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# The National Park System and Development on Private Lands: Opportunities and Tools to Protect Park Resources

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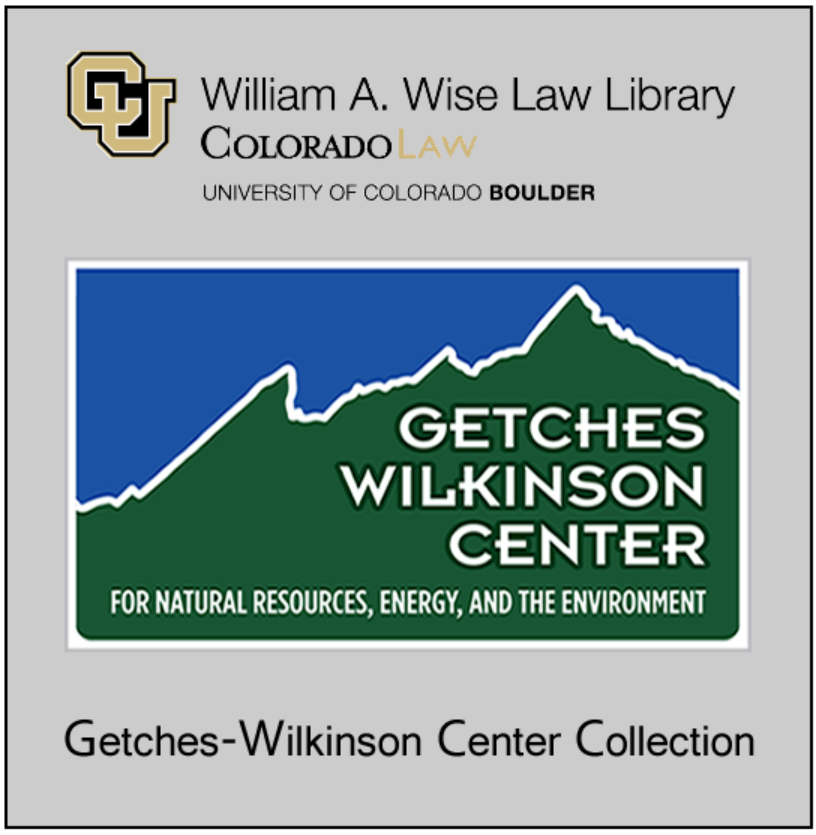


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# The National Park System and Development on Private Lands: Opportunities and Tools to Protect Park Resources

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External Development Affecting the National Parks:
Preserving "The Best Idea We Ever Had"

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# The National Park System and Development on Private Lands: Opportunities and Tools to Protect Park Resources

## I. Introduction

Many pressures on National Park System lands originate on private property under state and local jurisdiction. A 160-unit subdivsion just outside the park boundary in valuable wildlife habitat, a gas station built adjacent to an historic site, or strip development to accommodate increasing use in a gateway community can all affect park resources and the types of experiences parks are to provide.

While a variety of constitutional, common law and federal statutory avenues may be available to influence development on private lands in particular situations, the Park Service's ability to do anything about impacts from these lands varies from case to case. If the threat arises from development that could disrupt endangered species habitat or is funded or permitted in some way by a federal agency, say a sewage system built in part through EPA, several federal laws may be applicable to ensure that alternatives to the proposal are considered and that the adverse impacts from that development are minimized. If the threat is a billboard to be erected just outside a park entrance or an abutting residential subdivision approved by a local

zoning board that does not involve any significant federal agency role, however, the Park Service can generally only rely on cooperation from state and local agencies and private firms.

Regardless of the applicability of federal doctrines and statutes, the most important opportunities to protect National Park resources from the adverse effects of development on private lands may lie less in the application of various legal doctrines and more in a variety of cooperative mechanisms that involve local governments and the private sector.*

## II. The Constitution, the National Park Service Organic Act, and Private Development

### A. Property Clause

The reach of the Property Clause of the U.S. Constitution to activities on private lands outside park boundaries that pose a threat to park resources has not been specifically tested. There is little doubt that the Clause, combined with the Commerce Clause, provides authority for Congress to enact legislation giving the Park Service more authority to participate in and influence decisions on adjacent private lands to protect park resources.

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* The scope of this conference and this outline does not include issues relating to development on private lands inside park boundaries. Much of the material in this outline is summarized form The Conservation Foundation's forthcoming Handbook on Natural Resources Law and the National Park System: Duties, Opportunities, Tools.

Two crucial issues, however, involving the reach of the Constitution are:

1. The limits of authority that could be granted by Congress and the extent to which the Park Service could preempt or override state and local land regulation (See generally, Sax, "Helpless Giants: The National Parks and The Regulation of Private Lands," 75 Mich. L.R. 239 (1976)); and

2. the extent to which the Constitution, in combination with the Park Service Organic Act (16 U.S.C. 1), could be used to justify or compel Park Service action (without additional legislation) to protect park resources from activities on private lands outside the boundaries.

-- U.S. v. Alford, 274 U.S. 264 (1927) -- Property clause used as a basis to uphold criminal prosecution under federal statute of a individual who started a fire on private land adjacent to a national forest.

-- Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942) -- Property clause allows Secretary of Interior to control hunting on private land adjacent to a wildlife refuge.

-- Kleppe v. New Mexico, 426 U.S. 529 (1976) -- Wild burros case where "regulations under the property clause may have some effect on private lands not otherwise under federal control. Property clause is not limited to regulation required "to protect the public land from damage," but can also be applied to a statute that seeks "to achieve and maintain a thriving natural ecological balance on the public lands."

B. The National Park Service Organic Act

Like the Property Clause, the full reach of Park Service Organic Act (16 U.S.C. 1), combined with recent amendments (16 U.S.C. 1a-1, 1c) and specific park enabling statutes, to require that the Service address adverse impacts from activities on private lands outside park boundaries has not been adjudicated.

1. Most of the cases in the area have arisen in the context of activities on private lands within authorized boundaries, where courts have almost uniformly concluded that "under this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands." State of Minnesota by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981).

2. The issue of authority over activities on private lands outside park boundaries has been most prominently addressed in the context of Redwood National Park in the mid-1970s.

-- Sierra Club v. Department of Interior, 376 F. Supp. 90 (N.D. Cal. 1974); Ibid., 398 F. Supp. 284 (1975), Ibid., 424 F. Supp. 172 (1976)--Sierra Club sued to force Secretary of Interior to protect the park from the erosional effects of logging on private land upstream, arguing that the Secretary had authority to protect the park from outside threats through the enabling legislation and the

Organic Act and requesting the Secretary to seek modification of the park boundary and to acquire interests in applicable private lands outside the park or enter into agreements with outside interests to prevent damage to park resources. The court examined whether there was an obligation by the Secretary to provide buffer protection for the park and found that in this context, the statutory scheme imposed "a general trust duty" to maintain park resources unimpaired. In reaching this result, the court placed substantial reliance on the specific enabling statute. While the cases implied a duty on the part of the Secretary to do all that could be done to protect the park, the Secretary's compliance with the court's ruling was limited by the lack of Congressional funding.

3. In examining the Secretary's duties under the Organic Act, the court in Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980), quoted from the legislative history of 16 U.S.C. 1a-1: "The Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the National Park System." The scope of these duties has not been applied or tested.

## III. Federal Environmental Laws Applicable to Private Development

Depending on the nature of the activity on private lands outside park boundaries and the extent of federal involvement, a host of federal environmental laws may be applicable to preventing such activity or more like-

ly allowing the Park Service and public to comment on its adverse impacts and recommend measures to minimize those impacts. Among many, these include the National Environmental Policy Act, Endangered Species Act, Clean Water and Air Acts, and the National Historic Preservation Act. See generally, Anderson, Mandelker, and Tarlock, Environmental Protection: Law and Policy (1984).

The most promising federal statutory avenues to address the ill-effects of devolopment activity on private lands outside the parks seem to be in utilizing a variety of the processes and techniques embodied in existing acts and applying them through new legislation to the parks, perhaps on a pilot basis to selected areas. Examples include the conservation planning provisions of the Endangered Species Act, the consistency provisions of the Coastal Zone Management Act, and the limitations on federal development subsidies that appear in the Coastal Barrier Resources System Act. See generally, The Conservation Foundation, National Parks for a New Generation: Visions, Prospects, Realities (Washington, D.C.: The Conservation Foundation, 1985.)

## IV. Public Trust and Common Law Doctrines

### A. Public Trust

The public trust doctrine has been expanded by several courts over the last decade or so to include

wetlands, coastal zone areas, and to appropriated waters that affect downstream lakes. See, Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine," 71 Iowa L. Rev. 631 (1986). For an exploration of its applicability to public lands, see, Wilkinson, "The Public Trust Doctrine in Public Land Law," 14 U.C.D. L.Rev. 269 (1980).

Whether the doctrine imposes any trust duties on those administering National Park System lands beyond those contained in the Organic Act, however, has not been definitively resolved, although one court has flatly said no:

1. Knight v. United Land Association, 142 U.S. 161 (1891) -- "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted...."

2. Sierra Club v. Department of Interior, 376 F. Supp. 90 (N.D. Cal. 1974) -- first Redwood case where court said that the discretionary exercise of Secretary's powers to acquire land and enter into contracts with adjacent landowners was "subordinate to his paramount legal duty imposed, not

only under his trust obligation but by the statute itself, to protect the park."

3. Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980) -- in action to force the Park Service to protect federally reserved water rights to protect park resources, the court held that "trust duties distinguishable from statutory duties" did not exist.

B. Common Law Duties -- Nuisance and Trespass

While federal environmental legislation has preempted federal common law in terms of air and water pollution, the Park Service, like any landowner, has retained common law rights to be free of nuisance in some situations. See, Comment, "Protecting National Parks from Developments Beyond Their Borders," 132 U. Pa. L. Rev. 1189. The federal government may be subject, however, in these cases to questions involving the appropriateness of its action to halt development on adjacent property to a degree that would not be considered in cases involving two private landowners:

1. United States v. County Board of Arlington, 487 F. Supp. 137 (E.D.Va. 1979) -- injunction sought to halt construction of sky-scrappers claiming they would be a nuisance to Park Service lands and monuments in the D.C. area denied,

although court recognized standing "to protect the rights and properties of the United States." Court noted that "to sustain such an interference with the use of private land without compensation as an exercise of the police power has been farther than the courts have been willing to go."

## V. Non-Federal Setting

### A. State Programs

State programs regarding land and distinctive resources provide some important opportunities to protect National Park System lands. The Tenth Amendment of the U.S. Constitution has reserved to each state the power to protect and enhance the public health, safety, and general welfare of its citizens. Whether these so-called police powers have been delegated to localities or taken by them under home rule provisions, nearly every state has retained some degree of jurisdiction over land, especially critical areas such as floodplains, wetlands, cultural resources, and the coastal zone. State involvement in these lands has increased significantly over the past two decades.

#### 1. State Enabling Authority

State enabling legislation is the most indirect method for state involvement in land-use activities that effect national parks. Nonethe-

less, the broad police power language in most enabling statutes is generally sufficient to provide localities with the power to regulate land uses in these areas. No court has found broad enabling authority insufficient for the adoption of regulations. Local authority to deal with these types of resources has been strengthened by two U.S. Supreme Court cases: Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); and Agins v. City of Tiburon, 100 S.Ct. 2138 (1980).

2. State Flood Hazard Programs

In recent years, many states have enacted floodplain programs, creating specific flood hazard mitigation responsibilities for state agencies and assuming direct police power authority over land uses in floodplain areas. Twenty-four states have authorized regulations or standard-setting for floodway areas, while 17 states have programs for both the floodway and floodfringe areas. See, U.S. Army Corps or Engineers, A Perspective on Flood Plain Regulations for Flood Plain Management, pp. 95-97 (1976); U.S. Water Resources Council, Regulation of Flood Hazard Areas to Reduce Flood Losses, Vol. One, parts I-IV, pp. 59-66, 126-175 (1970).

### 3. State Wetland Programs

A number of states have established permitting programs for development and activities that threaten wetlands. To date, coastal wetlands have received far more attention from state programs than inland wetlands. At least thirteen states have coastal wetland regulatory acts that require a permit for fill and structures in these areas. Statutory or administrative requirements provide the basis for granting or denying permits. State agencies are authorized in six states to adopt wetland zoning-like regulations and determine permitted and prohibited wetland uses. The remaining coastal states have broad regulatory programs with wetland protection as one component. These regulatory efforts may include a coastal zone plan, power plant siting controls, or shoreland zoning programs.

Inland wetlands are generally treated separate from coastal wetlands, in part because of their different physical characteristics and use potential. Only some seven states have adopted specific inland wetland protection acts. Their protection in most state programs is generally the result of regulatory efforts on other areas such as shorelands, floodplains, and wild and scenic rivers. See, Jon A. Kusler, Strengthening State Wetland Regulations, (U.S. Fish and Wildlife

Service, November 1978); Jon A. Kusler, Our National Wetland Heritage, (Environmental Law Institute, 1983).

4. Coastal Zone Management Programs

The federal Coastal Zone Management Act (CZMA) is largely a state management program funding Act; funding and other federal assistance is provided to states for planning and implementing coastal zone management programs. It is completely voluntary, and states wanting federal support must comply with federal standards and regulations in developing their plans. To date, more than 78 percent of the coastline -- including the Great Lakes -- is covered in the 26 federally approved programs. See, 16 U.S.C.A., Sections 1457-1464 (1984); 15 CFR, Sections 923 et. seq. (1981). See, 17 Coastal Zone Management (No. 14, Apr. 10, 1986) for description of 1986 CZMA reauthorization.

In seeking protection for National Park System units under the Act:

-- Examine the government action that threatens a park area within the coastal zone. State and local programs are at the heart of CZMA. Even consistency disputes require state government cooperation to be resolved. Thus, attention must be directed at state and local plans, permitting decisions and laws.

-- Review the applicable state and local plans. Does the program define coastal zone and identify boundaries broad enough to

encompass the area in question (federally owned land is excluded from the reach of state and local programs)? Should the affected land be designated for special management as an area of particular concern? Is it a part of an estuarine sanctuary or the shoreline erosion protection provisions?

-- Participate in the administrative process. It is far more likely to have an agency decision protecting a coastal area upheld than it is to reverse an agency action that permits harmful development. Moreover, a thorough record below will help the reviewing court.

## B. Local Government Processes*

Private land development is regulated in most instances at the local level. Most localities have sufficient authority to ensure that development on private lands within their jurisdiction is compatible with park resources. More can be done by those concerned with park resources to make local governments aware of the values of the parks and the opportunities these laws and tools provide. Efforts to assist them in efficiently implementing these laws might also be explored.

In order to create effective cooperative relationships with local governments and to influence local land use decision making, Park Service personnel and friends must first understand the peculiar world of

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* This section is based, in part, on material authored by Luther Propst and Dwight Merriam, of Robinson & Cole in Hartford, Conn., for The Conservation Foundation's forthcoming handbook on the National Park System and Natural Resources Law.

local land use regulation. Local governments have available a variety of tools and techniques which they can use to influence several aspects of private land development in a manner that may reduce adverse impacts upon nearby park units. These characteristics include the amount or quantity of development (including the height and bulk of buildings); the type of land use permitted (e.g., single family residential, commercial, industrial, excavation, agricultural); the environmental costs or impacts of development; the location and geographic direction of growth; the quality and appearance of development; and the density of development.

1. Local Development Management Tools And Techniques

Local development management tools and techniques can be grouped into four categories: development regulation, land acquisition, public spending and local taxation. A locality may use all four of these in combination to create an effective and integrated development management program. The most important of these four categories is development regulation. The traditional local regulatory devices of zoning and subdivision regulation are frequently supplemented by several innovative techniques for development regulation, land acquisition, public spending and local taxa-

tion which complement zoning and subdivision controls.

Two local regulatory devices that offer important options in connection with development on private land that could affect National Park System resources include zoning by performance standards and transfers of development rights (TDRs).

a. Zoning by Performance Standards

Performance zoning sets standards for a zoning district based upon the permissible effects or impacts of a proposed use. The device was first used widely in industrial zones to set standards for noise, glare, dust, vibration, and so forth. The concept can also be applied to regulate the environmental impacts or traffic generation of a broad range of uses.

Performance standards for environmentally sensitive lands can be used to specify maximum levels of permissible stress on natural systems such as aquifers, watersheds, or wetlands. Proposals which exceed the maximum permitted impacts would not be approved. The complexity and sophistication of performance-based systems vary widely depending upon the objectives of the program

and the capacity of the locality to administer a complex program.

Perhaps the best-known performance-based zoning ordinance is that of Sanibel Island, Florida. Sanibel Island had adopted standards for development based upon the characteristics and thresholds of the island's different ecological zones. An applicant for a development permit must demonstrate that a proposed use will not interfere with the vegetation, wildlife, coastal processes, geology, or hydrology of the ecological zone in which it is situated.

The most widely-used performance standards relating to environmental protection limit the percentage of a parcel that may be covered by structures or other impervious surfaces. This sets a maximum ratio of impervious surfaces, such as buildings, asphalt driveways and sidewalks, to gross site acreage. It may also be expressed as a minimum percentage which must remain as open space.

b. Transfer of Development Rights (TDRs)

Transfer of development rights is a land use device which is based upon the basic property concept that ownership of land gives

the owner many rights, each of which may be separated from the rest and transferred to someone else. The right to build upon land is one of these separable rights.

Under a TDR system, land owners can sell the development rights to their land to another land owner who is required by ordinance to collect a specified number of development rights before developing the property.

Under a typical TDR program, a local government awards development rights to each parcel of developable land in the community based upon acreage or value of the land. The system is set up so that no owner possesses enough development rights to fully develop his or her property without buying rights from someone else. Persons sell their development rights on an open market because they either do not want to develop or they are prohibited by an independent regulation from developing the property. Those who sell their development rights cannot subsequently develop their land.

The use of TDR is designed to eliminate substantially the value shifts and economic inequities of restrictive zoning, by allowing the market to compensate land owners who

under a normal zoning scheme would have the development potential of their land restricted without compensation.

TDRs can be a valuable supplement to conventional zoning. It may serve to reduce development density throughout a jurisdiction or to preserve open space in environmentally sensitive or scenic areas or along scenic or greenline park corridors.

There is widespread uncertainty regarding the need for explicit state enabling legislation as authority for a municipality to enact a TDR program. Many TDR programs exist without the benefit of express state enabling legislation. Transfer of development rights runs counter to traditional notions of property rights, and the novelty of the concept may reduce its initial political acceptance in many communities. In addition, TDR requires a high level of staff expertise to design and administer a system.

The use of a TDR system to ameliorate the economic inequities of restrictive zoning, coupled with a local decision to strictly limit development in certain sensitive areas, may be a potentially powerful tool for protecting park resources under the proper circumstances. It has been applied

most extensively within the park system at the Pinelands National Reserve in New Jersey.

## 2. Legal Parameters and Requirements for Local Development Management Actions

Local governmental development management programs must operate within various constitutional and statutory parameters. First, an action may be challenged as unauthorized by the existing statutory delegation of authority from the state, a so-called ultra vires challenge. A local action is also subject to challenge if it conflicts with state legislation. Second, both the United States and state constitutions limit local actions. In land use law, the constitutional due process and taking of private property without just compensation provisions are particularly important. Finally, invalid land use regulations are subject to a variety of remedies.

### a. Due Process

The due process clause requires that local decision making use fair procedures (procedural due process) and that regulations promote a valid purpose (substantive due process).

Procedural due process requires that citizens be given: 1) adequate notice of

governmental action; and 2) a reasonable opportunity to be heard by an impartial tribunal when affected by a governmental action.

A claim based upon substantive due process challenges the fundamental fairness of a governmental decision. Substantive due process requires that land use regulations bear a reasonable relationship to the accomplishment of a legitimate governmental objective (i.e., promoting the public health, safety and general welfare). Aside from the taking claim, which is related to substantive due process, but is a distinct constitutional challenge, a land use regulation may encounter due process challenges to either its objective or the means chosen to effectuate the objective.

b. Takings

The most controversial and misunderstood constitutional issue in local development management is at what point does regulation, rather than actual appropriation, of private property become an unconstitutional taking without just compensation. It is settled that actual physical seizures or invasions of private property for public use which result

from governmental actions or ordinances violate the taking prohibition. See e.g. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The taking clause has been interpreted, in some situations, to also prohibit regulation of private property which leaves property with no reasonable economic use.

The taking challenge to development management actions need not be viewed as an overwhelming limitation to effective local regulation of land development. The spectre of a taking challenge is often a greater limitation to effective development management than the taking clause itself.

Courts are more likely to invalidate land use regulations either as a taking, a violation of substantive due process, or on various other grounds when enactment or enforcement of an ordinance involves procedural irregularities, or ad hoc and post hoc planning and land regulation, rather than even-handed implementation of comprehensive community planning. Documentation of the adverse effects to be avoided by development regulations is necessary in order for courts to appreciate the importance of community concerns addressed by regulations when

balancing community interests with the often more direct impact an ordinance may have on an individual landowner.

To show that a local regulation constitutes an invalid taking, a landowner must show both that the regulation deprives the property of all reasonable economic use and that the local decision makers have reached a final, definitive position regarding development of the parcel.

- No Reasonable Use

  Courts balance the public purpose served by the regulation against the extent and nature of the restriction imposed on the individual parcel.

  With respect to the burden imposed upon the parcel, the primary factor is whether the restriction leaves the landowner with an economically feasible use of the parcel. A diminution in property value, even a substantial one, resulting from a regulation does not in itself constitute a taking. The difference in the value of the property after the regulation compared to the value before the regulation is not dispositive, so long as some economically reasonable use remains. Courts are almost certain to uphold a regulation addressing the adverse effects of land development when the regulation does not deny a landowner all economically-reasonable use of a parcel.

  Regulations that have the effect of denying a landowner all economically reasonable uses of a parcel present a more difficult question. If no reasonable use of the parcel remains, the decisions are divided as to the validity of the ordinance. The importance the court places upon the regulatory objective; the reasonableness of the

expectations of the landowner given the size, the location, and the character of the specific parcel; and the equities of the particular facts in controversy, rather than the application of any clearly enunciated principles, seem to determine the outcome of these cases.

o Final, Definitive Position

The U.S. Supreme Court will not rule upon a claim that a municipal action constitutes an invalid taking until a landowner has obtained a "final, definitive position" from the local regulatory commission prohibiting any reasonable use of the property. The Court has repeatedly required a final administrative decision depriving a property owner of all reasonable use of a parcel before determining whether a regulation constitutes a taking of private property without just compensation. Most state courts follow this requirement.

The recent U.S. Supreme Court decision in Williamson County Regional Planning Commission v. Hamilton Bank, 105 S. Ct. 3108 (1985), held that developers must obtain a "final, definitive position" from local regulatory agencies before filing a federal suit. This decision requires a developer to attempt all reasonable development options before challenging a local regulation as a taking. On June 25, 1986, the Supreme Court reiterated its requirement that a developer obtain a final, definitive position before bringing a taking claim. In MacDonald, Sommer & Frates v. County of Yolo, 54 U.S.L.W. 4782 (June 24, 1986), the Court held that rejection of a single subdivision application does not constitute the necessary final determination of how the local regulatory authority will apply its regulations.

c. Remedies

The traditional remedy for an invalid land use regulation has been invalidation of

the regulation. Two other remedies -- inverse condemnation and damages under the federal civil rights acts -- have recently become important. These permit successful challenges to land use regulations to obtain an award of damages in addition to invalidation of the ordinance.

- Inverse Condemnation or Temporary Taking

  Municipal authority under two separate doctrines -- the police power and the power to take property by eminent domain -- merge under the doctrine of inverse condemnation to permit a landowner to bring suit to force a municipality to pay damages for a temporary taking when the landowner successfully challenges a regulation as an unconstitutional taking of private property. Several states have adopted the remedy of inverse condemnation. The U.S. Supreme Court has not adopted the remedy in federal claims; however, several Supreme Court justices have indicated they would favor such a remedy, and the Court may soon embrace the doctrine.

- Civil Rights Act

  The Civil Rights Act of 1871 authorizes monetary awards and other remedies, including recovery of attorneys' fees for deprivation by state or local action of federal constitutional and statutory rights. The extraordinary expansion of potential municipal liability for land use decisions under the Civil Rights Acts is an important recent judicial development. Violations of federally protected rights raises the possibility of the plaintiff recovering damages and attorney's fees from the local government. The Supreme Court has held that good-faith municipal action is

not immune from damages for interfering with property rights.

3. Participating in the Development Management Process

The importance of public participation in the land use planning process is often overlooked. Participation is almost always more effective in creating and revising comprehensive plans and development management programs than in responding to specific development proposals.

In case after case, judicial decisions tell municipalities that a strong data base resulting from local planning studies which supports a well-reasoned comprehensive plan implemented through carefully considered and drafted regulations is the key to success in court challenges.

Legislative and constitutional mandates require that the public be given notice of and the opportunity to participate in adoption of zoning ordinances, amendments to zoning ordinances and consideration of applications for subdivision and other development approvals. Most ordinance amendments and development approvals require the regulatory authority to hold a public hearing at which time members of the public may present evidence concerning the proposal.

Participation in the development management process at public hearings is important for at

least two reasons: 1) on appeal, courts generally review only the record developed at the public hearings and at other public deliberations in reviewing the validity of the board's actions. Evidence supporting the decision and an appellant's contentions must be found in the records; and 2) courts give land use regulatory commission's broad discretion and rarely upset their decisions on substantive grounds. If all procedural requirements have been complied with, the courts most often uphold a commission's decision. It is therefore important that members of the public interested in a proposed land use decision marshal and present in a cogent and reasoned fashion evidence and testimony at the public hearing rather than waiting for an unfavorable decision and taking an appeal.

C. The Role of Private Organizations in Protecting Park Resources*

There are cognizable limits to what government agencies and policies -- be they federal, state or local -- can do to protect park resources from the harmful effects of development on private lands outside

* This section is based, in part, on materials prepared by Christopher J. Duerksen and Philip C. Metzger of The Conservation Foundation for the Foundation's forthcoming Handbook on Natural Resources Law and the National Park System.

their boundaries. Political, fiscal, and legal constraints to government action are likely not to diminish in the next few years. In any event, regulations, impact statements, and government land acquisition efforts will not be sufficient to address all or even many of the problems posed by activities on private lands.

Private organizations, namely "friends of" groups and land trusts, can be enormously effective in protecting valuable resources and assisting parks in ensuring that compatible development takes place outside their boundaries. Local constituency building on the part of park staff can be an important response to external pressures.

1. "Friends of the Parks" Groups

Volunteers and nonprofit groups have long played an important role in the creation and protection of certain natural and historical parks. Local citizens' organizations dedicated to safeguarding a particular area can provide help to the Service in a number of ways:

- participating in the programs, processes, and development approvals that may affect a park;
- building local involvement and interest in an area through community celebrations, fundraising, and the like;
- helping with resource management activities, such as construction and

maintenance of trails, and assisting in monitoring easements, vandalism, and changing resource conditions.

Such groups are not without their costs to park personnel. Helping to form and organize "friends of" groups is a major task, requiring considerable amounts of consulting and even handholding as the group develops and works on various issues. At times, such organizations will make demands and take positions with which park personnel will disagree. Nevertheless, the effort spent organizing and working with local allies will virutally always pay-off in terms of working within the community to protect park resources.

2. Land Trusts

While "friends of" groups largely work in the local political arena and may help parks with the practical tasks of maintenance and the like, land trusts work in the local real estate market to protect valuable areas from development. Generally within small budgets, these groups protect land and partial interests in land by a wide variety of techniques, focusing on the deductability of federal and state taxes for donations. Trusts accept donations of land or of partial interests, arrange bargain sales in which the landowner donates part of the land's value and receives cash

for the rest, acquire interests and resell them to private owners with a reservation of some development or use rights or to government agencies, or simply retain the interest and manage the properties or oversee the partial interests acquired.

Working either on their own or in partnership with government entities, these non-profit organizations have several important strengths:

- trusts can generally purchase land cheaper and quicker than government;
- trusts can work quietly where public disclosure might cause values to skyrocket or individuals to protest;
- trusts are not limited by boundaries, beyond which the Park Service cannot act without a Congressionally authorized change.

In a few isolated instances, there have been claims of abuses by land trusts through unreasonable profit-taking when selling land back to the government or in unfairly setting acquisition priorities for an agency. Rules have been put into place to ensure that it is the federal agency which decides what lands needs to be purchased and that certain information is disclosed if the land trust seeks prior assurances that the government is interested in the parcel before it seeks to acquire it. 48 Fed. Reg. 155 (Aug. 10, 1983)

## VI. Conclusion

Conflicts between preservation of park resources and development of nearby private land are likely to increase with continued development of gateway communities around the older and traditionally more isolated parks, continued growth in the resort and second-home industries, and the increased incidence of greenline or cooperative parks with mixed public and private ownership patterns.

As was stated in The Conservation Foundation's 1985 report, National Parks for A New Generation: Visions, Realities, Prospects:

> The needs for additional protection against activities on non-federal lands vary from park to park. So do the local attitudes on land-use controls and participation by federal officials inlocal and state affairs. In practice, therefore, protective measures need to be highly localized.
>
> The most promising current opporunity to protect the parks against external threats from private lands lies in diverse cooperative mechanisms involving the park service and park neighbors. These partnerships are needed to provide a forum where activities can be discussed, differences thrashed out, consensus developed. Park officials have helped form some local land trusts, for example, and have sometimes advised local coordinating councils and land-use agencies. The park service should actively encourage its staff to cooperate in such partnerships and private initiatives.
>
> In addition, Congress should establish an experimental program in which the park service would take the lead in establishing partnerships at a few specified parks. Part of this program would involvle designating formal park protection zones, adjacent to the selected units, within which special support would be made available,

such as technical assistance or grants to pay for land-use planning. In addition, the service would be authorized to accept donations of lands and easements within these zones.