Land of Opportunity -
Maximizing Value, Creating Opportunity

A. Goals
1. Shared ownership, use and enjoyment during lifetime (rather than transfer upon death)
2. Ownership vehicles that
   a. Allow easy transferability by gift while affording control over transfers to unrelated third parties
   b. Flexibility of management/control; not necessarily in accordance with levels of ownership
   c. Limit personal liability

B. Ownership: Choice of structure/entity
1. Tenancy In Common
   a. Simple to create but hard to manage
   b. Requires a Co-Ownership Agreement to govern usage, sharing of expenses, voting on major decisions
   c. Transferability: Transfers relatively easy but require recording of deeds; no control on transfers
   d. Management: Absent any other document, requires unanimous agreement to take any action; no centralized management or control by older generation; owners can become deadlocked; must resort to “Partition” action which is expensive and time consuming
   e. No protection from liability
2. Nominee Trust:
   a. Not a true trust since the trustees have no authority to act absent direction of the beneficiaries
   b. Title holding entity only; must be used in conjunction with another ownership structure
   c. Allows for off-record transfers; no control over transfers
   d. Trustees are agents only; no real centralization of management
   e. Limited shield from liability
3. “Real” Trusts
   a. Complex drafting issues
   b. Used with Nominee Trust to avoid recording confidential provisions of the Trust but no longer necessary with recent legislation allowing recording of a Trustee’s Certificate
   c. Transferability: amendment required to change beneficial interests
   d. Management: by trustees only; beneficiaries have no legal authority to manage the trust property
   e. Liability: Trustees usually liable subject to reimbursement from trust assets; beneficiaries not liable; trustees may have limited liability in probate trusts
4. LLCs – Entity of choice
   a. Easy transferability/control of transfers to third parties
   b. Flexibility as to management/control; non-owner managers allowed
   c. Limited liability for all
   d. Documentation/filing fees

5. Insurance: Regardless of the choice of entity, families should not rely solely upon protection from liability conferred by limited liability entities.
   a. Potential for piercing of “corporate veil”
   b. Personal conduct creates personal liability
   c. Adequate liability insurance a must

Summary of Shared Use Issues and Solutions

<table>
<thead>
<tr>
<th>Issue</th>
<th>Solution</th>
</tr>
</thead>
</table>
| Centralized but representative management (each child represented) | • LLC  
• Trust  
• Co-Ownership Agreement |
| Funding maintenance and capital improvements    | • Parents can pay if in revocable trust  
• Rental income  
• Parents create endowment fund  
• Co-tenants or LLC members pay |
| Keeping property in the family                  | • Trust  
• LLC  
• Co-ownership agreement  
• Right of First Refusal/Right of First Offer  
• Need to cover gifts, divorce and transfers at death |
| Decisions re capital improvements               | • Depends on ownership structure  
• Can require family consent |
| Decisions re sale of property                   | • Depends on ownership structure  
• Can require family consent  
• Family can have right of first refusal |
| Fair use of the property                        | • Trust, LLC operating agreement or co-ownership agreement can cover this |
| Creditor protection (including ex-spouse)       | • LLC  
• Trust (but not for the donor) |
C. What is it worth: The Appraisal

1. What precipitates the need for an appraisal?
   a. Appraisal is an important tool in the estate planning process. It sets the baseline value for most decisions regarding real estate - tells owner what they have, what it’s worth and establishes the “bottom line” against which alternative plans can be compared.
   b. Appraiser works with clients and their advisors as part of the team in laying out choices. Once a good appraisal is done, land owner knows what they own and what it’s worth, allowing them to make the next set of decisions about what to do with their property.

2. The appraisal process
   a. Finding a “qualified appraiser” (IRS definition)
      i. A “qualified appraiser” is one who “holds himself or herself out to the public as an appraiser or performs appraisals on a regular basis”
      ii. State licensing and certification issues
   b. Define appraisal goal
      i. Financing, transfers, estate planning
      ii. Different types of appraisals for different purposes - form, restricted use, summary, self-contained. All have different goals and costs
      iii. Phased approach for estate planning is often helpful
   c. Define property
      i. Gather and review existing data (deeds, survey, previous appraisals)
      ii. Prepare base plan
   d. Regulatory review (See also Determining The Value)
   e. Market data research
   f. Prepare conceptual plans - alternative plans to test values
   g. Financial analysis valuation
   h. Meet with client and advisors to discuss findings
   i. Establish action steps

D. Transfer Tax Basics

1. Estate and Gift Taxes
   a. Gifts are subject to gift tax (if made during the giver’s life) or estate tax (if made at the giver’s death) with the following exceptions:
      i. Gifts to charity
      ii. Gifts to a spouse
iii. Gifts of up to $14,000 per year to any number of individuals (applies only to lifetime gifts)
iv. Gifts to pay certain medical or educational expenses (applies only to lifetime gifts)
v. Aggregate gifts during life and at death (other than those listed above) up to $5,340,000 (indexed for inflation)
b. Gifts that are subject to tax are taxed at combined state and federal rates of up to 50% or more.
c. Current federal estate tax laws provide for an exemption of $5.34 million in 2014 (with annual increases for inflation). The federal estate tax rate is a flat 40%. The Massachusetts estate tax exemption is $1 million and the Massachusetts estate tax is calculated as a share of the federal estate tax due under prior law. There are no scheduled changes to the Massachusetts exemption amount or rates.
d. Other states will have different estate tax rates and exemptions. Some states (such as Florida and New Hampshire) currently have no estate or gift tax.

2. Generation skipping taxes. The federal government and some states (but not Massachusetts) impose a second tax equal to the estate or gift tax on any gifts to anyone more than one generation below the giver to the extent that such gifts exceed the gift and estate tax exemption amount.

3. Discounting Value. More gifts can be made at lower transfer tax cost if the property being given can be assigned a value for tax purposes that is lower than its ultimate value to the recipient. Current value of a gift can be reduced by dividing ownership of the property that is given currently or across time.

4. Discounting through current division of ownership
   a. Basic Principle: A percentage interest in a piece of property is worth less than that percentage multiplied by the value of the whole property.
   b. Example: a 15% interest in a piece of land worth $100,000 is not worth $15,000; instead it may be worth $11,000 or less. This is because the owner of a 15% interest does not have full control over how the property is used and when or if it will be sold. Very few potential buyers would be interested in a 15% interest in a piece of property.
   c. Applications:
      i. Give away a percentage interest in a larger property through a trust, partnership or LLC in order to get a 20% or more discount, rather than make gifts of 100% interests in smaller pieces of property. Percentages can be set low enough so that the amount given each year is less than $11,000.
      ii. Sell a percentage interest to a child at a discounted value.

5. Discounting through Temporal Division of Ownership
   a. Basic Principle: A 100% interest in property to be received in the future is worth less than that same interest is worth now.
   b. Example: A gift of a piece of land worth $100,000 to be received in 10 years is not worth $100,000; instead it is worth approximately $68,800 (at an IRS assumed rate of return of 3.8%). This is because the recipient does not have use of the land for 10 years and that use is assumed to be worth $31,200.
   c. Applications:
i. Make a gift to charity that is delayed until the giver’s death. Giver gets to continue using the property during his life and gets an immediate tax deduction for the value that is assumed will be left to go to charity at his death. The amount of the charitable deduction will be largest when IRS assumes high rates of return on investments (when interest rates are high). This technique also benefits a giver who lives considerably longer than the IRS would predict. For a giver who does not need to continue to use the property, it may be given to a charity through a Charitable Remainder Unitrust (CRUT) that will pay income to the giver for life with the balance going to charity at his death.

ii. Make a gift to individuals through a qualified personal residence trust (QPRT). Giver transfers home to trust. At end of predetermined period giver’s children become owners of house. If giver dies before the end of the QPRT period the house goes back to the giver’s estate. Any actual appreciation in the value of house during the QPRT period is ignored for gift tax purposes. Initial gift to QPRT is less than full value of home because children have to wait to receive it and there is some risk that the giver will die before the end of the QPRT period. For example, a gift of a $100,000 house to a 10 year QPRT by a 60 year old giver at an assumed rate of return of 3.8% is a gift of just $57,500.

iii. Combine a temporal division of ownership with a current division of ownership to increase the discount. For example, a homeowner could give a 95% percent interest in her home to a QPRT.

6. When Discounting Works Best
   a. Basic Principle: Discounting strategies produce the best tax results when the assumptions used by the IRS in valuing gifts are different from reasonably predicted future realities.
   b. Examples:
      i. When interest rates are low the IRS assumes a rate of return that is lower than historical average rates of return for a diversified portfolio of investments and that may be much lower than the likely increase in value of a particular piece of property. The reverse is true when interest rates are high.
      ii. IRS assumptions about life expectancies are based on old census data for the entire U.S. population, without regard for gender or economic status. In fact, wealthier givers, especially women, are likely to live longer than projected.
   c. Applications:
      i. Make gifts of property that has a real appreciation potential that is different from IRS assumptions. When interest rates are high consider making a charitable remainder gift of property with no better than average appreciation potential. When interest rates are low consider making a gift of a future interest in property with better than average appreciation potential through a QPRT. A second home in a desirable resort area would be ideal.
      ii. If possible, have the giver of a gift where the giver gets a better result if the giver lives longer be a person in excellent health and, all other things being equal, a woman. For a married couple this can be accomplished by transferring the property to the appropriate spouse prior to the gift.
II. Estate Planning, Tax Planning, Real Estate and Valuation Strategies

A. General

1. QPRTs (See above)

2. Fractional Interests – property interests are analogous to a bundle of sticks
   a. Fractional interests – bundle of sticks – you can transfer one or more sticks from the bundle separately
      i. Perfect subject for annual gifts: illiquid, non-income producing
      ii. annual gifts "best" planning device/ $14,000 per donee per year
      iii. as many donees as one chooses times scores of years
   b. Fractional share is trigger for discounting (See previous section on discounting value)
   c. Principal limitation – prohibition against retained interest
      i. Donor cannot retain exclusive use/use enjoyment, must be shared
      ii. Vacation home/split the season
      iii. Separate parcels – give away unimproved property
      iv. If not separate, consider division
      v. Merger down the road of separate co-owned properties
   d. Valuation - don't forget appraisal expense
      i. Make gifts biannually, December/January
      ii. Assessed values may be substituted for appraisal at cost of discount
   e. Donor can pay taxes and take deduction
      i. Donor’s payment of taxes and other expenses formally create a lien against donees’ interests
      ii. Such payment may constitute a gift

B. Conservation Easements

Conservation easements can be used to accomplish a number of objectives and provide a means of obtaining tax relief from burdens associated with holding and transferring family held real estate to the next generation. Virtually every state has enacted legislation outlining a framework for conservation restrictions and historic preservation restrictions.

1. Common Objectives of Land Owners Considering Conservation Easements
   a. Protecting land from development while continuing to enjoy the benefits of ownership
   b. Protecting land from development while providing access to scenic natural resources to members of the public
   c. Keeping land in agricultural use
   d. Keeping a property in the family while getting it out of the estate of current generation owners
   e. Lowering the value of land for local assessment purposes
   f. Lowering the value of land for estate valuation and estate tax purposes
   g. Income tax deduction
h. Estate tax exclusion

2. Determining the Value

The value of the gift of a conservation easement or restriction is determined by subtracting the value of the land with the easement from the value of the land without it on the day of the gift. The services of a qualified appraiser with experience in appraising partial interests in land should be retained. The appraisal process should include consideration of the following factors:

a. The size and development potential of the property. (Note that if the property has development potential, the costs of development must be factored into the valuation)

b. Whether the property consists of separate lots or may be subdivided without the creation of new roads

c. Rights of way or easements over the property, including ancient ways, paper streets, utility easements and cart paths that allow persons other than the owner to use the property in some way

d. Evidence of prescriptive or adverse use by others

e. The right of the property owner to access a nearby beach, pond, dock or other amenity (so-called “appurtenant rights”)

f. Water access, water views or frontage on an ocean, lake or pond

g. Scenic views

h. Evidence of environmental contamination (note that old farms are likely suspects because of the chemicals in fertilizers)

i. Determination of the “highest and best use” in light of legal, physical, environmental and market considerations

3. Budgeting for the Conservation Restriction Gift: While gifts of conservation restrictions provide significant tax benefits, it is necessary to budget for up front expenditures that will likely be required. The following are the more significant up front expenditures:

a. Cost of updated survey, showing relevant topographical data and depicting improvements, the location of the land subject to the conservation restriction and the retained land. Depending on the size of the property, this can be a significant expense. A survey is required for grants of conservation easements in Massachusetts and many other states.

b. Cost of the appraisal. The appraisal is essential to justify any large deduction or exclusion. Care should be taken to select an appraiser with experience in valuing conservation restrictions and other partial interests.

c. Legal fees. A law firm with experience in drafting conservation restrictions and advising on their tax implications should be selected. Negotiation of terms with both the donee organization and the state executive office of environmental affairs will likely be necessary.

d. Endowing the conservation restriction. Most donee organizations and land trusts now require donors to fund the maintenance expenses for the land subject to the restriction and the cost of enforcing the restriction. This can take the form of an up front gift of $5,000 or more, or a pledge to make an annual gift over a number of years.
4. Planning and Drafting Considerations: Families need to focus on their plans and desires for the future use of the property and reserve whatever rights are necessary to insure that use. This may well be an issue to be negotiated with the holder of the conservation restriction.

a. One of the most important issues to both donors of conservation restrictions and donee organizations is whether public access will be permitted and on what terms and conditions. If a conservation easement is taken for trail access purposes, for example, it is important that the granting instrument specifically address whether vehicles of any sort, including boats and bicycles, or animals, such as horses and dogs, will be permitted.

b. Of equal importance is determining what retained rights the family may wish to reserve in the land being restricted. Families may wish to reserve an access path to a pond or beach, the right to maintain horses or cattle, raise crops or certain limited development rights.

c. To the extent possible, families with extensive land holdings contemplating a gift of a conservation easement should consider making the gift in a year when their income and income tax liability are projected to be high. Care should be exercised to insure that all requirements of effecting the gift have been complied with in the year in question. Usually this requires recording the instrument in the local land records office. In states where governmental or other approval is required, sufficient time should be allowed for the approval process. In Massachusetts, for example, the process can take two to three months. Where the gift contemplated and the tax benefits sought are substantial, consideration should be given to seeking a private letter ruling from the Internal Revenue Service to insure compliance with the requirements for the deduction.

5. Income and Estate Tax Benefits of Conservation Easements

a. Introduction

i. Conservation easements offer terrific income and estate tax benefits for conservation-minded families who own property with valuable development rights.

ii. The donation of a conservation easement is a charitable gift equal to the value of the extinguished development rights. The gift can be deducted on the donor’s federal (but not Massachusetts) income tax return. As noted below, however, beginning in 2011, some conservation easements will qualify for a Massachusetts income tax credit.

iii. The conservation easement will reduce the value of the property for federal and state estate tax purposes. With current combined state and federal estate tax rates in excess of 50%, there is a lot of appeal for a technique that allows landowners to retain their property yet reduce its value for estate tax purposes.

iv. The third tax benefit for conservation land is the estate tax exclusion. The exclusion is equal to the lesser of $500,000 or 40% of the land’s value and is allowed in addition to the reduction in value caused by the conservation easement.

b. Income Tax Considerations: Requirements for Charitable Deduction
Massachusetts does not currently allow charitable income tax deductions of any type but will allow a credit for certain conservation easement donations beginning in 2011. Total credits per year are capped at $2 million so the credit is not guaranteed. The maximum credit is $50,000 per gift and cannot exceed the donor’s annual Massachusetts income tax liability. The credit can be carried forward for 10 years. In order to qualify for a federal income tax deduction, the conservation easement must satisfy certain requirements set forth in the Internal Revenue Code and regulations. The conservation easement donation must be a “qualified conservation contribution,” defined as a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. Those key terms are defined as follows:

i. Qualified Real Property Interest: the entire interest of the donor, a qualified mineral interest, remainder interest, or a restriction granted in perpetuity on the use which may be made of the real property. A conservation easement meets this test because it is a restriction on development of the property that is granted forever.

ii. Qualified Organization: a governmental unit or a corporation, trust or community chest supported by a governmental unit or from direct or indirect contributions from the general public or certain nonprofit organizations. Generally, the conservation easement is donated to a government unit or a public charity involved in land conservation such as a local land trust or a regional or national land conservation organization.

iii. Conservation Purpose: preservation of land areas for outdoor recreation by, or education of, the general public; the protection of fish, wildlife or plant habitat; the preservation of open space for the scenic enjoyment of the general public or pursuant to a governmental conservation policy and that will yield significant public benefit; or the preservation of an historically important land area or certified historic structure.

c. The Amount of the Charitable Donation: The value of the gift of a conservation restriction is determined by subtracting the value of the land with the easement from the value of the land without it on the day of the gift. The value used by the donor for charitable deduction purposes must be supported by a qualified appraisal prepared by a qualified appraiser. The value of the conservation easement must be reduced to the extent that the easement increases the value of other nearby land owned by the donor or by a member of the donor’s family.

d. Limits on Income Tax Deduction: The donor may claim a charitable deduction for the value of the conservation easement, provided that the donor owned the land for at least one year. The donor’s charitable deduction will be limited to 30% of the donor’s “contribution base” (similar to adjusted gross income or “AGI”). The unused deduction may be carried forward for five years.

e. Income Tax Planning for Conservation Easement Deductions: Families should plan their conservation easement deductions carefully to make sure that they receive maximum tax benefits. Here are some guidelines:

i. The conservation easement must be donated during life in order to receive a charitable income tax deduction for the value of the extinguished development rights.
ii. Tax planning begins with an appraisal and, if necessary, a survey or engineer’s report, to confirm the value of the land and the potential development rights. The value of the land before and after the proposed conservation easement is key to determining the value of the donor’s potential income tax savings.

iii. Once the value of the conservation easement has been determined, the donor should consider the optimum timing for the donation. The charitable deduction will save more in taxes if it is used to offset ordinary income (taxed at a federal rate of up to 39.6% currently) vs. capital gains (taxed at a federal rate of up to 20% currently). In either case there may also be an additional 3.8% Medicare tax. Ideally, the donor would make the deduction in a year in which he or she has a large amount of ordinary income. The donor will also want to time the donation so that the entire amount can be fully deducted within sixteen years. The deduction for the conservation easement will be limited to 30% of the donor’s adjusted gross income and the donor can carry forward any unused deductions for five additional years (based on current law).

iv. The donor should allow several months to complete the process. The income tax deduction will be available for the year in which the conservation easement is signed and recorded. Prior to recording, the property must be appraised, the easement must be drafted and the conservation organization must review and accept the easement. The conservation easement is a permanent restriction on the use of the donor’s property. It should be carefully crafted to protect the landowner’s rights to maintain and use the property while meeting its conservation purposes. In addition, Massachusetts conservation easements must be approved at the state and local level.

f. Estate Tax Benefits of Conservation Easements

i. Introduction: There are two important estate tax benefits for land subject to a qualified conservation easement. First, the conservation easement can significantly reduce the value of land for estate tax purposes. Land with development potential is taxed at its highest value, regardless of whether the owner plans to sell the land for development. If the land is subject to a qualified conservation easement, its value will be reduced to reflect the lost development rights. Land subject to a qualified conservation easement is also eligible for an estate tax exclusion equal to the lesser of $500,000 or 40% of the land’s value. With state and federal estate tax rates exceeding 50%, the exclusion alone can save over $250,000 in estate taxes.

ii. The estate tax benefits for land subject to qualified conservation easements are unique in that the conservation easement can be granted after death, either by the donor in his or her will or trust, or by the family members who inherit the property. This offers post-death planning opportunities for conservation-minded families facing a big tax bill for developable land. Easements donated after death must be recorded by the filing deadline for the estate tax return (9 months after death or 15 months if on extension). Like all good “tax breaks,” the Internal Revenue Code imposes numerous requirements in order to qualify as a “qualified conservation easement.” These requirements are in addition to the income tax requirements for conservation easements described in the preceding section of this outline.
iii. The Percentage Excluded from Estate Tax: The estate tax exclusion for conservation easements is intended to apply only to easements that significantly reduce the value of the land (excluding structures). Therefore, the exclusion is not available if the value of the easement is worth less than 10% of the land’s value (calculated without the easement). In addition, if the value of the easement is worth between 11% and 30% of the land’s value (calculated without the easement), the percentage of value that can be excluded will be reduced from 40%. Each percent reduction in the easement’s value results in a 2% reduction in the portion that can be excluded.

iv. The percentage calculations are based on the values at the time the easement is granted.

g. The Seven Requirements for the Exclusion

i. Three years of family ownership prior to death: The decedent or a member of his or her family (spouse, lineal descendant, parent, spouse of a lineal descendant), must have owned the land for the three year period prior to decedent’s death. An interest in a partnership, corporation, or trust is eligible for the exclusion if at least 30% of the entity is owned directly or indirectly by the decedent.

ii. Donation of the conservation easement: the qualified conservation easement must have been granted by the decedent; a member of decedent’s family (defined above); the decedent’s executor, or the trustee of a trust that owns the land subject to the easement.

iii. Easement/land ratio: the value of the easement must be greater than 10% of the value of the land calculated without regard to the easement.

iv. Land location requirements: the land must be located in the United States or any possession of the United States. Massachusetts estate tax is based on federal law in effect on December 31, 2000 and for Massachusetts estate tax purposes only, the conservation easement must meet location requirements under the “old” federal law. Almost all Massachusetts land, other than a small area on Martha’s Vineyard, meets one of the three location requirements.

v. Certain Conservation Easements Do Not Qualify: in order to qualify for the estate tax exclusion, the easement must satisfy at least one of the following three conservation purposes (described above in connection with the income tax deduction): preservation of land areas for outdoor recreation by or for the education of the general public; the protection of a habitat of fish, wildlife, plants or similar ecosystems; or the preservation of open space which will yield a significant public benefit. Easements for the preservation of an historically important land area or certified historic structure are not eligible for the estate tax exclusion. The easement document must prohibit “more than a de minimis use for a commercial recreational activity.” The Code does not define “de minimis commercial recreational activity.” The consensus seems to be that activities such as golf courses, ski resorts, summer camps and dude ranches would be more than de minimis while granting occasional hunting and fishing licenses in connection with use of the land would be de minimis. The land may be used for farming, ranching, horse breeding or training or timber harvesting.
vi. The Exclusion Does Not Apply to the Extent of “Debt-Financing.” The estate tax exclusion does not apply to the extent that the land is “debt-financed.” In other words, the exclusion is available only to the extent of the decedent’s equity in the property. The land is deemed to be debt-financed to the extent of any unpaid debt that was incurred by the decedent in connection with acquiring the property. The debt need not be in the form of a mortgage on the property.

vii. The Exclusion Does Not Apply to Retained Development Rights: The value of the land subject to the qualified conservation easement is determined without regard to any development rights retained by the donor. A “development right” is a right to use the land for any commercial purpose that is not subordinate to, and directly supportive of, the use of the land as a farm (includes raising crops, animals or timber). Parties inheriting property subject to a conservation easement can agree to permanently extinguish retained development rights and thereby avoid the reduction in the estate tax exclusion amount. The agreement must be filed with the estate tax return and must be implemented no later than the earlier of (i) two years after the taxpayer’s death or (ii) the date the land is sold. If the retained development rights are not extinguished in time, the estate tax savings on those rights will be recaptured.

h. Timing of Donation and Estate Tax Election: The donation of the easement may be made by:
   i. The donor during his or her life (the preferred method);
   ii. The donor, by express direction in his or her will or trust;
   iii. The executor or trustee (if so empowered); or
   iv. The beneficiaries receiving the property.

i. The easement must be donated as of the filing deadline for the donor’s federal Estate Tax Return (9 months after death or 15 months if filing on extension).

j. The election to exclude a portion of the value of the land subject to the qualified conservation easement is irrevocable.

6. Income Tax Basis: In general, the income tax basis (used to calculate capital gain) for property owned by a decedent receives a “stepped up” basis equal to the date of death value. The stepped-up income tax basis is a benefit of having property included in one’s taxable estate. Special rules apply to the income tax basis of property subject to the estate tax exclusion because part of the property is included in the taxable estate and part is not. The portion included in the taxable estate receives a stepped-up basis. The portion excluded from estate tax receives a carry-over basis (equal to the decedent’s pre-death basis in the property).

7. Planning Considerations
   a. If possible, donate the conservation easement during lifetime to receive the income tax charitable deduction and to minimize legal issues. If the executor, trustee or beneficiaries place a post-mortem conservation easement on property, they cannot take a charitable income tax deduction for the value of the easement.
   b. The value of the exclusion can be multiplied by splitting ownership of the conservation property among more than one owner. At each owner’s death, the
estate tax exclusion could be used to reduce the value of that owner’s share of the property.

c. If the landowner incurred debt to acquire the property, the debt could be paid down prior to death if necessary to increase the amount of the estate tax exclusion available.

d. The landowner’s estate planning documents should be reviewed to ensure that maximum tax savings will be achieved in light of the exclusion for a portion of the land subject to the conservation easement. Strategies may include: (i) changing title to certain assets in order to ensure that the right amount of property passes to various trusts; (ii) adding an express provision in the will authorizing the executor to elect the estate tax exclusion on the estate tax return; (iii) adding an express provision in the will or trust authorizing the executor or trustees to place a conservation easement on the landowner’s property; and (iv) reviewing the funding language for the landowner’s trust in light of the exclusion of qualified conservation easement property from the landowner’s taxable estate.

e. The conservation easement should include an express clause prohibiting more than de minimis commercial recreational use. Conservation easements for historic purposes will not be eligible for the estate tax exclusion.

f. The landowner may retain development rights, but any retained rights must be considered in determining the exclusion amount. Retained development rights may be extinguished after death, and the landowner’s estate plan should anticipate that possibility.

g. The property appraisal should include a separate determination of the value of the buildings on the property.

8. Example of Estate Tax Savings for Qualified Conservation Easement

The following example illustrates the estate tax savings for land subject to a qualified conservation easement if the landowner died in 2009 and donated the conservation easement during his or her life.

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of land without easement</td>
<td>$1,800,000</td>
</tr>
<tr>
<td>Less easement (worth 30% of total value)</td>
<td>(540,000)</td>
</tr>
<tr>
<td>Value of land subject to easement</td>
<td>1,260,000</td>
</tr>
<tr>
<td>Less estate tax exclusion</td>
<td>*(500,000)</td>
</tr>
<tr>
<td>Amount subject to estate tax</td>
<td>$760,000</td>
</tr>
<tr>
<td>Federal and MA estate tax savings due to exclusion @ 50% rate (est.)</td>
<td>$250,000</td>
</tr>
<tr>
<td>Total federal and MA estate tax savings</td>
<td>$520,000</td>
</tr>
</tbody>
</table>

(50% tax on $760,000 vs. $1,800,000)

C. Sales. Although most of these materials focus on various strategies aimed at preserving family lands for future generations, on occasion a sale of part or all of a family parcel must be considered either for financial reasons or because the objectives of one or more family members cannot be reconciled. If land must be sold from an estate in order to generate needed funds, older generation family members may wish to consider providing a right of first refusal to members of the next generation. In addition, there are a variety of “buy-out”
options that may permit family members interested in retaining a property to purchase the shares of family members who wish to “cash out” their interest.

III. Reducing Local Taxes: The Chapter 61 Programs

The three Chapter 61 programs require reduced local tax assessments on farm, forest and open space land provided owners make a commitment to maintain use. Caution should be exercised in utilizing the provisions of these statutes, however, as at least a portion of the amount of taxes saved must be repaid if the land ceases to be used for the exempt purpose and the town or city acquires a right of first refusal in the event the land is sold for other than its exempt purpose. The statutes give the city or town the right of first refusal on all lands classified pursuant to the statute if such lands are sold for or the use converted to residential, commercial or industrial purposes. The town has the right to match any bona fide offer and must exercise its option within 120 days and may assign its right to a qualified conservation organization.

A. Chapter 61: The Forest Land Act
   1. Contiguous forest land of ten acres or more, certification by state forester required
   2. Ten year forest management plan approved by the state forester to include harvesting of timber or stand improvement
   3. Boundaries must be blazed and painted
   4. Reduces local property taxes and establishes yield tax on forest products harvested
   5. Runs for ten year periods
   6. Owner may withdraw at end of ten year period but must repay portion of taxes saved plus interest
   7. Property may be sold subject to ten year management plan
   8. Reapply every ten years

B. Chapter 61A: Agricultural Lands
   1. Requires at least five acres of land in active agricultural or horticultural use for at least two years before application
   2. Application made to local assessors on annual basis
   3. Requires minimum yearly gross sales of farm products - $500 for first five acres; $5.00 for each acre above the first five
   4. Typical reduction in local taxes approximately 80%
   5. Removal requires payment of conveyance tax or rollback tax
   6. Reapply annually

C. Chapter 61B: “Recreation” Lands
   1. Minimum of five acres in "natural, wild or open condition" or in a landscaped condition (golf courses open to the general public or lands opened to members of a nonprofit organization qualify)
2. Annual application to local assessors
3. Reapply annually

D. Rollback/conveyance taxes
1. Rollback tax same for Chapter 61 and 61B
   • Assessed if land use changes while enrolled in Chapter 61 or within 5 years of withdrawal from the program
   • Rollback tax is difference between property tax at full assessment and reduced tax paid under Chapter 61 program plus 5% simple interest per year for each year of enrollment up to five years
2. For 61A, same as above except no interest if enrolled in program before July 1, 2006
3. Conveyance tax
   • Assessed in all Chapter 61 programs if greater than roll back tax
   • Chapter 61 and 61A: 10% (of sale price) if sold within first year, reduces by 1% each year; after 10 years, no conveyance tax
   • Chapter 61B: tax is 10% (of sale price) if property sold in first 5 years of enrollment and 5% if sold within years 6-10
   • No tax if property remains in program

IV. Equitable Partition and General Land Use Considerations

A. Equitable Partition
1. Voluntary: Families desiring to provide for ownership by individual family members of a portion or “share” or a large family tract may agree to divide or “partition” their land. Care should be taken to insure that such divisions do not violate zoning or other legal constraints, that wetlands are apportioned fairly and that scenic views are preserved. Frequently, a family will determine that it makes sense to keep a particular amenity, such as a shorefront, dock or pond, “common,” and to provide individual owners with view easements to limit building in specified zones.
2. Court Procedure: Where multiple owners hold land “in common” and cannot agree to sell or divide their land, any individual owner may petition the probate or land court to “partition” the land in an equitable manner. The process requires the appointment of a commissioner to appraise the real estate and recommend an appropriate division. It is lengthy and costly and should be avoided where possible.

B. General Land Use Considerations
   Although a detailed discussion of land use consideration is beyond the scope of these materials, any division or change in structure in the use of family lands or compounds should involve a consideration of the following land use elements:
   1. Zoning: Care should be given to avoid dividing the property in such a way as to create a zoning violation or a future potential zoning violation. In addition, analysis should be done to determine whether any of the lots in question is entitled to protection as a
nonconforming lot (so-called "grandfathered" status) and whether changing lot lines in any way defeats this protection.

2. Wetlands considerations: The state Wetlands Protection Act and local bylaws should be consulted as to whether and what permissions will be required before a building permit can be obtained. Frequently, local wetlands protection bylaws contain "no build zones" of a specified number of feet from a protected resource area.

3. Easements for access, amenities and utilities: When dividing property, particular attention needs to be given to creating any necessary easements for water or beach access or other amenities such as a boat house, a walkway, access to the property itself and installation of utilities. In addition, consideration should be given to the creation of view easements to protect a scenic or water view.

4. Location of existing utilities: Although an easement would ordinarily be implied in law to permit continued existence of a pre-existing utility when land is subdivided, this is not necessarily the case if the land in question is registered land. It is important to understand the location of existing utility lines whenever property is divided and to create easements for those lines or plan for relocation of the utilities.

5. Septic and well issues: If the land in question is not serviced by a municipal water and sewer system, care should be taken to divide the lots in such a way as to permit location of wells and septic systems. Both title 5 of the State Environmental Code and local Board of Health Regulations contain regulations specifying the minimum distance between a well and a septic system and between a septic system and a protected water resource.

6. Regional planning agencies: Although the construction of a single family residence or division of large tracts for residential purpose do not ordinarily implicate regional planning issues, the Cape Cod Commission and Martha's Vineyard Commission may have jurisdiction in certain circumstances. In addition, the entire island of Nantucket is included in the Nantucket Historic District and any construction of a residential structure on that island requires Historic Commission approval.

V. Not So Neighborly: Common Disputes Among Abutting Landowners

A. Trees, Branches, Roots: To Cut or Not to Cut?
   Landowner may trim overhanging branches or remove roots that extend over (or under) property line, but may not remove trees on the property of another. G.L.ch.242, §7 provides for an award of treble damages for the wrongful cutting of trees on the land of another.

B. Shared Driveways, Access and Utility Easements / View Easements
   1. Clarity of documents is important to identify limits and use of what is shared and who pays to maintain.
   2. Must be recorded to bind future owners.
   3. For view easements it is important to define the view being preserved and the location point from which the protected view is to be observed.
C. Boundary Disputes and Adverse Possession
   1. Survey of property can be an invaluable tool.
   2. Adverse possession requires open, notorious, exclusive and continuous use for at least 20 years.
   3. Prescriptive easement requires the same except use of easement / right of way / path need not be exclusive.
   4. Where use is permissive, permission should be documented by license.
   5. If use of path by public or others is permissive, owners should gate or otherwise block entry for a period of time each year to establish dominion and interrupt usage.
   6. Appropriate signage and posting is helpful but not determinative.
   7. Notice to Prevent Acquisition Pursuant to G.L.c.187, §3
      a. Posting on property for six successive days.
      b. Service of notice if on a particular person.
      c. Record notice of service or posting in the registry of deeds.
Nancy E. Dempze is a Partner with Hemenway & Barnes. Nancy serves as a professional trustee, executor and estate planner for individuals and families. Nancy also represents nonprofits in connection with planned giving and development.

Ruth Kennedy Sudduth is a Principal and Director, Residential Brokerage Division at LandVest, Inc. Ruth manages LandVest’s luxury brokerage team throughout New England and the Adirondacks, in addition to helping her own clients, including a major portfolio in Chilean Patagonia.

David Rosen is Executive Vice President and Director, Real Estate Consulting Group, LandVest, Inc. David is responsible for management and operation including all advisory appraisal, land planning, design and real estate investment analysis.

Diane C. Tillotson is a Partner with Hemenway & Barnes. Diane’s practice covers a broad range of land use litigation and permitting matters, including zoning and environmental litigation, boundary and easement disputes, contested land court registration cases, land damage cases and tax abatement and exemption issues.