Protecting Park and Natural Areas without Purchasing Them: A Review of Methods Adopted in the USA

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Ownership of a parcel of land can be conceptualized as a bundle of rights. These include the right to sell or bequeath the land, the right to keep others off it, the right to use it for farming, ranching or timber production, the right to extract minerals from it, and the right to erect buildings and other structures upon it. Taken together, all rights constitute full ownership. The major problems with purchasing full ownership are the high initial costs of buying land and the on-going costs of maintaining the land once it has been acquired. Primarily for these reasons, in recent years both public agencies and non-profit organizations with environmental interests have shown increasing inclination toward acquiring one or more rights or specifically defined parts of rights, rather than full ownership.

Less-than-full ownership approaches have gained in popularity as more people have come to realize that it is neither possible nor desirable to commit to
public ownership all the land needed for park and recreation purposes. It is not possible to own all the land needed because the amount of money required is not likely to be available.

There are at least four reasons why it may not be considered desirable always to purchase full ownership of land. First, there are some instances in which transferring the land from private to public ownership for recreational use may destroy some of the vital qualities which make it aesthetically attractive. This view was articulated to a generally unresponsive recreation and parks field long ago as 1962 when Whyte stated:

The public do want parks, but intuitively it is the living, natural countryside they seek, and they will respond to a program that articulates this. To present open space action almost purely in terms of conventional park acquisition does not touch this nerve, and the vision of institutionalized open space that it conjures up is a somewhat sterile paradise.

Second, if land is purchased in fee simple, it must be maintained at taxpayers' expense, which is frequently a costly burden. Third, the less-than-full ownership approach does not take land off the tax rolls. It may result in the land being assessed at a lower rate, but the entire potential tax base is not lost.

Fourth, less-than-full ownership methods are likely to be less disruptive for they do not deprive anyone of their right to remain on the land. Indeed, they may permit a landowner to derive substantial monetary gains from the property and at the same time to continue to use it as it has been used in the past. The lack of disruption was, for example, an important factor in the National Park Service's decision to purchase easements rather than full ownership along the Blue Ridge and Natchez Trace Parkways. This minimized the displacement of residents and caused minimal disturbances to them.

The discussion in this paper focuses on the three main mechanisms which are most commonly employed to acquire less-than-full ownership rights in the U.S.A. They are zoning, differential taxation, and easements. Often their use in isolation will not offer a "solution" to a particular acquisition problem, but their combined potential may make them very effective.

Zoning

Zoning authority is derived from a unit of government's police powers. Traditionally, it has been used to define what activities may take place in certain areas. However, zoning authority can be used to do more than regulate activities and their locations within an area. It can also be used to create and protect a wide range of public amenities.

In recent years an increasing number of public agency officials and planners have recognized that their control of zoning ordinances provides them with a strong negotiating tool which can be utilized to increase open space, park, and recreation opportunities. Three main mechanisms are being used to create these opportunities. They are: planned unit and cluster developments, incentive zoning, and transferable development rights. Each is discussed in the following paragraphs.

Planned Unit and Cluster Developments

Planned Unit Development (PUD), is a technique within an overall zoning schedule which allows relief from conventional standards for a defined development. Its adoption permits a developer to reduce lot sizes and consolidate lot layouts on the portions of a tract which are most suited to building, which reduces the associated infrastructure and construction costs. In exchange for this concession, the developer designates a portion of the tract as open space. Cluster development operates in the same way, but the term is usually associated with smaller developments than PUD. Even though lot sizes have been reduced, the net result is a feeling of openness. Moreover, the open space often increases the dollar value of the adjoining residential properties.

A developer is unlikely to retain ownership and management of the open space created by this mechanism, since it offers no future profit opportunities and will require on-going maintenance costs. The developer will usually seek to pass title for the open space either to a homeowners' association which is established by the developer, or to a public agency. If a homeowners' association takes responsibility for these amenities, then each resident is assessed his or her share of the cost of management of the amenity area. In such situations, it is usual for the city to reserve the right to take over responsibility of the open space, park and recreation resources if they are not adequately maintained, and to assess each owner for the cost of municipal maintenance.

In some jurisdictions, government takes responsibility for determining the appropriate ownership and use of the amenities based on public need. This model is followed in Fairfax County, Virginia. The Fairfax County ordinance gives the County the right of first refusal on any cluster-created open space that has not otherwise been reserved for schools or other public uses. The right allows the County either to request dedication to it of the open space, or to recommend dedication to a homeowners' association. Over 25 percent of the 13,000 acres of public parkland owned by the County has been acquired by dedicated open space created as a result of cluster zoning. In addition, Fairfax County has an unusually large amount — over 5,000 acres — of privately owned open space. About 70 percent of that was dedicated by developers to homeowners' associations at the recommendation of the Fairfax County Park Authority.
Incentive Zoning

Developers often seek variances or exceptions from zoning regulations and, in some situations, this offers opportunities to negotiate for public amenities. In return for a specific type of public amenity, such as open space, the city may relax certain zoning restrictions. An illustration is provided by the New York City Educational Construction Fund, a state-created corporation, which was authorized by the city of New York to sell zoning concessions to the New York Telephone Company. The concessions allowed the telephone company to erect a more economical building rising 32 stories, which now dominates the skyline around City Hall. In return for the zoning variances, the telephone company agreed to pay the Fund an average of $5 million a year for 35 years, both as payment for the variances and in lieu of property taxes. The money was to be used to build an 8.5-acre recreational park for the city on a concrete platform in the East River.

Clearly, this type of "opportunity planning" must take place within a coherent planning framework. While the incentives and trade-offs depend upon compromise, the compromise must not be of sufficient magnitude that it poses a threat to the locale's physical integrity.

In some jurisdictions, this trade-off leverage has been formalized and institutionalized by the passing of an Incentive Zoning Ordinance. The first such ordinance was passed in New York City in 1961. Its most significant feature was a provision which permitted a developer to increase floor area by up to twenty percent in certain high density commercial and residential districts, if a public plaza was provided at ground level that met the qualifications specified in the ordinance.

Effective leverage through incentive zoning is predicated on the assumption that public officials have an understanding of the relative value of the trade-offs being exchanged. Developers are good negotiators; they have to be if they are to stay in business. To obtain good results from incentive zoning public officials must be skilled bargainers who can insist on receiving commensurate value in return for the incentives they can offer developers. If incentive zoning is not orchestrated skillfully and carefully, then developers may receive major gains in return for relatively little investment in public benefits. For example, in the early years of the New York City ordinance between 1961 and 1963, one source estimated that developers exchanged $4 in public amenities for $186 million in revenues from bonus floor area.

Transferable Development Rights

The concept of transferable development rights (TDR) is a complicated, lengthy procedure for preserving open space which was first instituted in New York City in 1968 as part of a program for preserving landmark buildings. The city permits the transfer of air rights, or development rights from landmark buildings that are protected by city ordinance from being demolished. These buildings are smaller than buildings that could be built on their sites if the protective ordinance were not in place. The air rights can only be transferred to adjacent properties, not anywhere in the city. This mechanism allows the owners of landmark buildings an alternate means of income from the land that is prevented by the landmark from containing a larger building. The program in New York had some success and this encouraged others to broaden its applicability and to apply it to the preservation of open space.

The primary goal of a TDR program is to create a market for development rights in which owners of developable land may buy development rights from owners of preserved open space land and increase the density of their permitted development. The government entity is in effect the middleman. It merely allocates development rights equitably among parcels of land. To work successfully this technique requires not only strict zoning, but also a strong demand for growth to create a market for development rights.

All parcels of land in a designated TDR district are assigned development rights with one development right equalling one residential unit. The following occurs under TDR:

A developer owns land with 100 development rights on it, but it is capable of more intensive development and the developer is permitted to increase the total to 200 units. That developer may purchase the additional development rights from owners of underdeveloped land with 100 development rights. These 100 rights are then transferred to the developer's land, while the undeveloped land owners give up the right to develop their land in perpetuity. The undeveloped land may be sold as farm land or open space but it may never be built on. The TDR transaction places what amounts to a restrictive covenant or negative easement on the underdeveloped land's future use.

TDR requires enabling legislation at state level as well as the enactment of a local ordinance. The combination of its conceptual and administrative complexity, the need for enabling legislation, and its newness, means that there are only a few jurisdictions in which it has been implemented so its effectiveness is not known. This concept has generated considerable discussion in the planning literature, but most of it is conjectural.

TDR contains some of the attributes both of cluster development and of incentive zoning. One of the limitations of cluster development is that it is limited to one tract at a time. Thus, large park or open space areas are unlikely to be created and natural features of extensive ecologically significant areas that are in diverse ownership cannot be preserved. TDR provides a mechanism which can protect larger areas of open space or parkland, by permitting higher density development in other areas. Like incentive zoning, it offers higher density development in return for the safeguarding of public open space.
There is an important conceptual distinction between cluster development and TDR. With cluster development those who live in the higher density clustered dwellings receive the benefits which accrue from the nearby open space which is created. However, in a TDR district the land parcel which is impacted by the increased development rights may be many miles away from the open space land parcel from which the rights have been purchased. Thus, the preservation may benefit all local residents, but the cost falls only on those in the cluster.

To expedite TDR, it is usual to establish a development rights bank or a revolving fund. The government entity establishes this mechanism when it designates its TDR districts. Developers in “receiving” sectors who want the increased density, deposit a sum equivalent to the increased value of their land resulting from this extra development potential. Funds accumulated in this manner are used only for the purchase of the development rights from “sending” parcels. Under this system, the market value of the development permission granted or taken away must be compensated for by the developer in development zones and by the government entity in preservation zones.

TDR has been used with success in development of the Santa Monica Mountains National Recreation Area:

There are over 7,000 presently undeveloped small lots and parcels, created earlier in the century in the core of the mountains. The buildout of any significant portion of these lots and parcels is incompatible with present concepts about the environmental/recreational future of the Santa Monica Mountains. In 1979, the controlling authority initiated a TDR program that links approval of each new subdivision located in more appropriate areas of the mountains (generally around their periphery) with the retirement of the development potential of a specified quantity of the problem lots in the core of the mountains.

The authority established a program allowing land subdividers to contribute cash to a revolving fund that finances and directs centralized lot retirement efforts. This has resulted in much greater support from the development community for TDR because it is much simpler than each subdivider having to seek out and retire his or her own lots. Acquisitions through this revolving fund could occur in accordance with a coherent plan and program rather than the alternative episodic and scattered approach. The Santa Monica TDR program was launched in 1979 and in the first six years of its operation an impressive 15 percent of the potential development lots in environmentally sensitive areas had been retired.

Differential Taxation Assessment

Since Maryland first introduced its differential assessment policy in 1956 all the other states have adopted a similar program. This mechanism enables farmers, and in some cases forest owners, to have their land assessed at “current-use” value rather than at market value. Current-use value means that in the case of farmland, for example, it is assessed at agricultural production value - what a farmer can pay for the land and still make a viable living from it. If the land were taxed at its market value rather than its use value, the tax assessment would be based on the “highest and best use” of the land. Frequently, this would be much higher because of the land’s development potential, especially if it were located close to an urban area. In some cases, these taxes are sufficiently high that they force a landowner to sell the land for development purposes, even though he or she may not really want to do so.

Differential assessment does not necessarily contribute to an increase in the amount of recreation and parkland which is directly accessible to the public. However, it is intended to preserve open space close to urban areas and hence to enhance the aesthetic quality of the environment.

There are three types of differential assessment programs in use:

1. Pure Preferential Taxation by which property is assessed on the basis of its current use value as opposed to its market value with no associated penalty for conversion to non-agricultural use. This method is preferred by landowners because it requires no commitment from them to keep their land in its existing state in the future.

2. Deferred Taxation is similar to pure preferential assessment, except that the taxes are only deferred and if land is converted to a non-eligible use, a sanction is imposed on the landowner consisting of the taxes he or she was excused from paying (typically for somewhere between the last two to five years) and an interest penalty. This payment or “rollback” of taxes acts as a deterrent to withdrawing from the program. This type of program operates, for example, in New Jersey and Massachusetts.

3. Restrictive Agreements require the participant to sign a contract with a public agency that restricts him or her to keeping the land in an eligible use for the duration of the contract (typically ten years). In return for this, the participant receives a current use value assessment. This type of program operates, for example, in California.

Differential taxation has been used in some urban areas. For example, in Metropolitan Dade County in Florida an ordinance was passed to encourage owners of large private tracts used for scenic outdoor recreational or park purposes, such as golf courses, bay fringes, wetlands, or other ecologically sensitive areas, to commit their land to non-development. Owners of such lands can petition the county for their land to be assessed at its current use value by guaranteeing that the parcel will not be developed or used for anything other than outdoor recreational or park purposes for a minimum of ten years. The ordinance provides for penalties if development should take place during the agreed upon moratorium period.
It has been argued that differential taxation often encourages land speculation instead of effectively protecting it for recreational use of scenic value\textsuperscript{2}. Even the presence of a "rollback" clause requiring payment of back taxes with interest is not likely to deter abuse of this tool in some situations. The deferred tax provision allows the landowner to pay the back taxes and interest out of his or her capital gain upon selling the land. This makes it easier to retain the property for many years in the face of rising taxes and other pressures, until the selling price reaches a very high level.

Empirical evaluations of differential taxation assessment programs suggest that they do not stop the conversion of open space over time\textsuperscript{15}. For differential taxation to be effective, it must be complemented by strong land use controls, otherwise it can amount simply to a subsidy of land speculation. In many cases, differential taxation is being used without such controls and, thus, is probably encouraging a holding action rather than a permanent solution. Nevertheless, this holding action furnishes time during which efforts may be made to secure more permanent arrangements, such as easements.

Easements

Ownership of land consists of a “bundle of rights” which a landowner is permitted to exercise. An easement limits a landowner’s ability to exercise one or more of these rights. Every easement is tailored to the needs of the individual landowner, so that no two easements are likely to be identical. Easements are negotiated, voluntary arrangements between a government agency or non-profit organization and private landowners. They may be acquired through donation or by purchase. The landowner retains title to the land and may sell it, lease it, bequeath it to heirs, or whatever, for he or she relinquished only those rights which are stated in the easement. However, all easements run with the land, which effectively binds not only the original landowner who executes the easement, but also all subsequent purchasers or heirs to the land.

Easements have been used to protect the special resource value of privately-owned property since the Department of Interior pioneered their use in the 1930's. This discussion of easements is subsumed under three main headings: types of easements, the benefits and costs associated with easements, and strategies for expediting easement acquisition.

Types of Easements

There are a number of technical terms associated with easements that need to be reviewed to facilitate understanding. They are: affirmative and negative, appurtenant and in gross, and term and perpetual.

Affirmative and Negative Easements

If an easement permits something to be done on the land the easement is affirmative. The most common types of affirmative easements are those which permit limited pedestrian access by the general public, often along a specific trail or corridor, for fishing, hunting, canoeing, nature study, or scenic hiking. Frequently, these easements provide access to beaches, rivers or forest lands. For example, most of the Bureau of Land Management’s acquisition program is devoted to purchasing easements to provide access to public lands across private lands. This is necessitated by the fragmented land ownership pattern in most of the Western States where many roads and trails, providing access to public lands cross state and private land\textsuperscript{16}.

If an easement prohibits a landowner from doing something on his or her property the easement is negative. Sometimes negative easements are called "development rights" since this term accurately describes, in many cases, what is actually conveyed. In contrast to affirmative easements, most negative easements do not allow for any public access to the land at all.

Generally, the covenants in a negative easement limit the number and location of structures and the types of commercial and industrial activity, and they specify what can be done to the surface of the land and its natural growth. The versatility of easements allows them to range from the “forever-wild” easement, which states that the land will remain as nature leaves it, to the easement that allows limited residential use, farming, and properly managed commercial timber harvesting, with many combinations in between\textsuperscript{13}.

Negative easements may be drafted to conform to almost any situation, such as: restriction against development; restriction against cutting down trees; restriction against altering land use or form within a certain distance of a stream, coast or road; restriction against mining; restriction against putting up a structure that would block a view; or, in the case of historic structures, restriction against alteration of exterior features.

The following examples illustrate the use of negative easements:

- At Picataway Park, Maryland, the National Park Service acquired scenic easements to 2,450 acres of largely upper-class residential land to protect the views from Mount Vernon, just across the Potomac in Virginia\textsuperscript{18}.

- At San Antonio Missions National Historic Park, the agricultural scene around Mission Espada is compatible with the objectives of the park and it is desirable that such use continue. There, farming and cattle grazing is a continuation of the historic scene. Therefore, all that is needed is assurance that it will not be replaced by some incompatible use. The acquisition of development rights through easements is perceived by the National Park Service to be the best way to protect that land\textsuperscript{19}.
The distinction between appurtenant and in gross easements is important because easement in gross cannot always be transferred while appurtenant easements can always be transferred.

For example, if non-profit organization A holds an easement in gross on farmer A’s land such as a right of way, it will depend on local statutes and court interpretations whether or not non-profit organization A could transfer this easement to agency B. Thus, just to be on the safe side, most non-profit organizations and agencies that are active in acquiring easements recommend that a small part of the land be acquired in fee simple, so that the easement can be considered appurtenant.

**Term and Perpetual Easements**

Easements may be granted for a term of a fixed number of years or in perpetuity. A term easement may enable a recreation and park agency to buy time to acquire the land or to persuade future owners to make the easement perpetual. Easements granted in perpetuity are permanent because they legally bind all present and future owners of the land. They always go with the title to the land thereafter. Often, affirmative easements are for term periods which permit the landowner to refuse access beyond a specified future time period if users abuse the resource or the arrangement does not work out to his or her satisfaction. Negative easements are frequently granted in perpetuity in order to guarantee permanent preservation of the resource. A perpetual easement also maximizes the tax benefits which accrue to the landowner.

While at first glance the perpetual easement may appear to the recreation and park agency to be the more desirable alternative, it has been suggested that in fact it presents the agency and the landowner with a moral dilemma:

To what extent is any owner of an interest in land justified in imposing his will upon the future use of land by the community, even though needs may change and the desires expressed in the legal instrument directed toward preserving the land become obsolete?

The person desirous of effecting land-use control of a perpetual nature must ask himself the question of whether his own concerns and desires should override the concerns and desires of people using and needing the resources in the time to come. This is a question which must be answered on an individual basis, but from the writer’s point of view it would seem that any conservation plan should lean strongly toward flexibility and that it should take into very serious consideration the fact that the needs of future generations may change.

**Benefits and Costs Associated with Easements**

This section discusses the benefits accruing to the agency and to the landowner, followed by a description of the costs perceived to be associated with easements.
Benefits Accruing to an Agency

For an easement to be negotiated, benefits have to accrue to both the agency representing the public interest, and the individual landowner. Two major benefits may accrue to the agency. They are the retention of property owners' goodwill and lower costs.

Easements may avoid the alienation of property owners which frequently accompanies eminent domain or fee purchase acquisition:

Time and time again at public hearings dealing with resource protection I have heard property owners who obviously came into that area because they loved it, they saw the quality of it and they wanted to participate in it and protect it, say openly I just want to keep it the way it is. Nobody gave them the opportunity to do that22.

The easement is very flexible. With full ownership purchase the title is either owned or it is not. It is an "all-or-none" situation. With easements, however, a wide range of permission or restriction is possible for which a willing buyer and a willing seller can negotiate. In short, there are many instances where willing sellers exist for the purchase of easements where they did not exist for fee purchase.

Easements are likely to be cost effective. Table 1 illustrates the differences in cost between an easement and full ownership purchase22.

![Table 1: The Differences in Cost to Government Between an Easement and Fee Simple Purchase](image)

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<thead>
<tr>
<th></th>
<th>Easement</th>
<th>Fee Simple</th>
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<tbody>
<tr>
<td>Amortization payments on the easement</td>
<td>Amortization payment on cost of full ownership</td>
<td></td>
</tr>
<tr>
<td>+ Interest</td>
<td>+ Interest</td>
<td></td>
</tr>
<tr>
<td>+ Some loss of property taxes</td>
<td>+ Total loss of real estate taxes</td>
<td></td>
</tr>
<tr>
<td>+ Cost of enforcing the easement Restrictions</td>
<td>+ Operating and Maintenance costs</td>
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Once land is owned by the public, the government must assume maintenance costs and will no longer receive any property tax payments. If an easement is purchased, the landowner continues to assume the operating and maintenance costs and continues to pay taxes on the use value of the land.

Supporters of easements emphasize that there are clear limits to how much land or water the nation can afford to buy. There is an added dimension to that argument.

There are also clear limits on how much land and water the nation can afford to own. Publicly owned property is off the tax rolls; generally it is not put to its full potential of multiple use; and often it is not as well cared for or maintained as it would be in private ownership24.

Benefits Accruing to Landowners

Individual landowners may receive two types of benefits from negotiating an easement. First, they are able to protect land they value so that future generations will be able to enjoy it. In some cases, this sense of satisfaction from having protected something of value will be the primary benefit.

The second benefit which may accrue to the landowner is financial remuneration either through selling an easement and/or through tax savings. Most land is worth something less on the market when restrictions have been placed on its use. This means that the landowner will usually be entitled to a reduction in property taxes and estate taxes. The extent of these reductions will be dependent upon the financial value of the easement.

In addition, if a perpetual easement is donated to a government agency or tax-exempt organization, a charitable donation equal to the value of the easement may be claimed which would result in a reduction in state and federal income taxes. However, the complexity of the IRS rules and the long lead time involved in obtaining an advance ruling from the IRS as to whether or not an easement is eligible for a charitable deduction, are inhibiting factors in acquiring easement donations25.

These tax advantages often may be realized by the landowner without really giving up anything. The landowner may continue to use the land in the way it has always been used, and at the same time secure a significant financial gain. It has been observed that:

In most cases, gifts of negative rights are gifts of rights the landowner had no intention of exercising anyway. For example, a landowner may convey an easement prohibiting the harvest of timber on property containing a unique stand of trees he is preserving and intends to preserve for as long as he owns the property. The effect of the easement would be to formalize and perpetuate the landowner's present intent. Similarly, gifts of positive rights may involve rights the grantor has already given to the public. An example would be a gift of a conservation easement allowing pedestrian access for fishing along a stream which the landowner has always kept open to the public. In each case, the donation of a conservation easement would have no impact on the existing uses of the property, but it would give the landowner substantial federal income tax benefits for the charitable contribution26.
Costs Associated with Using Easements

Despite the increased awareness of discussion of easements in the 1970's and 1980's, there is a reluctance among many agencies to use them. By and large, officials who have to deal with land programs like to buy land outright. The dominant conventional wisdom is that easements are more trouble than they are worth, because of both the cost of managing them when they have been acquired and their high initial acquisition costs.

Easements are likely to be effective only if an enforcement mechanism is developed which can be fairly and effectively applied. Thus, recreation and park managers of areas which incorporate substantial easements may spend as much of their time managing the process of protecting the easement as managing the unit itself. Such managers are required to monitor adherence to the easements and to solicit the continued cooperation of landowners. An easement agreement signed with a sympathetic, supportive landowner may be opposed by subsequent owners of the land, who may seek ways to abuse it. In such situations agency personnel find themselves in the emotionally traumatic position of being in the middle of disputes between landowners and recreationists, often with only limited control over either. On-going costs associated with easements may include supervision costs, resource appreciation costs, the costs of law suits, and in some instances, the cost of bad publicity which may accrue to an agency seeking to enforce an easement.

Even with proper monitoring, enforcement is sometimes difficult. One commentator on the National Park Service's experiences observed: “There was little the agency could do after a woodlot had been cleared or a building had been put up without prior agency approval.” In other situations, trees have grown up on formerly cleared land and have destroyed scenic vistas. Because of the scenic easements, however, owners are prevented from cutting them down.

The evidence does not always support the contention that easements secure the goodwill of landowners since they are able to remain on their land and, in essence, receive money for not doing anything. Landowners in some cases resent the careful monitoring of easements viewing it as harassment. This resentment may be nurtured by differing interpretations of the terms of an easement:

For example, along the Blue Ridge Parkway, the terms of the scenic easements sold to the National Park Service stipulated that no new buildings would be constructed without agency permission and that no trees were to be cut without prior agency approval. Immediately there began to arise disputes, some of which reached the courts, over what distinguished a building from a mere shed and over where to draw the line between tree cutting and brush clearing.

Views on the use of easements may vary within an organization according to individual responsibilities. Senior managers and policy makers concerned with formulating agency strategy and overall budget concerns may be attracted to the concept of easements, whereas field managers who have to resolve the operational difficulties which may arise may be less enthusiastic.

Part of the reluctance to use easements at the local level is attributable to most local officials having had no experience with easements. Because they are unfamiliar, local officials lack confidence and are suspicious of them. The problem is compounded because the legal, appraisal and property skills they need, frequently are not under their direct control and have to be solicited and coordinated with other departments. In contrast, federal and state agencies frequently have this expertise available within their departments, and have had experience in working with easements. Similarly, private non-profit organizations devoted to preserving land because of its scenic or conservation values have made extensive use of easements.

The cost range of acquiring easements varies greatly. For example, in Minnesota, where officials believe easements have been "most cost-effective", costs have ranged from 15 percent to 85 percent of full ownership value. In desirable development areas, easements which acquire development rights are likely to be expensive but, as Table 1 illustrates, acquisition costs are only part of the total costs which should be considered. In the following section some alternative approaches to purchasing easements are suggested which are likely to reduce their acquisition costs.

Strategies for Expediting Easement Acquisition

This section describes two different strategies that have expedited easement acquisition which may be generalizable to other contexts. The first strategy is to purchase full ownership and re-sell with an easement, or to pre-emp; the second strategy suggests the usefulness of an escrow account approach.

Establishing an Easement via Purchase of Full Ownership

There is some evidence which suggests that the cost of acquiring an easement can be reduced if an agency or non-profit organization acquires unrestricted land by fee purchase, attaches the desired easement to it, and then re-sells or leases the land subject to the easement. It is generally not possible for government agencies to engage in the buying and selling of real estate in this way. Such transactions have to be undertaken by a non-profit organization. The resale price will almost certainly be lower than the purchase price, since the easement is likely to decrease the market value of the land. Thus, a non-profit organization has to be prepared to absorb the difference between the buying and selling prices, as well as to finance the total initial purchase cost of the real estate during the time period until it is re-sold.
Other countries, for example France and Norway, have adopted a concept called the right of pre-emption. In France, this mechanism enables a municipality or the State to intervene and pre-empt a sale in designated areas of public concern whenever designated land is sold to someone intending to change its use. The concept is similar to the common U.S. practice in the private marketplace of the right of first refusal. In Norway, the conditions for pre-emption are different. There, it is applicable for use in areas which have been privately developed, but which it is deemed should return to the public domain over a period of time, and should be protected from development in the interim. It works in the following way:

When a willing seller and buyer have negotiated an agreement, the municipality has the right to pre-empt the sale. However, it must offer the seller the same price he or she would have received from the agreement with a willing buyer. The municipality then offers to lease the property, with desired easements attached to it, to the buyer at a rate which is sufficient to redeem the annual payments on the publicly borrowed money that the municipality uses to finance the scheme. This is likely to be considerably less than the buyer would pay if he or she were to commercially borrow money from a bank.

Thus, the usurped buyer is able to enjoy living on the property while paying lower monthly payments and without having to provide a down payment. The money which would have been used as a down payment can be invested elsewhere to build up equity. The lease payments redeem the money which the municipality borrowed. Over a 25- or 30-year period the municipality would have protected the property through easements and ultimately acquired it at no direct cost to its taxpayers.

Putting Easements in Escrow - The Blackfoot River Corridor

The Big Blackfoot River in Western Montana is used intensively by swimmers, tubers, floaters, campers, and fishermen. For many years there had been efforts to effect a management plan for the river by individual landowners and government agencies. It was the landowners’ desire to retain their agricultural way of life and to maintain the natural state of the river. As a group they did not want to be forced by escalating land values and accompanying taxes into selling their land for development purposes. Concurrently, the landowners wished to preserve the tradition of reasonable public use of private land. With a sense of enlightened self-interest, they perceived that if the private sector voluntarily provided recreation access to the river, the potential of imposed public access through governmental action would be blunted.

In June 1975 a task force which included representatives of all concerned landowners and public land managers was formed. The task force received key technical assistance from the Heritage Conservation and Recreation Service, and a master plan encompassing thirty miles of river frontage emerged. The plan identified frontage ownership, delineated a conservation corridor, and identified access points to the river.

The landowners would agree to donate those property rights along the river that could significantly impair the natural, scenic, or aesthetic quality of the resource, for example, the right to subdivide, to clear-cut timber, to dredge, or to establish feedlots. However, the landowners would keep all other agricultural and forestry rights, such as the option to selectively harvest timber, to graze livestock, to cultivate crops, to irrigate and so on.

However, one important problem had to be addressed before the plan could be implemented. Landowners were reluctant to grant an easement because they had no assurance that their fellow landowners would also cooperate in the plan. If a landowner granted an easement and the neighbors did not, then he or she had merely contributed to enhancing the value of abutting property because of the guarantee of adjacent open space provided by the easement. Hence, before any single landowner would grant an easement there had to be an assurance that all others would do likewise.

This assurance was provided by establishing an escrow account which was managed by the Nature Conservancy. Landowners agree individually to the specific terms of the conservation easement as it pertains to their property, and the document is put into escrow. Any landowner may inspect the documents signed by the other landowners to ensure that suitable blanket protection will be afforded his or her property. At the end of a specified time period if some easements had not been granted, those landowners who had granted easements would be free to choose whether or not they wanted the easement to be implemented or whether they wanted to invalidate it.

Concluding Comments

It is neither possible nor desirable to commit to public ownership all the land needed for park and recreation purposes by purchasing all rights to the land. There are an increasing number of examples of parks in which full ownership of land is limited to relatively small, high intensity use areas. Affirmative easements are used to link fully owned acquired areas along watercourses and trails. Negative easements are purchased to preserve critical scenic views. It has been observed:

If there are sufficient “chunks” of public-access recreation lands augmented by linear systems involving trails and watercourses, the outdoor recreation “need” can be satisfied. In existing parks - National, State, and local - only a fraction of the land is intensively used. In many cases five percent or ten percent. The rest is ambiance. It is hardly logical then for the public to deplete its treasury to buy land in fee when it is not intensively used.

This approach emphasizes intergovernmental planning cooperation, with federal, state, and local levels each having their own distinct functional and spatial responsibilities, yet with each cooperating with the others in overall planning. There...
can be no standard format because each park has to be sensitive to the unique requirements of each area and of the state and local government units which will administer those areas. However, land-use regulation is one of the keys to their success. Since it is the state level of government which possesses the power to control land use, greenline parks must be primarily a state level initiative.

Any federal government involvement is limited to supplying initial capital as incentives to state, regional and local entities. This money is used for research and planning, start-up costs, payments in lieu of taxes to local governments, easements, and fee simple acquisition of critical, small, intensively-used sites.

The outstanding example of this type of park in the United States is the Adirondack Forest Preserve in New York State which contains six million acres and is only 39 percent publicly owned. It was established in 1892 when the New York legislature drew a “blue line” area around a substantial region within the Adirondack Mountains in order to protect the vast watershed of the Hudson River. It is currently administered by the Adirondack Park Commission which has a major responsibility in the administration of public land and great regulatory power over the use of private land within its area of responsibility. It acquires some land by fee purchase, accepts gifts of land and easements, develops design controls, and regulates land use based on a comprehensive plan.

The Adirondack Park has been long established. The first recent national park of this type to be formed was Cape Cod National Seashore in 1961, and perhaps the most ambitious recent greenline park is the Pine Barrens area of New Jersey which was legislated in 1978 and occupies one-fifth of New Jersey. The area is close to Philadelphia and within its 1.1 million acres there is a large amount of privately owned land. It was established to protect the unique ecological and cultural features of the area. It is under the control of the Pine Barrens Commission established by the state in 1981 which is modeled after New York’s Adirondack Park Commission. Technical assistance and funds for planning (not to exceed $3 million) and land acquisition (not to exceed $26 million) were authorized by the federal legislation. If the traditional approach of full fee acquisition of all private lands had been adopted, the cost would have exceeded $500 million.

While primarily a conservation measure, the Pine Barrens plan was intended to manage growth, not stop it. The Commission in its first five years from 1981 to 1986 approved permits for only 149 new houses in the sensitive 368,000 acre core, called the “preservation area”, but in the more diverse 568,000 acre “protection area” surrounding the core, 17,297 houses and 697 new commercial buildings were approved. The Commission has no control over the balance of the national reserve, which remains under local jurisdiction.

The Cape Cod and Pine Barrens approach has become the norm for recent additions to the National Park System. In the case of the Alaskan additions: Aaukchak, Bering Land Bridge, and Cape Kruseauru National Monuments; and Gates of the Arctic National Park, the private land allows indigenous cultures or already established towns to flourish without the inhibiting restrictions of public land ownership.

Much private land also came into the National Park system through the establishment of national and wild and scenic rivers. For example, the New River Gorge unit in West Virginia included over 54,000 acres of private land, only a small fraction of which is to be transferred to public ownership. Park planning calls for the rest to remain under essentially unchanged uses. Many of the new parks established near urban areas included large tracts of private land. Cuyahoga Valley, with 12,000 acres of federally owned land, also includes more than 14,000 acres of private land. Some of this private land is to be acquired but much will remain under current patterns of private use. Jean Lafitte National Historic Park and Preserve contained slightly under 15,000 acres of federal land and over 13,000 acres of private land. Santa Monica Mountains National Recreation Area has slightly under 8,000 acres of federal land yet includes 107,000 acres of private land within its boundaries. Here plans call for much of this private land to remain private, with planning for public and private lands coordinated toward the best interests of both.

The potential effectiveness of easements for facilitating increased recreation and park opportunities is controversial. Some have said that easements do not work. Others have concluded that they work very effectively and that the widespread failure to adopt them reflects adversely on the recreation and park manager. It is the author’s opinion that they are likely to be used more extensively in the future. On their own, they may be of limited use, but when they are used in combination with other protective methods their potential is impressive.

NOTES AND REFERENCES


John L. CROMPTON
Comment protéger les parcs et espaces naturels sans avoir à les acquérir? Revue des méthodes américaines en la matière

RESUMÉ
Le présent article examine les trois méthodes les plus utilisées aux États-Unis pour la protection des parcs et des espaces naturels à l’exclusion de l’acquisition des droits de propriété complète. L’auteur passe en revue trois mécanismes principaux...
de zonage utilisés à cette fin: le développement planifié des grands et des petits ensembles, le zonage incitatif et les droits de développement transférables. II décrit le concept d'évaluation de la taxation préférentielle («Differential Taxation Assessments»). Il analyse ensuite l'influence potentielle des servitudes: les coûts et bénéfices qui s'y rattachent, ainsi que les stratégies d'accélération de l'acquisition des servitudes. II conclut avec des exemples de parcs qui ont été protégés à l'aide de ces méthodes combinées.

John L. Crompton

Protecting Park and Natural Areas Without Purchasing Them: A Review of Methods Adopted in the U.S.A.

ABSTRACT

The paper focuses on the three main methods which are most commonly employed to protect park and natural areas in the U.S.A. without purchasing full ownership rights. Three main zoning mechanisms which are used to create these opportunities are discussed. They are: planned unit and cluster developments, incentive zoning, and transferable development rights. Differential Taxation Assessment is described. This is used by all states and contributes to protection by assessing land at current use value rather than at market value. An assessment of the potential influence of easements considers the variety of types of easements, the benefits and costs associated with easements, and strategies for expediting easement acquisition. The paper concludes with examples of park protection which have incorporated combinations of these methods.

John L. Crompton

¿Cómo proteger los parques y espacios naturales sin tener la necesidad de adquirirlos? Revista de métodos americanos en la materia.

RESUMEN

El artículo presente examina los tres métodos más utilizados en Estados Unidos para la protección de parques y espacios naturales, excluyendo la adquisición de derechos de propiedad completa. El autor pasa revista a los tres mecanismos principales que limitan las zonas utilizadas para este fin: el desarrollo planificado...