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PRESERVATION OF AMERICA'S OPEN SPACE: PROPOSAL FOR A NATIONAL LAND- USE COMMISSION

Paul N. McCloskey, Jr.*

ENVIRONMENTAL hazards may be divided into four types: those affecting air, those affecting water, those affecting quietude, and those affecting landscape. This Article will focus on the last of these hazards and will analyze a single aspect of it: the continuing loss of open-space lands.¹ I suggest that this loss can be controlled only if we are willing, in the next decade, to review and to overhaul our entire basic system of land use and tax laws, accepting no present law as sacred other than the constitutional guarantee of just compensation for the taking of private property.²

The fundamental basis for this suggestion is that every American should have the right to look across and to range large areas of the earth which are in a relatively natural state and that therefore national policy should require that there be laws compelling preservation of such areas. Positive action is necessary, because ever since the earliest days of colonization, American land laws and tax systems have been structured to encourage the development of the land. It has become evident that our land laws and tax system are combining with the twin explosions of population and technology to force rapid development of our loveliest remaining open space. At the same time, however, American public opinion and national goals have changed materially. After 187 years of American public support for *development* as a primary goal of land and tax laws, dating from the Northwest Ordinance of 1783, there has recently been an abrupt reversal. We have proclaimed the 1970's as the Decade of the Environment, and a growing public opinion now asks that we give the conservation of natural landscape a higher priority than the further development of our lands. Thus, since our laws and legal systems are no longer in accord with public goals and opinion, it is time for legal craftsmen to consider and promulgate such changes as may be necessary to preserve that broad public acceptance and respect for the law which is essential to domestic tranquility.

In light of these considerations, I seek to outline a proposal for

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1. The term "open-space lands" is used to refer to lands without structures; the term is found in most property tax schemes. See note 12 *infra* and accompanying text.

2. U.S. CONST. amend. V.

the preservation of America's open space through a new national land-use policy.³ Specifically, that proposal calls for the creation of a national land-use commission to deal with the development of new lands and the preservation of open space in this country. The purpose of this Article is to set forth the foundations of, and premises for, the proposal and to explain briefly the suggested organization and powers of a national land-use commission.

I. THE LEGAL BACKGROUND OF THE PROPOSAL

Governmental efforts to attack the environmental hazards of noise, air pollution, and water pollution have not required any serious modification of traditional common-law legal relationships. The laws of nuisance and trespass together with accepted principles of a common public interest in airways and waterways,⁴ have required only slight modification in order to be adapted to modern hazards of smog, waste disposal, and jet aircraft noise. To combat these types of environmental destruction effectively then, courts and legislative bodies need only assign new values and priorities in performing their task of attaining balance between injury to the senses of individuals and the technological progress. In this area, the courts have quite often been ahead of both the executive and legislative branches.⁵ Commencing in the latter half of 1969, Congress has begun to act as well as to deliberate. Recent congressional action in funding the Clean Water Restoration Act⁶ and in enacting the National Environmental Policy Act⁷ and Population Commission Act⁸ give promise of increasing federal support for programs to deal with air pollution, water pollution, and unchecked population increase.

It is more difficult, however, to stem the accelerating loss of open-

3. Senator Henry M. Jackson of Washington has recently introduced legislation in the United States Senate to accomplish some of the goals which I consider necessary. See Jackson, *Foreword: Environmental Quality, The Courts, and the Congress*, 68 MICH. L. REV. 1073 (1970). Senator Jackson's bill is not, however, as far-reaching as the legislation which is suggested in this Article.

4. See 6A AMERICAN LAW OF PROPERTY § 28.1-35 (A. Casner ed. 1954, Supp. 1962) (trespass and nuisance). See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-89 (1970).

5. See generally *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966); *Maun v. United States*, 347 F.2d 970 (9th Cir. 1965); Sax, *supra* note 4. But see Jackson, *supra* note 3.

6. 33 U.S.C. §§ 431-37, 466a, c-1 to e, g, j, I-n (Supp. IV, 1965-1968); Jackson, *supra* note 3, at 1076 n.13.

7. Pub. L. No. 91-190, 83 Stat. 852 (1970). See Jackson, *supra* note 3, at 1079.

8. Pub. L. No. 91-213, 84 Stat. 67 (1970).

space lands. Long accepted legal principles and institutions, which both permit and provide an incentive for the development of land,⁹ effectively block governmental action to conserve our most desirable open space. The difficulties caused by these principles and institutions are exemplified by the situations in four California valleys in various stages of development: San Gabriel, Santa Clara, Napa, and Livermore. Each of these valleys was once known as an area of exceptional environmental quality, with unique combinations of soil and climate for the production of citrus fruits, of prunes, and of grapes for fine red and white wines. The mustard fields of the San Gabriel Valley in Southern California are now almost wholly replaced by industry and housing, the Santa Clara Valley's fruit orchards are nearly gone, and the world famous vineyards of the Napa and Livermore Valleys are under such heavy pressure that it can be foreseen that they will be completely developed within twenty years.

In order to put an end to this kind of environmental destruction, it may be necessary to make sharp modifications of the traditional laws, principles, and institutions which combine to encourage the development of land and thereby block governmental action to conserve open space. One such principle is that a man may use his property in whatever way he chooses so long as his use does not constitute a nuisance to others.¹⁰ If we are to preserve open-space lands, it may well be necessary to place restrictions on the manner in which property may be developed, that is, to impose upon the owner of land deemed desirable to retain as open space an obligation to maintain it so. Two-acre, three-acre, and four-acre zoning laws in wealthy suburban communities have represented an attempt by local government to do this, but the courts have properly imposed limits on this type of governmental "taking without compensation."¹¹

Another major force that has been instrumental in encouraging land development is our historic local property tax system. The local property tax is the primary source of funds for the operation of local government. Assessment is predicated upon the fair market

9. These principles and institutions are discussed in text accompanying notes 10-19 *infra*.

10. See *Antonik v. Chamberlain*, 81 Ohio 465, 475, 78 N.E.2d 752, 759 (1947); W. PROSSER, *TORTS* § 90, at 616 (3d ed. 1964).

11. See, e.g., *National Brick Co. v. Lake County*, 9 Ill. 2d 191, 137 N.E.2d 494 (1956); *Hitchman v. Oakland Township*, 329 Mich. 331, 45 N.W.2d 306 (1951); *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

value of each parcel of property or some fraction thereof,¹² and usually the basis for that assessment is the value which the property would have in its "highest and best use."¹³ Since assessors are authorized in most states ". . . to consider all relevant facts, standards and assumptions" in making this determination,¹⁴ potential uses of the land often influence the judgment as to its present value.¹⁵ Thus, a parcel of open-space land used for agricultural purposes at the edge of a growing city will often be taxed on a basis that may include its value for future residential subdivision, a value which may well be in excess of ten times its value for agricultural purposes. Similarly, a parcel of land next to a scenic lake or river is properly taxed on the basis of its value for future recreational and vacation cabin sites, a value which can be substantially higher than it would be if the property is required to remain undeveloped. The resulting taxes are so high that the property owners are quite literally forced to sell their land for development. Thus the urban sprawl and premature loss of recreational open space continues. Local governments, caught in the squeeze of increasing costs for education and welfare, have been forced to compete with one another to attract new industry and new residential and recreational development; "best use" property taxes are a means of making land available for that development.¹⁶ In large metropolitan areas, the inner-city resident is removed further and further from available rural open space. In mountain and river scenic areas, "honky tonk" development and vacation cottages remove past areas of open space from public access and enjoyment. The power lines, airports, and highways needed to serve these new developments further diminish the remaining natural landscape.

The problem involving local property is enhanced by a third

12. See Shannon, *Full Disclosure Policy—The State's Role in the Assessment Process*, in TAX INSTITUTE OF AMERICA, *THE PROPERTY TAX: PROBLEMS AND POTENTIALS* 108-10 (1967).

13. See *Discussion of Responsibilities for Administration*, in *id.*, at 131-34.

14. Comment, *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335, 347 (1958).

15. See Barlowe, *Taxation of Agriculture*, in PROPERTY TAXATION—USA 96-97 (R. Lindholm ed. 1967); *Discussion of Responsibilities for Administration*, *supra* note 13, at 131-34. "Highest and best use" is often synonymous with "speculators selling to speculators." *Id.* at 133.

16. *Introduction*, in PROPERTY TAXATION—USA, *supra* note 15, at 4:

The property owner is forced to use his property in a manner that will increase income from the property so that he can pay his property taxes. The property owner unable to do this places his property on the market and sells to someone able to utilize the property more completely. The new owner, by utilizing the property to its highest and best use, earns sufficient income from the property to pay the property taxes based on market value of the property.

institutional problem, that of the overall relationship between local property taxes and the federal income taxes. It can properly be said that local governments have the problems while the federal government has the money to solve them. Since the passage of the sixteenth amendment in 1913, the graduated income tax has radically changed the concept of federalism. In order to meet the financial burdens of four major wars, federal income taxes have been progressively increased. Once these taxes have been accepted for war purposes, they have generally been retained even after the return of peace.¹⁷ As a result, the decade of the 1970's began with local governments facing the problems of environmental hazards, but with the federal government having almost a monopoly on the major source of revenue with which to attack these problems—the income derived from a growing gross national product.

Since the graduated income tax is designed to impose a burden on those most able to pay,¹⁸ it is the least burdensome on the elderly and low-income elements in the population. An increase in local property taxes, on the other hand, quite often results in a disproportionate burden on those least able to pay—retired home owners and younger couples. The sales tax likewise can place a disproportionate burden on the poor, who must pay the tax to obtain the necessities of life and who pay a greater proportion of their incomes for those necessities than do the well-to-do.¹⁹ It is therefore difficult for local governments to give up the tax base represented by new development or to find local revenues with which to acquire and preserve open-space lands in the midst of new urban sprawl. Even if local, county, or state governments have the will to preserve open space, there is little likelihood that they will be able to obtain the necessary funding from those persons residing within their jurisdiction, except through occasional charitable gifts from wealthy philanthropists. By reason of these institutional and legal relationships, it appears that the federal government will have to be the leading force in making the changes necessary to prevent the continuing loss of open-space areas.

Thus, unless there are drastic changes both in our laws and in our tax structure, the remaining areas of rural beauty surrounding both urban and outdoor recreational areas will continue to be sacrificed to development.

17. See J. CHOMMIE, *FEDERAL INCOME TAXATION* 3-7 (1968).

18. See J. DUE, *GOVERNMENT FINANCE* 369-71 (1963).

19. *Id.* at 297-99.

II. THE PROPOSAL: A NATIONAL LAND-USE COMMISSION

A. *Premises*

There are five premises which lead to the conclusion that a national land-use commission should be formed. First, as has been stated previously,²⁰ it is, or should be, every American's right to look across and to range great areas of the earth's natural landscape, provided that the exercise of such right does not damage the landscape itself. Second, the very term "open space" contemplates large areas of natural landscape unmarked by the works of man other than, perhaps, those rural structures which are necessary to permit the landscape to be used by wildlife and domestic animals and those which are necessary to prevent pollution by man. Third, natural landscape includes lands used for both agricultural and grazing purposes. Fourth, much of the great natural landscape of America should be considered to be held in public trust by the temporary owner of the title to such property, whether that owner be a private citizen or an agency of government. The specific provisions of the trust may vary from place to place depending upon the terrain, but in all cases, the land itself would be deemed to be held subject to the same common interest of the American people as are our great waterways and the air itself.²¹ Fifth, the continuing growth of the American population and the expanding problems of our present urban areas require that the national government provide for new cities at the same time that national and local governments take actions to preserve the natural landscape adjacent to existing and future urban areas.²² In light of these premises, it appears that a national land-use commission should be created to plan, coordinate, and control both the continuing development of new places of habitation and the preservation of open space in America.

B. *Organization and Powers of the National
Land-Use Commission*

1. The national land-use commission should consist of a chairman and four members appointed by the President and with the consent of the Senate.

20. See text following note 2 *supra*.

21. See generally Sax, *supra* note 4, at 478-89, 556-57.

22. COMM. ON URBAN GROWTH, THE NEW CITY (1969); H.R. 16,647, 91st Cong., 2d Sess. (1970).

2. The commission should have the power to designate areas for urban development, to determine what areas will be dedicated to agricultural use, to set aside lands for conservation and for recreational use, and to set the terms and conditions for all of these uses.

3. In determining whether privately owned lands may be developed by their owner or whether they should either be conserved as open-space lands or become the site of an urban area, the commission should attempt to deal first with those lands which are both particularly valuable as open-space lands and most heavily threatened by potential development.

4. The commission should be granted the power to monitor all open-space lands owned by the federal government, and no development of or change in the use of these lands should be permitted without the prior approval of the commission. In time of national emergency, the President should have the power to overrule a decision by the commission preventing development or a change in use; and in other cases, a court of competent jurisdiction should have such power after thirty-days notice to all interested parties.

5. Whenever any local or state government is without sufficient financial resources to acquire open-space lands or to prevent the threatened development of such lands, that government should be able to request the commission to make an emergency determination that would prevent any change in use of the lands in question. That determination should take effect immediately and be effective for a period not to exceed one year, pending a final decision by a court of competent jurisdiction. Such a temporary emergency determination, however, should entitle the affected property owner to compensation, when loss of land value can be demonstrated under traditional principles of condemnation.

6. The commission should make use of the property assessment offices and procedures of affected local and state governments. When the commission decides that a tract of land should be used for urban, agricultural, or conservation purposes, that decision should be accompanied by the local property assessor's determination of the property's change in value which is caused by the action of the commission. That determination of change in value should be appealable by either the property owner or the commission through a procedure consistent with due process of law.

7. Whenever any federally funded improvement project is authorized, local assessors in the affected areas should be required to

appraise properties adjacent to those areas in order to determine what change in the fair market values of such properties has been caused by the federally funded improvement.

8. If it is determined that the commission's action has resulted in an *increase* in value, an assessment lien equal to seventy-five per cent of the increase in value should be imposed against the property in question. The assessment should bear no interest and should be payable upon sale or development of the property. Upon imposition of such an assessment lien, the value of the property for purposes of local, state, or federal taxation should be reduced by the amount of the assessment.

9. If it is determined that the commissioner's action has led to a *decrease* in the value of the property, the property owner should be entitled to immediate payment of the full amount of the decrease.

10. In order to receive and disburse such assessments and compensation, the commission should administer a revolving trust fund account, known as the "Urban Development and Conservation Fund," initially funded with the sum of one billion dollars.

The foregoing proposal is offered, not as a polished bill for immediate action by the Congress, but rather as a suggestion for consideration, debate, and modification by the nation's legal scholars. It is my hope that the publication of the proposal in these pages will lead to careful analysis and, as a result of that analysis, to legislation which is both acceptable to Congress and efficient in accomplishing the desired changes in our federal land-use and tax laws.