

Appendix A – Determining if Land is Legally Protected Open Space

When is property considered to be legally protected open space?

Article 97 of the Amendments to the Massachusetts Constitution (“Article 97”) states, among other things, that the “people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment”. This has long been interpreted to apply to public lands held for the purposes of conservation, recreation, water supply protection, and agriculture. Additionally, Article 97 states that lands or interests in land subject to Article 97 cannot be used for another purpose or disposed of without a two thirds majority vote of the legislature.

In 1998, EEA implemented a “No Net Loss” Policy that provided compliance criteria for municipalities and EEA agencies seeking to dispose of land or interests in land subject to Article 97. This policy also stated that equal replacement land must be dedicated for Article 97 purposes as mitigation for such dispositions to ensure no net loss of land subject to Article 97.

In 2022, An Act Preserving Open Space in the Commonwealth (otherwise known as the “Open Space Act”) codified some elements of the EEA policy and provided a legal framework for protecting Article 97 land. Notable requirements of the Open Space Act include notification to the public and the Secretary of EEA, an alternatives analysis describing the public purpose served by the disposition and all efforts made to avoid or minimize impact to the Article 97 land and the dedication of replacement land for Article 97 purposes of equivalent size, location, cost and natural resource value.

Public and private lands can also be permanently protected if subject to a Conservation Restriction, Agricultural Preservation Restriction, Historic Preservation Restriction, or Watershed Preservation Restriction in accordance with Massachusetts General Law (M.G.L.) chapter 184 sections 31-33. Additionally, land can be permanently protected by a qualified conservation organization such as a land trust.

How do we determine if a property is legally protected open space?

There are helpful preexisting resources on the Division of Conservation Services’ [Open Space and Recreation Plan website](#) that provide guidance on this topic, including, “Protected Open Space – Leaving Legal Footprints” and “Article 97 by Dedication, Land Trust roles in holding and stewarding (anti-merger) and CPA provisions for monitoring fees.”