



*CPA Open Space Projects  
and Conservation  
Restrictions*

*Insuring Permanent Protection of Your  
Community's Resources*



# INTRODUCTION

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## Conservation Restriction Basics



# What is a Conservation Restriction ?

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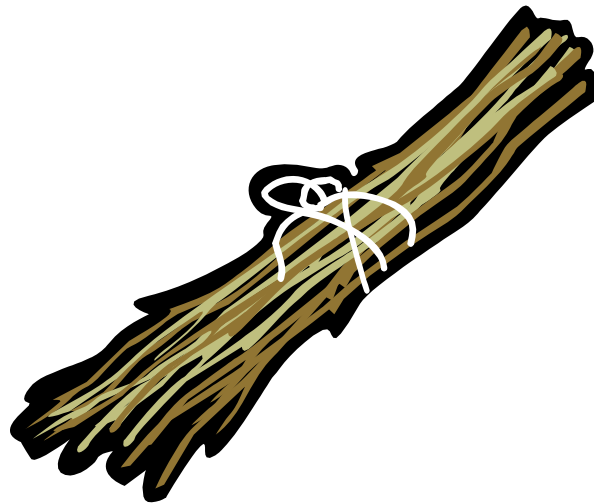
Interest in real property

Not a contract

It follows the land when land is sold

# BUNDLE OF STICKS

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# Conservation Restriction

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Today – discuss 1 stick in the bundle

Conservation Restriction



# Conservation Restriction Acquisition Process

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## The Mechanics



# Identify Desirable Land

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Why?



# CPA Requirement

## G.L.c. 44B, § 5(b)(1)

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The Community Preservation Committee must study:

- Needs, possibilities and resources of the city or town regarding community preservation.
- Includes consultation with municipal boards, e.g. the conservation commission, the historical commission, the planning board, the board of park commissioners and the housing authority.
- Must hold one or more public informational hearings.





# Other Reasons

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- Allows you to establish priorities for acquisition
- Allows planning and budgeting
- Potential to negotiate before property goes on the market
- Allows you to act quickly when property goes on the market



# How do you identify land?

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Community process  
Consultation with other boards  
Consult masterplan



# What are Town's priorities?

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# OPEN SPACE



# RECREATION



# HISTORIC PRESERVATION



# COMMUNITY HOUSING





# Develop approach to acquisition

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Will you approach the owner directly?

Who will make the contact?

Wait until it goes on market?

What interest will you acquire?





# Develop acquisition protocol

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What is the decision making process?



# For Example

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Who decides to pursue parcel?

Who negotiates? Third party, CPC, Town committee...

Who enters into agreement

What boards or officials have to approve;  
legally/politically?

When do you get their approval?

Answer these questions ahead of time.



# Obtain Appraisal

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- G.L.c. 44B, § 5 - Municipality may not pay more than value determined by “procedures customarily accepted by the appraising profession as valid.”
- Technically - do not need a licensed appraiser, but best practice is to obtain appraisal from a licensed appraiser
- State grant - need an appraisal by a licensed appraiser
- G.L.c. 40, § 14 - limitation that a city may not purchase for a “price more than twenty-five per cent in excess of its average assessed valuation during the previous three years” does not apply.



# Enter into Purchase and Sale or Donation Agreement.

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Conditions of performance:


- favorable vote of CPC if CPA funds to be used
- favorable Town Meeting or City/Town Council vote
- EEA approval
- grant contingencies, if applicable
- appraisal if not available before P&S signed. (Not best practice.)



# Obtain favorable vote of CPC

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Recommends expenditure for purchase to Town Meeting or City/Town Council



# Obtain Favorable Town Meeting or City/Town Council vote

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## “Marketing” Strategy

Why is this an important way to spend Town’s money?

Why is this purchase more important than others?



# “Marketing” Strategies

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Town Boards must be aware and on board with the expenditure

Keep neighborhood informed/meet with abutters

Let them know your plans

ID benefit for community at large

ID what will be gained

ID what will be lost

Consult with opposition and address concerns if possible



## “Marketing” Strategies (cont’d)

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Analyze from opposition’s viewpoint – Is this really a benefit for community? Be able to say why.

Anticipate issues and address them

Keep presentation short and to the point

Make sure someone is present who can answer the questions

GET OUT YOUR VOTE!!!





# DUE DILIGENCE

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# Title Examination

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ID record owner

ID encumbrances

- Are there mortgagees? - will have to subordinate
  - Why? - If foreclosed without subordination, conservation restriction could be wiped out.
- Easements that lower conservation value?
- Existing leases?



# Survey

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Must have description of Conservation Restriction area

Survey is ideal

EEA determines what is satisfactory.

EEA Handbook states that survey plan should be prepared under the following circumstances:



# EEA Recommends Survey

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- o taking where no prior plan is on record and deed description cannot be confirmed on the ground;
- o division of a parcel, i.e., a new property line is created (Registry of Deeds requirement see G.L.c. 41, Section 81X);
- o "envelope" created around a dwelling or other portion of land;
- o CR is over a portion of a lot; or
- o deed description is unclear; cannot be confirmed on the ground; no extrinsic evidence which defines the boundaries.



# G.L.c.21E site inspection

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- o G.L.c. 21E, sec.5(I)-provides protection, but should carefully consider;
- o CR should expressly state that holder of conservation restriction is not responsible for the condition of property;
- o may affect value of conservation restriction and public access to property



# Pre-Closing Steps

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- Negotiate terms of conservation restriction with Owner
- EEA staff preliminary review and approval of draft conservation restriction
- See EEA handbook for detailed description. Link: <http://www.mass.gov/Eoeea/docs/eea/dcs/crhandbook08.pdf>



## Pre-Closing Steps (cont'd)

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- Obtain signatures of parties and necessary municipal officials
- Obtain EEA Secretary's signature
- Obtain municipal lien certificate



## Pre-Closing Steps (cont'd)

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- o Obtain necessary title clearing documents e.g. subordination of mortgage
- o File “Disclosure of Beneficial Interest Statement” with DCAM (G.L.c. 7, § 40J) if municipality holding CR





# Closing

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- Confirm with treasurer/financial officer availability of funds
- Conduct final inspection of property near closing date
- Record conservation restriction following title rundown
- Release funds to seller following recording of conservation restriction



# Post-Closing

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- Send notice of registry information, GIS data and copy of recorded CR to Director of Conservation Services
- Send copy of recorded CR to the local Board of Assessors for assessing records
- Send original recorded conservation restriction to City/Town Clerk
- Obtain title insurance, if desired



# CONSERVATION RESTRICTION PROVISIONS

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Allowed Uses/Prohibited Uses

Pay attention to the details

Most difficult to negotiate

Utilize DCR if necessary

TPL, TTOR and Local Land Trusts – wealth of  
information and experience



# Allowed Uses

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## Agricultural Land

- Retain an affirmative right, but not an obligation, to mow agricultural fields
- Retain right to approve location of agricultural related buildings
- Define the type of fencing allowed
- Subdivision of agricultural fields should not be permitted without consent of holder



# Allowed Uses

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## Forestry

- Allow cutting and harvesting of trees for commercial timber production on a sustained yield basis
- but carried out in accordance with a M.G.L. c. 132 Forest Cutting Plan
  - prepared by a Massachusetts certified professional forester, and
  - designed to protect the conservation values of the Premises



# Allowed Uses

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## Alternative Forestry Clause

Commercial woodland and forestry operations conducted in accordance with a forest management plan and Forest Cutting Plan approved by DCR acting by and through its State Forester



# Allowed Uses

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## Fences

- sight-pervious fences
- not interfere with the passage of wildlife
- not interfere with the conservation purposes of CR



# Prohibited Uses

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Motorized vehicles, bicycles, trail bikes etc

Exceptions:

necessary for public safety (i.e., fire, police, ambulance, other government officials) in carrying out their lawful duties

baby carriages, strollers, individual transportation vehicles necessary for the mobility of persons with disabilities shall be permitted





# Prohibited Uses

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Subdivision of the premises is generally prohibited.

If future subdivision is contemplated, no portion of the premises may be used towards development

e.g. open space calculation, utilities, setbacks.



# Prohibited Uses

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Opening paragraph to prohibited uses revised recently:

Subject to the exceptions set forth herein, the Grantor will not perform or permit the following acts and uses which are prohibited on, above, and below the Premises



# ALLOWED/PROHIBITED USES IN SUM

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Consider use by next owner – “educational use”  
Can day camp become college campus?

Consider intensity of uses allowed under provision  
e.g. horse farm – 5 or 20 horses  
Does it include riding school?

Commercial agricultural use – farm stand?



# Public Access

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- EEA strongly encourages, but may be approved without it if other substantial public benefit
- Recreation Use Statute protections, G.L.c. 21: Sec. 17C
  - Liability protection if no fee charged for public use
- IRS regulations:
  - Outdoor recreation and education, substantial and regular use by the general public. Reg. 1.170A-14(d)(2)(ii);
  - Protection of environmental systems allows limitation on access, as appropriate to protect environment. Reg. 1.170A-14(d)(3)(iii);



## Public Access (cont'd)

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- Open space/scenic enjoyment requires visual access to or across the property by the general public. Reg. 1.170A-14(d)(4)(ii)(B);
- Open space/governmental policy allows limitation on access, unless conservation purpose is frustrated or undermined; if governmental policy is for scenic protection, visual access is required. Reg. 1.170A-14(d)(4)(iii)(C);
- Historic sites and structures require some visual public access to protected features; otherwise, physical access by public on regular basis is required. Reg. 1.170A-14(d)(5)(iv).



## Public Access (cont'd)

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- o Compliance Monitoring Access – G.L.c.184, §32 requires access at reasonable times for the purpose assuring compliance.



# Extinguishment/Termination

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No release of conservation restrictions except under the following circumstances:

- Doctrine of Changed Conditions: CR becomes a burden without benefit
- No practical alternative to some other public action which requires a complete or partial release and there is overriding public benefit in the release



# Extinguishment/Termination Process

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Process is as follows:

1. Holder votes to release the restriction.
2. Notice of the decision to Selectmen (Mayor and City Council) and EEA in writing.
3. The Selectmen (City Council) publish notice of hearing at which they will consider release of the restriction. After the hearing, Selectmen (City Council) vote to release restriction for consideration they determine to be appropriate.
4. Selectmen (City Council) send the release document to EEA after two-thirds vote of approval by Town Meeting (City Council) and two-thirds roll call vote of the Massachusetts legislature (once acquired, CR becomes subject to Article 97 if held by govt.) and MEPA approval.
5. Secretary's approval and recordation by proponent.





# EEA Policies

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## Floating Building Lots

Generally, not acceptable for inclusion within restricted lands.

But, if restricted land is of sufficient size to absorb the building(s) without disturbing the natural attributes of land, the Secretary may approve provided the grantee has non-revocable approval as to location



# EEA Policies (cont'd)

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Subordination agreement required from any mortgagee holding a mortgage on property proposed to be restricted



# EEA Policies (cont'd)

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## Amendment

- treated as something less than releases but subject to the approvals of the grantor, grantee, municipality, and the Secretary
- must be recorded in the registry of deeds
- approve only if they strengthen the original conservation restriction or will have a neutral effect
- no amendment will be approved which will affect the qualification of the conservation restriction or status of the grantee under any applicable laws



# Tips and Traps for the Unwary

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## EEA approval –

- Must be in the public interest
- Deemed in the "public interest" if meets any of the IRS tests for deductibility



# Tips and Traps (cont'd)

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## Qualified Organization

- o State – G.L.c. 184, sec. 32
  - governmental body,
  - charitable corporation, or
  - trust

whose purposes include conservation of land or water areas or of a particular such area



## Tips and Traps (cont'd)

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- o Federal - Internal Revenue Code Sections 170(h)(1)(B) and 170(h)(3)

- Governmental units (such as towns);
- Charitable corporations; and
- Private non-profit land trusts,

exempt under Section 501(c)(3) and enjoying public foundation status

Grantee must have the commitment and resources to enforce the terms of the restriction



# Tips and Traps (cont'd)

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## Authority to Sign

- All owners must sign
- If it is trust/corporation make sure proper individuals have executed



# Tips and Traps (cont'd)

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## Quantum of vote

- Majority vote of Town Meeting or City Council
- Taking – two-thirds vote





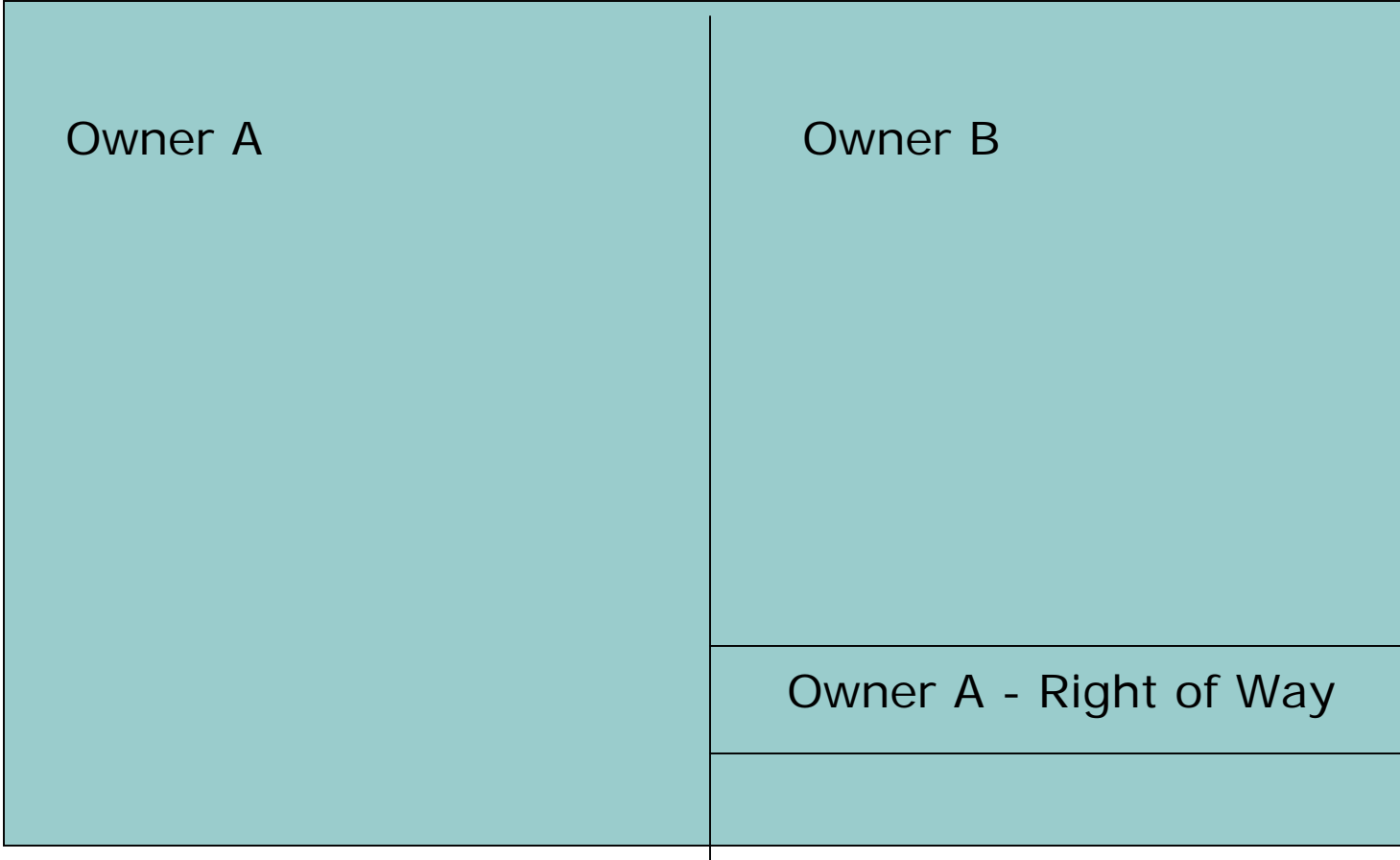
## Tips and Traps (cont'd)

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### Merger of title doctrine

Combining the dominant estate with the servient estate extinguishes the easement, unless the combining document clearly indicates an intention not to extinguish the easement

Corollary - Easement must be held over land of another





Owner A

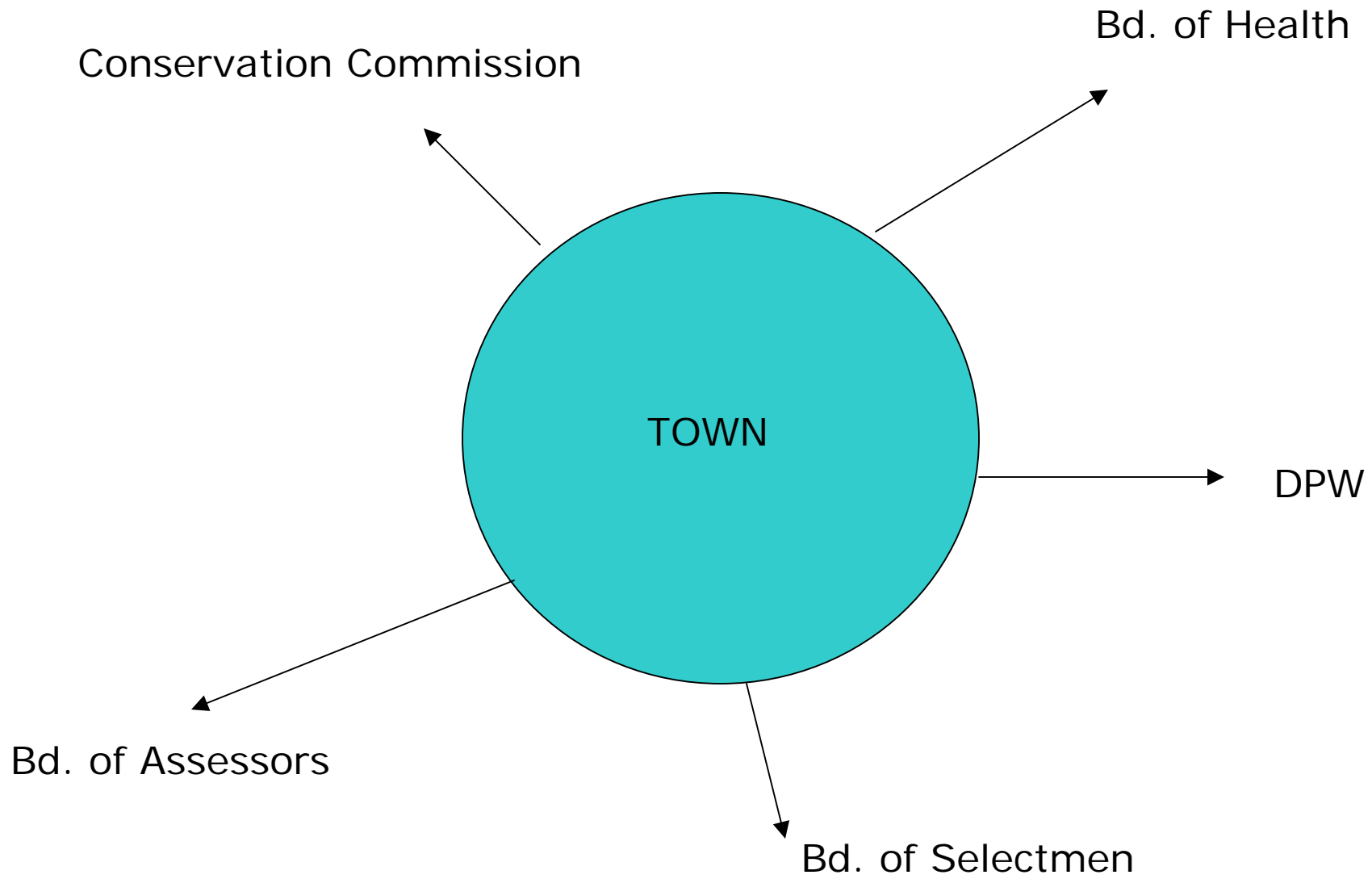
Main Street

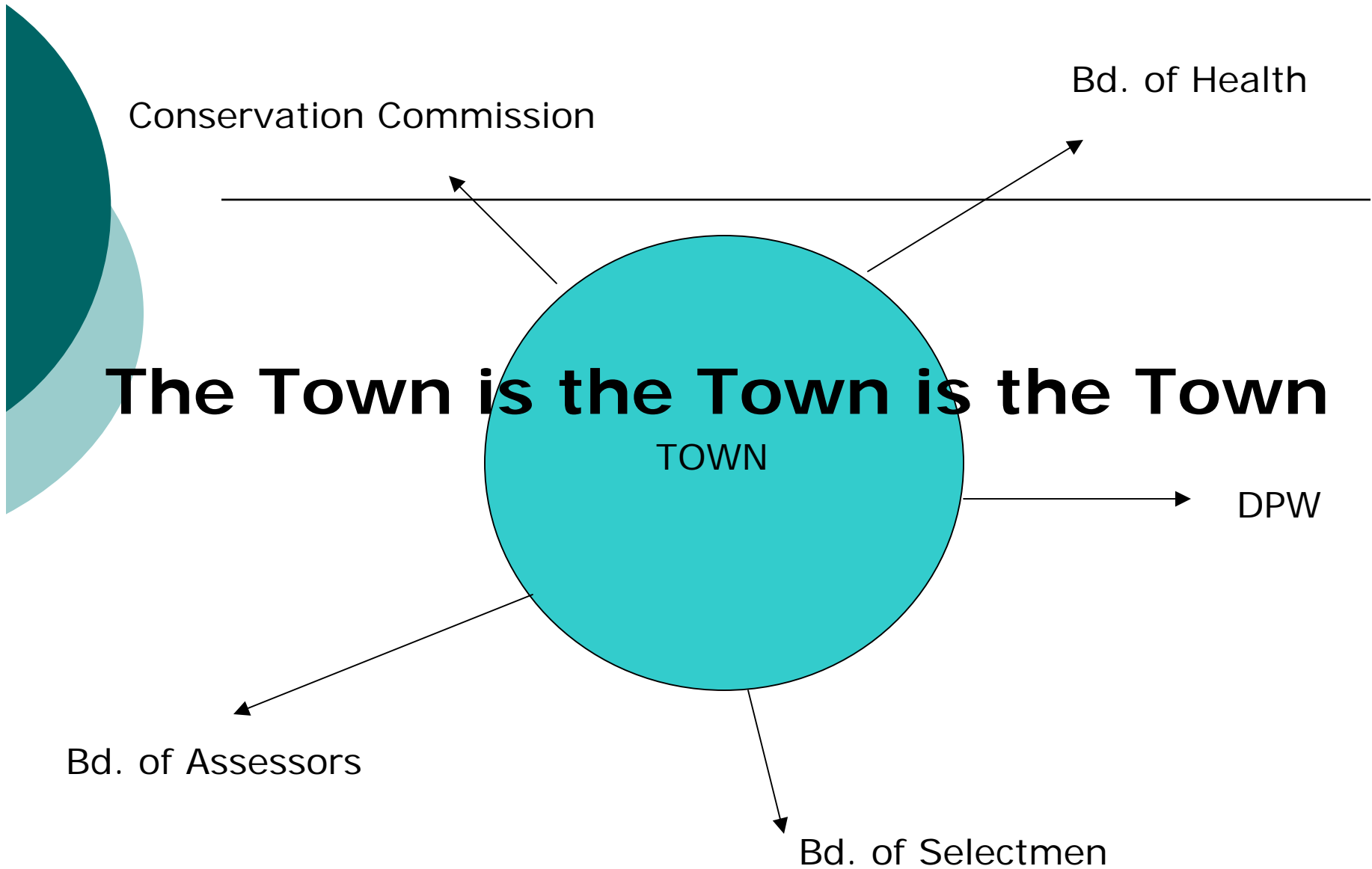


## Tips and Traps (cont'd)

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G.L.c. 44B, Sec. 12. (a) A real property interest that is purchased with monies from the Community Preservation Fund **shall be bound by a permanent deed restriction** that meets the requirements of chapter 184, limiting the use of the interest to the purpose for which it was acquired. The deed restriction shall run with the land and **shall be enforceable by the city or town** or the commonwealth. The deed restriction may also run to the benefit of a nonprofit, charitable corporation or foundation selected by the city or town with the right to enforce the restriction.







## Tips and Traps (cont'd)

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### Don't leave any doubt

- Best – Have the conservation restriction held by a TP; i.e. nonprofit, charitable corporation or foundation
- Insert language stating no intention to merge title. Not ideal
- Model CR Art.IX contemplates TP to hold CR; safest action



# Tips and Traps (cont'd)

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## Form of CR

CPA requires deed restriction that meets requirements of G.L.c. 184

DOR letter – raised some question as to the form





# Tips and Traps (cont'd)

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## Uniform Procurement Act

- o Does not apply
- o No uniqueness filing in central register or issuance of RFP



# HANDOUTS

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- Sample warrant article(s)
- EEA Model Conservation Restriction/Application
- EEA sample additional Conservation Restriction clauses
- Conservation Restriction acquisition checklist



**ENJOY THE DAY!**