Natural lands preservation and the profit corporation

by James H. Davenport

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During the recently concluded 98th Congress 8,581,055 acres of federal land were designated wilderness. 1.4 million of those are new national park land wilderness. However, the 98th Congress added no new acreage to the nation's recreationally important National Park System. The Coastal Barrier Resources Act, protecting the Atlantic and Gulf Coasts barrier islands against development, Pub. L. 97-348, 16 U.S.C. 3501-#510, and the Protection Island National Wildlife Refuge Act, Pub. L. 97-333, 16 U.S.C. 668 dd., protecting seabird habitat in Puget Sound were two of the 97th Congress' few gestures at preserving natural land. Wetland protection bills before the 98th Congress (S 1329, HR 3802), authorizing a major expansion of the wetland acquisition program, failed to pass. A two year extension of the Wetlands Loan Act (HR 5271) did pass. But, overall, the prospect of the federal government committing new major resources to natural lands acquisition is very small.

It is now appropriate to attempt to analyze the current status of our national recreational and natural properties and to develop strategy in order to move forward. Natural and recreational properties policy is not the only policy area undergoing reanalysis. Like health and welfare programs and federal retirement programs, natural and recreational lands acquisition and development has depended primarily on federal largess for its current well-being. Also like those program's proponents, those of us who believe that growth in the national inventory of natural and recreational lands is desirable initially react that largess should be restored. Congress' recent gestures in that direction encourage that reaction. But that reaction should be checked in favor of the development of creative methods of lands acquisition and designation which do not require reliance on Congressional appropriations.

The alternatives for natural lands acquisition or preservation fall in two categories; governmental or non-governmental. The governmental category includes outright acquisition in fee, the traditional approach of the federal government where designated park land was not already in federal ownership; designation of lands with important governmental value placing encumbrances upon development, as through the National Wild and Scenic Rivers Acts, 16 U.S.C. 1271 *et. seq.*, or the State of Washington Shorelines Protection Act, Ch 90.58 RCW; and exercise of the police power by state and local government, i.e., zoning.

The first governmental alternative, acquisition in fee simple absolute, has been the basic tool of development of our natural lands system. This tool has been utilized actively, by purchase or by condemnation, and passively, by retention of fee ownership where the government has had the good sense to hold on to desirable properties. The virtue of fee acquisition is that once ownership is obtained, protection of the resource is perpetual. Even the legal maxim that a fee owner's title is completely lost upon sale or divestiture can be modified were government to encumber subsequent owners by legislation designating the park status of the subject land. No more permanent status could be accorded national park land than the governmental ownership plus statutory designation which it enjoys, unless the national parks were also Constitutionally protected. Fee acquisition is also the tool which has created the important state park systems.

Governmental fee acquisition has been possible primarily because of the availability of desirable properties, the availability of public funds to purchase them, and the exercise of the power of eminent domain, both by the federal and state governments, where unwilling sellers did exist. The obvious current problem with fee acquisition is that with a growing population there are fewer willing sellers and with major federal deficits there are fewer available public funds.

A subcategory of fee acquisition is acquisition of property rights less than fee simple absolute. Governmental purchase of a right to use property can preserve a consumptive use from occurrence, thereby protecting the natural amenities of particular property. For instance, the acquisition of scenic easements or development rights have placed in public ownership the right to view across property, the right to prevent vertical development, or the right to develop property at all. Another subcategory is acquisition of a nonfreehold estate, for example an estate for years. This acquisition would allow complete control for the period of years and may be successful in preserving natural property through a period of stress of demand for use, but does not carry the feature of perpetual protection.

The second category of governmental natural lands preservation is by designating the natural importance of given property, either by general category or specific description, through statute and placing an encumbrance upon its development. An example of this method is the Pinelands National Reserve System, Pub. L. 92-625, 16 U.S.C. 47li, or the National Wild and Scenic Rivers Act, *supra.* The nature of the encumbrance on development varies widely. Development permits consistent with pre-established preservation plans or restrictions against specific governmental projects on public lands within an encumbered area are common.

This method of land preservation is valuable at "keeping things the way things are" and can be particularly useful where demand for more rigorous or consumptive land use has not yet occurred. Where that is imminent, however, this method is the most roundly criticized because it places encumbrances upon the use of land without transferring value to private owners. This criticism is based on the incorrect notion that these encumbrances constitute taking of property without compensation. Statutory encumbrances are as perpetual as the statute which creates them, which is to say long lasting but not permanent.

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The third method of governmental land protection is exercise of the police power. The police power is the general constitutional power of a state or its subdivisions to protect the health and safety of its people. It is pursuant to this power that the laws of zoning have developed. Under the police power local governments can and have placed restrictions on property prohibiting all but certain uses. The virtue of this zoning approach to natural lands preservation is that no acquisition cost is involved. The other virtue is that it is ordinarily performed by persons with local knowledge of areas worthy of natural lands protection. It is, of course, most suitable for use in a local setting, a method having been used primarily in urban growth planning. The problem with this method of natural land preservation is that all zoning designations are subject to change. Though comprehensive plans limit arbitrary alternation of zoning designations, land use choices and the laws memorializing them, comprehensive plans and zoning ordinances, are dynamic, hopefully representing the attitude of the people at any given point. Though federal statutes have condoned and assisted state land use planning the concept of land use planning by the federal government has never taken hold in Congress, with the notable exception of the recent Coastal Barrier Resources Act, *supra.*

Another governmental method of natural lands preservation is taxation. Through the exercise of state property taxing power, tax preference can be given to those owners who own property capable of inclusion in natural land designations. Tax preference can be conditioned upon commitments to the continued natural character of such property. Designations as forest land or open space under State of Washington tax law, Ch. 84.34 RCW, are examples.

The second category of methods for natural land preservation is nongovernmental. The single power which is possessed by nongovernmental entities which governments also have is the power to acquire property through voluntary purchase. It is well known that private entities do not possess the powers of eminent domain (though some public interest corporations have been delegated this power by legislative bodies) or the police power (zoning, parks designation). It is this fact which has caused conservationists to rely so heavily on governmental lands preservation. However, if we desire a greater amount of preserved land and, if governmental acquisition is limited by political or fiscal restraint, then the nongovernmental acquisition approach must be pursued.

The nongovernmental acquisition of land for preservation purposes is performed credibly at the present time by environmental-charitable corporations like Nature Conservancy and the Audubon Society. But the overall volume of lands which can be purchased, and consequently the success, of these groups is limited by the amount of money which can be raised and the specter of operation costs.

The inevitable conclusion is that we must develop a method of participation in natural lands preservation for the American profit corporation. Because the traditional American profit corporation is motivated by factors different than the environmental charitable corporation, the method and approach by which American profit corporations may participate in natural lands acquisition must be tailored to its different motives. The following is one possible