

CPB Commission CLUP Worksession of May 15, 2013

Excerpts Pertaining to CLUP Standard 5.3.3.6 Derived from CLUP Technical Staff Worksession Parking Lot Items of December 20, 2011 and updated with Advisory Committee Recommendations of December 15, 2011

**Left side note refers to date of the CLUP technical staff worksession that generated the parking lot item listed*

The following comments pertain solely to Section 5.3.3.6 of the CLUP. These comments pertain to unresolved issues emanating from the worksessions conducted by Commission staff with technical and planning staff of Commission member agencies during the period from 2010 to 2011. These issues were placed in a “Parking Lot” for future review, debate and, hopefully, resolution. These unresolved issues, which included those for which no consensus was achieved, were compiled from each of the Technical Worksessions and incorporated into a single “Parking Lot” document originally prepared on December 20, 2011. At its December 15, 2011 meeting, the Central Pine Barrens Advisory Committee (the “AC”) discussed these issues and adopted resolutions recommending the Commission undertake certain actions on each. Both the Technical Worksession Parking Lot information and the subsequent 12/15/11 AC Meeting resolutions were incorporated into a single document prepared by Commission staff on February 6, 2012. Excerpts from this last document, which pertain solely to Section 5.3.3.6 of the CLUP, are listed below:

5.3.3.6 Coordinated design for open space, habitat, and soil protection

12-3-2010

- Revise the lengthy preface in this Standard to be more direct and concise. The purpose and intent should be more clearly stated. The second paragraph regarding “Conservation Design” may not belong in this section.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS AND THAT THE SECTION REFER TO PICTURES AND ONE OR MORE MANUALS OR WORKBOOKS THAT PROVIDE VISUAL GUIDANCE.

12-3-2010

- Consider incorporating provisions for flag lots where only the bulk of the lot is subject to the Clearing Standard and the flagpole driveway is excluded from the clearing calculation. This would be consistent with Town Code(s) (e.g., Southampton Town Code § 330-67A (4) (a), “...except on flagpole lots, where the area of the pole shall be exempt from the total lot area and the total amount of clearing permitted”).

Discussion occurred about whether the clearing required in the flagpole portion of flag lots should be included in a development project’s clearing calculations, especially as a very long flagpole could significantly constrain clearing on the developable portion of a lot.

**AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION
CONSIDER THE PROPOSAL AND COMMENTS.**

12-3-2010

- Define open space. Obtain Town Law 278 definition of open space for review.

Section 278 of the New York State Town Law, which pertains to cluster development, does not contain a formal definition of the term “open space.” It does utilize and refer to the term “open lands.” However, Section 278 does provide guidance regarding the purpose of clustering and the intent of setting aside and preserving open space. Subsection 1 (a) (“Definitions”), states the following:

*“(a) ‘cluster development’ shall mean a subdivision plat or plats, approved pursuant to this article, in which the applicable zoning ordinance or local law is modified to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of **open lands**.”*

Subsection 2(b) states the following:

*“(b) The purpose of a cluster development shall be to enable and encourage flexibility of design and development of land in such a manner as to preserve the natural and scenic qualities of **open lands**.”*

Subsection 3, “Conditions,” states the following:

*“(c) The planning board as a condition of plat approval may establish such conditions on the ownership, use, and maintenance of such **open lands** shown on the plat as it deems necessary to assure the preservation of the natural and scenic qualities of such **open lands**. The town board may require that such conditions shall be approved by the town board before the plat may be approved for filing.”*

The following definitions of open space were collected from sources including Suffolk County, Town of Southampton, Town of Riverhead, NYSDEC, NYSDOS, New York State, USLegal.com, and US EPA.

Suffolk County

Laws of Suffolk County, New York, v. 92 updated 12-30-2010

Part III Administrative Local Laws

Chapter 25, Conservation Easements

Section 25-2 – Definitions

“OPEN SPACE or OPEN AREA – Any space or area characterized by natural scenic beauty or whose existing openness, natural condition or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development or would maintain or enhance the conservation of natural or scenic

resources. For the purposes of this definition, natural resources shall include, but not be limited to, agricultural lands, defined as “open lands,” actually used in bona fide agricultural production.”

Town of Southampton

Town Code Chapter 247 – Open Space

Article II – Alienation of Open Space

Section 247-13 – Definitions

“OPEN SPACE or OPEN AREA -- Any area or space characterized by natural scenic beauty or whose existing openness, natural condition or present state of use enhances the present or potential value of abutting or surrounding development or maintains or enhances the conservation of natural or scenic resources. For purposes of this section, natural resources shall include but not be limited to agricultural lands used or possessing the potential for use in bona fide agricultural production.”

Town of Riverhead

Chapter 14 – Community Preservation

Article V – Acquisition and Use of Open Spaces, Parks and Park Preserves

Section 14-37 – Definitions

“OPEN SPACE - Undeveloped and essentially unimproved land that is important to conserve and maintain either for the quality and character of the lives of Town residents or for the preservation of their common heritage.”

NYSDEC website

<http://www.dec.ny.gov/lands/317.html>

“Definition of Open Space

Open space may be defined as an area of land or water that either remains in its natural state or is used for agriculture, free from intensive development for residential, commercial, industrial or institutional use. Open space can be publicly or privately owned. It includes agricultural and forest land, undeveloped coastal and estuarine lands, undeveloped scenic lands, public parks and preserves. It also includes water bodies such as lakes and bays. The definition of open space depends on the context. In a big city, a vacant lot or a small marsh can be open space. A small park or a narrow corridor for walking or bicycling is open space, though it may be surrounded by developed areas. Cultural and historic resources are part of the heritage of New York State and are often protected along with open space.”

NYSDOS & NYSDEC

Local Open Space Planning Guide (2004)

“Open Space is land that is not intensively developed for residential, commercial, industrial or institutional use. It serves many purposes, whether it is publicly or privately owned. It includes agricultural and forest land, undeveloped shorelines, undeveloped scenic lands, public parks and preserves. It also includes water bodies such as lakes and bays. What is defined as open space depends in part on its surroundings. A vacant lot, community garden or small marsh can be open space in a big city. A narrow corridor or pathway for walking or bicycling is open space even though it is surrounded by developed areas. Historic and archeological sites are often associated with significant open spaces and are a part of our common heritage. “

New York State

Environmental Conservation Law

§ 52-0101. Definitions.

“4. Environmentally sensitive lands project" means a state project to preserve aquifer recharge areas, areas of exceptional scenic beauty or exceptional forest character, open space, pine barrens, public access, trailways, unique character, wetlands, and wildlife habitat, as defined below:

(d) ‘Open space’ means open or natural land in or near urban or suburban areas necessary to serve the scenic or recreation needs thereof.”

New York State Real Property Tax Law

§ 491. Conservation easement agreement exemption; certain towns.

“2. Definitions. For the purpose of this section, the following terms shall have the following meanings: "open space" or "open area" means any space or area characterized by natural scenic beauty or whose existing openness, natural condition or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development or would maintain or enhance the conservation of natural or scenic resources. For the purposes of this definition, "natural resources" shall include, but not be limited to, agricultural lands defined as open lands actually used in bona fide agricultural production.”

USLegal.com

Open Space Law and Legal Definitions

<http://definitions.uslegal.com/o/open-space>

“Open space generally refers to undeveloped land or water area. Specific definitions vary by jurisdiction, so local laws should be consulted for applicable requirements. The following is an example of a local law dealing with open space land:

Open Space land is defined as either:

- (1) Any land area zoned for open space by a comprehensive land use plan adopted by a city or county legislative authority, or
- (2) Any land area in which the preservation in its present use would:
 - a. Conserve and enhance natural or scenic resources
 - b. Protect streams or water supply
 - c. Promote conservation of soils, wetlands, beaches or tidal marshes
 - d. Enhance the value to the public of abutting or neighboring parks, forest, wildlife preserves, nature reservations or sanctuaries or other open space
 - e. Enhance recreation opportunities
 - f. Preserve historic sites
 - g. Preserve visual quality along highway, road, and street corridor or scenic vistas;
or
 - h. Retain in its natural state tracts of land not less than one acre situated in an urban area and open public use on such conditions as may be reasonably required by the granting authority.

US EPA

<http://www.epa.gov/owow/NPS/ordinance/mol3.htm>

Model Ordinances to Protect Local Resources (path: EPA Home > Water > Wetlands, Oceans and Watersheds > Polluted Runoff (Nonpoint Source Pollution) > Model Ordinances to Protect Local Resources > Open Space Development > Model Ordinances Language)

“Open Space

A portion of a development site that is permanently set aside for public or private use and will not be developed. Open space may be used as community open space or preserved as green space.”

Bring to the Commission for consideration to decide on which definitions to include.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS, INCLUDING PROVIDING PICTURES AND VISUAL EXAMPLES OF WHAT IT CONSIDERS TO BE MEANINGFUL OPEN SPACE.

Figure 5-1

12-3-2010

- For Southampton only, review Aquifer Protection Overlay District (APOD) Clearing Standards and consider adding a separate table for Southampton that is consistent with the Town Code’s existing requirements, as Southampton’s is based on lot size, not zoning, and is generally more restrictive than the Central Pine Barrens standard, specifically since open space and clearing restrictions apply to subdivisions of land, as per Town Code § 247-8, *Farmland and Watershed Protection*, and § 330-67, *Protection of Natural Vegetation*, respectively.
 - See Town of Southampton Town Code Section §247-8 (H):
 - § 247-8. Farmland and watershed protection.
 - H. Where a parcel is located in Residence Zone CR-200, CR-120 or R-120 and is in the Aquifer Protection Overlay District, at least 65% of the parcel shall be preserved. In CR-80 or R-80 within the Aquifer Protection Overlay District, 50% shall be preserved. In all other cases in the Aquifer Protection Overlay District, 35% shall be preserved.
 - See Town of Southampton Town Code §330-67 (A)(4)(a):
 - § 330-67. Protection of natural vegetation.
 - A. To ensure maximum water recharge and to minimize the potential for fertilized vegetation, natural vegetation located on a tract or lot shall be preserved to the maximum extent possible, consistent with the following parameters:
 - (4) Residential lots and tracts.
 - (a) For residential lots, the amount of disturbance of natural vegetation shall not exceed the following percentages, *except on flagpole lots, where the area of the pole shall be exempt from the total lot area and the total amount of clearing permitted:*

Lot Size (square feet)	Percentage of Site
1 to 15,000	75%
15,001 to 30,000	60%
30,001 to 60,000	50%
60,001 to 90,000	35%
90,001 to 140,000	25%
140,001 to 200,000	20%
200,001 or greater	15%

Comments were expressed that in the CLUP the amendment(s) it should be distinguished whether or not they are more or less restrictive than the Towns. The standards should not

exempt specific Towns unless the Town wants to be more restrictive. The Commission should find out how and where the CLUP is being applied differently in different Towns.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS AND THAT THE COMMISSION NOT PERMIT SEPARATE, STAND-ALONE CLEARING SCHEDULES FOR INDIVIDUAL MUNICIPALITIES IN AS MUCH AS MORE RESTRICTIVE CLEARING REQUIREMENTS ARE ALREADY PERMITTED IN THE CLUP.

12-3-2010

- In the four to five+ acre zoning districts, clarify the clearing percentage and remove exclusions for septic systems and driveways coverage (Towns of Southampton and Brookhaven to provide pertinent Town code sections).

The Town of Brookhaven is to provide additional information, if it has not done so already.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.

5.3.3.6.1.3 Residential Overlay District and Redemption of PBCs

12-3-2010

- Clarify the clearing percentage and average lot size applied to meet this Standard.
- The increased clearing allowed with PBC redemption should also be cross-referenced in Chapter 6.
 - On July 18, 2001, the Commission adopted a resolution (see attached) for Graystone Estates that applied a clearing limit of 46% to 1.5-acre lots, as opposed to a CLUP 35% clearing limit applicable to 2-acre lots. The limit was increased to 46% due to the redemption of two Pine Barrens Credits for the project.

Bring to the Commission for consideration.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.

5.3.3.6.1.5 Relief from clearing

12-3-2010

- Move the statement regarding, “persons seeking relief from clearing requirements must file a CGA Hardship,” to the intent portion of the Standard rather than having the statement remain as its own standard.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS BUT ALSO RECOMMENDED THAT THE COMMISSION NOT APPROVE THE CONCEPT OF ALLOWING INDIVIDUALS TO FILE CGA HARDHIP WAIVER APPLICATIONS FOR CLEARING RELIEF.

12-3-2010

- The Hardship requirement is applicable to BZA subdivisions as well.

Bring to the Commission for consideration. Also, this clarification should be added to the CLUP standard

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.

5.3.3.6.1.6 Split Core/CGA site

12-3-2010

- Brookhaven to review the intent of this Standard and provide input.

No further information has been received from the Town of Brookhaven.

AC ACTION: THE AC TOOK NO ACTION ON THESE PROPOSALS AND COMMENTS.

12-3-2010

- For clarity, cross reference Chapter 6, specifically Section 6.3.3.5, which may result in greater clearing in the CGA portion of the site to protect the Core portion. Address timing of credit redemption if and when Credits are issued for the Core portion.
 - In a recent decision on an application in the CGA (The Meadows at Yaphank PDD CGA-DRS resolution dated 10/19/11), since the applicant for the project offered and the Commission required the redemption of Pine Barrens Credits, the Commission imposed the following condition which may help in the future in guiding the timing of credit redemption: “Prior to the issuance of any building permits or physical activity on the project site, the applicant shall redeem a minimum of five (5) Pine Barrens Credits for the Project and provide proof of this transaction to the Commission.”

An additional comment was made that cash flow can be a significant issue for a development until it receives revenue from completed sites. Accordingly, an agency should allow for phasing and establish a schedule for redemption in a development project that will be phased. Cash payments toward redemptions could be implemented incrementally as development progresses in order to spread out the cost of redemption. Another comment was expressed that this will add to the complexity of government review process and tracking and that certain fees, such as park fees, are already required upfront.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS, WITH THE ADDITIONAL RECOMMENDATION THAT THE PROPOSED AMENDMENT LANGUAGE BE CHANGED TO ALLOW FOR THE DEVELOPMENT OF A PRO RATA CREDIT REDEMPTION PROGRAM.

5.3.3.6.1.7 Cleared sites

12-3-2010

- Clarify jurisdiction and the review process for overcleared sites to come into conformance, jurisdiction to approve revegetation, plans and timing to review and approve mitigation for

overclearing violation. Distinguish between clearing which occurred before the Long Island Pine Barrens Protection Act and clearing that occurred after the Act.

- Outline the approach for an applicant who seeks to partially remedy a clearing violation and seeks Hardship relief.
- Clarify when Town can grant relief and revegetation as it relates to standards and only Commission can grant relief to exceed CLUP standards.
- Planning Board can grant relief for clearing but clearing in excess of standard requires hardship subject to Commission review and decision.

Defer to legal counsel for input.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE MATTER BE REFERRED TO LEGAL COUNSEL FOR INPUT.

5.3.3.6.2 Open space standard

9-27-2011

- Provide the definition of open space from multiple sources and develop consensus on a single definition. (*Definitions have been provided above.*)
- Clarify open space versus habitat.
- In the first sentence in the second paragraph of this section, consider substituting the phrase “project design” for the phrase “site planning.”
- In the third sentence of the second paragraph, consider replacing the word “contours” with “existing natural contours” or the word “topography.”
- Remove flexibility and provide a firmer mechanism to set aside open space – the clearer the standard, the easier it will be to determine whether or not a project complies.
- Clarify when a hardship waiver would be required.
- Provide the Towns and the Commission’s interpretation of the open space standard.
- Provide sample diagrams to illustrate the intent of the open space standard. (*These are now posted on the Commission’s website.*)

12-9-2011

- *Would conservation design apply to subdivisions and commercial site plans as well?*

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSALS AND COMMENTS.

5.3.3.6.3 Unfragmented open space and habitat

9-27-2011

- In the first paragraph, which begins “Subdivision and site design...:”
 - Rework the first paragraph in this standard. Refer to other standards, for example state, “...in accordance with other CLUP standards.”
 - Add “when adjacent parcels are undisturbed” to the first sentence.
 - Consider adding the phrase “or entirely or partially preserved” to the end of the first sentence.

- Consider eliminating the phrase comprising the first portion of the second sentence – that portion which states: “Subdivision and site designs ~~should~~ shall also be configured in such a way so as to prioritize the preservation of designated open spaces and/or native pine barrens vegetation...” as it seems to be unnecessary.
- Explain why the phrase, “...to the maximum extent ~~necessary~~ *practicable*,” is being eliminated from the end of the first paragraph?

A comment was expressed that this standard should be as firm and clear as possible.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.

9-27-2011

- Second paragraph. Explain why the paragraph in this part of the standard, which begins “For the purpose of this paragraph, native pine barrens vegetation...,” was eliminated.

This paragraph constitutes the second paragraph of the existing CLUP section 5.3.3.6.2 (“Unfragmented open space”). The use of the term “native vegetation” was found to be inconsistent with the first paragraph of this existing section, which references “natural vegetation,” not native vegetation, and its companion section 5.3.3.6.1 regarding clearing as that section refers to clearing of natural vegetation, not native vegetation. The use of the term natural vegetation is more inclusive and ensures that natural vegetation, which may include vegetation not native to Long Island but which is native to the northeast or other parts of the United States or non-invasive vegetation introduced from outside the United States but which provides important habitat and ecological functions and which may be intermingled with native vegetation in certain situations, is more adequately protected and accounted for when setting aside open space.

9-27-2011

- Fourth paragraph
 - Provide examples demonstrating why natural area should not remain in lots. Address concern that natural area remaining in lots is often lost over time with changes in property ownership. Compliance and enforcement time and efforts needed to monitor compliance may not be available. The term “privately-owned” should be considered for elimination.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS AND NOTED LIBI’S OBJECTION TO THE SUGGESTION FOR THE FOURTH PARAGRAPH THAT OPEN SPACE SHOULD BE KEPT OUT OF INDIVIDUAL LOTS.

5.3.3.6.5 Native Plantings

NEW PARKING LOT ITEM FROM 12/15/2011 ADVISORY COMMITTEE MEETING

AC ACTION: THE OPEN SPACE COUNCIL RECOMMENDED NEW LANGUAGE BE ADDED TO THIS SECTION. THE AC ADOPTED A RESOLUTION THAT THIS SECTION

SHOULD BE REVISED TO INCLUDE LANGUAGE THAT RESTORATION INCLUDE SELF RESTORATION (NATURAL SUCCESSION) UNDER THE SUPERVISION OF STAFF WITH THE REMOVAL OF THE NON NATIVE OR INVASIVE PLANTS THAT ARE THERE. IT WAS ALSO DECIDED THAT MS. BLUMER SHOULD SUBMIT SUGGESTED LANGUAGE TO THE COMMISSION.

5.3.3.6.6 Receiving entity and protection of open space areas

9-27-2011

- Provide information on ECL Article 49 - Protection of Natural and Man-Made Beauty, particularly in regard to third-party enforcement. The complete text of Title 3 of Article 49, which pertains to Conservation Easements, is attached. Section § **49-0303. Definitions.** states that “*Third party enforcement right’ means a right which may be granted in a conservation easement which empowers a public body or a not-for-profit conservation organization which is not a holder of the easement to enforce any of the terms of the easement.*”

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.

9-27-2011

- **Section 49-0305** entitled “Conservation easements; certain common law rules not applicable” states in part 5 that:

“A conservation easement may be enforced in law or equity by its grantor, holder or by a public body or any not-for-profit conservation organization designated in the easement as having a third party enforcement right, and is enforceable against the owner of the burdened property..”

Concern expressed that when a application is submitted it is not always known or has been determined as to who will be the third party. It was suggested that a condition of approval could be applied that would require the easement to be reviewed by the Commission or Town after this has been determined.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.

9-27-2011

- The objective is to require protection, however, a specific entity cannot be specifically identified as required to receive the open space.
- Provide sample wording to address this standard and receiving entities. If a non-profit receives the open space then ceases to exist, who is the default owner? What enforcement powers exist to protect property?

Defer to legal counsel for input.

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.

5.3.3.6.8 Invasive plant species mitigation

9-27-2011

- Re-write this standard.
- Indicate that the developer is required to do the assessment.
- Change wording to “removal and/or management.”
- Elaborate on the requirements included in the “removal and/or management” of invasives.
- Describe how this standard works with other standards. For example, if someone is making a good-faith effort to comply with the invasives standard this might cause that person to violate the clearing standard as invasives may comprise a portion of the natural vegetation on a parcel which is intended to be set aside.
- Consider adding the phrase “maximum extent practicable.”
- What is the basis for the reference to “10 acres”?
- Consider adding the phrase “*to the maximum extent practicable*” as there may be some situations in which it is difficult to remove invasives or in which the removal of invasives may cause an undesirable situation (e.g. the removal of *Phragmites* on a steep slope may destabilize the slope and cause erosion.)

12-9-2011

Suffolk County Planning Commission recently placed certain plants that were formerly acceptable on a “no plant” list.

What if land is conveyed to a public agency?

AC ACTION: THE AC ADOPTED A RESOLUTION TO RECOMMEND THAT THE COMMISSION CONSIDER THE PROPOSAL AND COMMENTS.