regarding good of title: In this economy, many conveyances of roads and Open Space have been the subject of foreclosure proceedings by banks, which can create avoidable confusion and risks to public property interests. The choice between title insurance and a certificate of title is one of preference: A certificate of title may cost the applicant less, but title insurance provides the municipality with perpetual protection for its legal interest. This Section also provides a procedure in the unlikely event that the Open Space is not accepted. One of the ways to prevent this embarrassment is to achieve a consensus with the legislative body in advance as to the general policy on Open Space dedications. Preparation of the local plan of development, or a specific Open Space and recreation plan, is a good vehicle for achieving that consensus. Note the optional Statutory reference: Here again, the reference incorporates some helpful language, but creates the nuisance of cross-reference and the risk of inadvertent amendment.

SECTION X.11 DEDICATION FOR OTHER MUNICIPAL PURPOSES

In the event the subdivider desires to transfer to the Town land for other municipal purposes such as future schools, fire houses, etc., the dedication provisions of this Regulation shall be complied with. The Commission may consider such a municipal dedication as a credit toward any Open Space disposition requirements, but may not require such dedication.

Comments:

The Statutes are clear that land can only be required in a subdivision for parks, Open Space, and recreational uses. Although the definition of "Open Space" may be broad, it cannot be construed to include land for fire houses, schools, senior centers, or the like. This optional paragraph permits the commission to credit such voluntary contributions against the Open Space requirement to provide some incentive for such contributions where they are appropriate.

SECTION X.12 PAYMENT OF FEE IN LIEU OF OPEN SPACE

In accordance with Connecticut General Statutes §8-25, as amended by Public Act 90-239, Section 1, the Commission may authorize a

subdivider to pay a fee and/or transfer land to the Town of [name of town] in lieu of the disposition of land by one of the methods set forth in Section X.5 hereinabove. Such authorization may be granted by the Commission if and when it determines, in its sole discretion, that there are inadequate areas on the subdivision which merit preservation by one of the methods set forth in Section X.5, or that there are other areas in the Town of [name of town] where preservation would be more beneficial to the public health, safety and welfare. In the event that such authorization is granted by the Commission, such payment or combination of payment and the fair market value of land transferred shall be equal to not more than ten (10%) percent of the fair market value of the land to be subdivided prior to the approval of the subdivision. The fair market value shall be determined by an appraiser jointly selected by the Commission and the subdivider. A fraction of such payment, the numerator of which is one and the denominator of which is the number of approved lots in the subdivision, shall be made at the time of the sale of each approved lot in the subdivision and placed in a fund. Such fund shall be used solely for the purpose of preserving Open Space, including the acquisition of land for Open Space [and the capital improvement of existing Open Space lands]. The said payment obligation shall be secured by a lien against each lot in the subdivision, and the lien shall be filed at the time that the final subdivision plans are filed in the Office of the Town Clerk, in accordance with Section III.3(i) of these Regulations. The said lien shall be in a form approved by the Commission, and shall be unencumbered by any mortgage or encumbrance having priority over said lien, as evidenced by a Certificate of Title, in accordance with Section III.3(i) of these Regulations.

Comments:

This is drawn directly from the Statutory language, but there are still a number of questions and options which will probably be clarified by future court decisions. The language about "authorizing" Fees-in-Lieu of Open Space is one such ambiguity: Whether the commission could require a fee-in-lieu of Open Space; or may only permit the subdivider to substitute the fee for the Open Space; or must permit such substitution, is not clear from the Statutory language. Individual regulations could specify one of these options and await further clarification by the courts.

The vehicle of a lien as a means of securing the payment of the fee is not in the Statutes, but would be a reasonable method of implementing the Statutory scheme. Other methods would be some sort of mortgage or declaration, but a lien seems like the simplest approach. Note that this lien must be in "first place", senior to any mortgage or other encumbrance which could later be used to void it in a foreclosure proceeding.

Note the optional language concerning improvement to existing Open Space/recreation areas. This is another ambiguity in the Statutes. Less rural areas might find this option attractive, but only time will tell if it is legal.

Note also the language about a fund for Open Space acquisition: In order to demonstrate that the future subdivision residents will benefit in some direct way from the fees paid, geographically large towns may wish to set up regional funds to insure that the money is spent in proximity to those who have paid for it in the price of lot purchase. Although the Statutes do not specifically authorize such sub-town funds, it would implement the concept embodied in case law that the burden on the subdivider be matched by the burden on community services created by the subdivision.

SECTION X.13 EXEMPTIONS FROM OPEN SPACE DISPOSITION REQUIREMENTS

In accordance with Public Act 90-239, Section 1, the provisions of this Chapter X shall not apply if:

- a) The transfer of all land in a subdivision of less than five (5) lots is to a parent, child, brother, sister, grandparent, grandchild, aunt, uncle, or first cousin of the property owner for no consideration. Such intended transfer shall be evidenced by covenants, restrictions, contracts, or other legally binding documents as the Commission may approve, which documents shall be filed in the Land Records in accordance with the procedure and other requirements of Section [filing procedure] of these Regulations. If the Commission determines, based on events subsequent to the approval of such subdivision, that such transfers were intended to be temporary, and for the sole purpose of evading the requirements of this Chapter X, the Commission may, following a public hearing with notice by certified mail to the violator, void, in whole or in part, any such subdivision approval, and may cause notice thereof to be filed in the [name of town] Land Records.
- b) The subdivision is to contain affordable housing, as defined in Section 8-39a of the Connecticut General Statutes, equal to twenty (20%) percent or more of the total housing to be constructed in such subdivision. Such restrictions for affordable housing shall be evidenced by such documents as the Commission may require, and such restrictions shall run with the lots affected thereby in perpetuity. If, subsequent to approval of the Subdivision, the lots designated for affordable housing shall not be sold for that purpose, the Commission may, following a public hearing with notice by certified mail to the violator, void, in whole or in part, any such subdivision approval, and may cause notice thereof to be filed in the [name of town] Land Records.

Comments:

These exemptions are drawn directly from the Statutory language. The requirement for documentation to support the exemption is a logical and necessary provision for enforcement which would, in all probability, be supported by the courts. However, the provision for voiding subdivisions which are found to have used these exemptions fraudulently is likely to be controversial with many municipal attorneys. Only recently, the courts

recognized that there is an inherent authority for a permit, once
, to be revoked under circumstances where it appears that the
al issuance was illegal. However, such cases are quite new and the
t is not fully developed, nor is it clear how or if these cases
apply to this type of situation. The main purpose of this provision
keep applicants honest: It is too easy to create "straw man"
ers to a dozen or so relatives to take advantage of the exemption,
then subsequently transfer all the lots back into a shell corporation
developer-purchaser. Something is needed to make applicants hesitate
such schemes, and this provision should make them want to avoid even
risk of having a subdivision voided. This will be the case even if
Commission's authority is unclear because no one wants the expense and
of court action, especially when there is case law to support the
Commission's action. Note again the importance of filing the covenants
restrictions at the time of subdivision endorsement and filing, and of
sly conditioning the exemption from open space dedication on the
ence of the exemption: Since such filings provide notice to
ial lot buyers, they would tend to make a court more comfortable in
ing any sanction imposed, including voiding of the subdivision.