

America's Converging Open Space Protection Policies:
Evidence from New Hampshire, Virginia and Oregon

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(ABSTRACT)

The nature of open space protection in America is changing. All across the country, states have begun to converge on a common set of tools designed to protect the rural land within their borders from development. Ideas which are successful in one state are being borrowed and copied in others. When adopted in a new state, these tools work in conjunction with, or sometimes replace, the state's traditional methods of open space protection. The adoption of these new tools is important because it highlights the fact that traditional approaches to preserving open space may no longer be able to protect land to the degree desired by local residents. The more quickly policy makers become aware of this trend, the more quickly they can begin to search for new ideas to slow the loss of open space.

This paper shows that the convergence of open space protection policies is taking place first by documenting the widespread popularity of open space protection throughout the country, and then by chronicling the relevant policy changes of three representative states: New Hampshire, Virginia, and Oregon. It closes with a discussion of the importance of this shift to the planning profession, and it identifies three future challenges for open space protection in the United States. It also includes an appendix, which gives a detailed discussion of three different approaches to defining "Open Space," and gives examples of each approach.

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Introduction

Few issues define a culture better than what its land owners allow to happen on their own little plots of earth. The settlement history of the United States provides ample opportunity to examine this idea, because the country was established by such diverse groups of people over the course of so many years. As America passes into the 21st century, each state's day as a frontier territory recedes further and further into its collective memory, taking with it many of the traditional values and ideals once associated with land ownership. The emergence of the modern open space protection movement reflects the decline of these traditionally held, locally unique land ethics, and the rise of a near nation-wide open space protection ethic in its place. This movement towards a national open space protection culture is taking place all across the country, and has not received the attention from the planning community that perhaps it should. The purpose of this paper is to draw attention to the country's converging open space protection values, to prove that this convergence is taking place by chronicling relevant policy changes in New Hampshire, Virginia and Oregon, and to explain the importance of this shift to the planning profession.

What is Open Space?

Finding an acceptable operational definition of open space is fast becoming the planner's quest for the Holy Grail. As the issue becomes increasingly popular with the general public, planners are pressed to put into words exactly what qualifies as open

space and what does not.¹ The lowest common denominator of many of the different open space definitions is somewhat simplistic: open space requires the absence of infrastructural improvements to the property.² The problem with such an all-encompassing definition, however, is that it covers so much land, which is used for so many different purposes, that it becomes almost impossible to make any truthful statements that apply to all types of “open space.” Farmland qualifies. Front yards qualify. The dirt surrounding a landfill, providing that it is not packed to form a road, qualifies. The definition becomes so broad as to be useless.

And yet, as broad as that definition is, there is no good way to pare it down into something smaller and more usable. Size requirements are impossible, because there is no way to decide how much space is needed before it can be called “open.” Working landscapes can’t be excluded either, because to many people a farm with a house and a barn epitomizes open space, while some strict environmentalists might not think of farmland as being open space because of its potential for pesticide and animal-related runoff. And not to be forgotten is that the farmer might cringe at the idea of his farmland being anything other than his farmland.

¹ This paper’s Appendix compares and briefly discusses some of the different approaches used by selected state governments and other authors to define the term “open space.”

² See Hollins, Linda E., William Fulton, Open Space Protection, Conservation Meets Growth Management (Washington DC, Brookings Institution Center on Urban and Metropolitan Policy, April, 2002): 3,4, 45, 46; Eric Damian Kelly, Managing Community Growth: Policies, Techniques, and Impacts (Westport, CT, Praeger Press, 1994):95; and Douglas R. Porter, Managing Growth in America’s Communities (Washington DC, Island Press, 1997):98.

Although they may not specifically identify infrastructure as the determining factor in identifying open space, the discussions in the above works mention the absence of urban development, either directly or indirectly, as an indicator of open space. Because the word “urban” can be somewhat vague, I would like to suggest that open space be defined as land which has not been altered by infrastructural improvements. Taken to its logical conclusion, the land that is underneath buildings, roads, lamp posts or cellular phone towers would not qualify as open space, while the land immediately to its side would.

Has the term “Open Space” outlived its usefulness? Now that the issue of open space is on the public radar screen, perhaps it is time to recognize the complexity of the issue by identifying the objectives that people usually hope to achieve through engaging in what has so far been called open space protection. Many members of the public are in favor of open space protection because they want to encourage the practice of agriculture, or because they would like the scenic benefits of public parks, or because they want to repair the damage done to the environment after so many years of its abuse. Many also favor open space protection as a way to encourage denser, less wasteful development than the current style permits, in preparation for coming population growth. These are all objectives which are more likely to be realized through direct public policy engagement than they are through a more oblique treatment by way of open space protection.

Dealing with the individual components of open space protection may also be prone to less public criticism, because realizing those objectives would provide readily understandable, tangible public benefits, such as locally grown produce, more public parks, clean air, clean water, greater biodiversity, or increased human contact. When weighed against those policy goals, the purchase of development rights for fifty acres of former farmland which may never be seen by the public, which cannot be accessed by the public, and which may not provide any readily identifiable benefit to the public, does not seem like such a wise decision.

Open Space Protection Across the United States

Open space protection has become a major part of the modern planner’s workload, despite the conceptual problems identified above. The following table helps to

illustrate the widespread nature of open space protection throughout the United States. Such politically and culturally diverse states as Vermont, Montana and New Hampshire make up the top three states in terms of the number of open space acres preserved per capita, while New Mexico and Delaware round out the top five.³ With the exception of Vermont, these states are not known for being particularly liberal, and these statistics help to dispel the myth that open space protection is the province of a few well-heeled cappuccino drinkers.⁴

³ Although they may be geographically similar, New Hampshire and Vermont have very different political and cultural traditions. Bill Bryson, a travel writer who resides in New Hampshire, once made the observation that Vermont is a land of Volvos and quaint country inns, while New Hampshire is a land of old pick-up trucks and guys in hunting caps.

⁴ Sean Paige, “Open Space Programs Feeling Budget Squeeze” *Insight on the News*, April 29, 2002 v18 i15 p8 (1). In his own words, Mr. Paige’s understanding of the logic behind open space protection is so that “effete yuppies and not-in-my-backyard busybodies could have a pretty picture to look at and someplace to fly kites, run their golden retrievers and stare blankly at the unbroken horizon, \$5 latte in hand...”

Table 1
Land Preservation Statistics by State, 2002 ⁵

State	Total Acres Protected	Acres Owned by Land Trusts	Acres Under Easement	Acres Transferred and/or Conserved by Other Means	Census 2000 Population	Acres preserved per capita	Acres preserved by easement per capita
Alabama	33,516	6,661	855	26,000	4,447,100	0.0075	0.0002
Alaska	28,939	538	1,250	27,151	626,932	0.0462	0.0020
Arizona	38,175	1,958	1,606	34,611	5,130,632	0.0074	0.0003
Arkansas	1,496	780	173	543	2,673,400	0.0006	0.0001
California	1,251,782	199,789	160,671	891,322	33,871,648	0.0370	0.0047
Colorado	339,122	5,996	293,864	39,262	4,301,261	0.0788	0.0683
Connecticut	70,361	46,584	19,821	3,956	3,405,565	0.0207	0.0058
Delaware	102,041	21,678	1,274	79,089	783,600	0.1302	0.0016
District of Columbia	34	0	3	31	572,059	0.0001	0.0000
Florida	64,456	13,137	19,550	31,769	15,982,378	0.0040	0.0012
Georgia	36,864	4,844	27,996	4,024	8,186,453	0.0045	0.0034
Hawaii	8	3	4	1	1,211,537	0.0000	0.0000
Idaho	36,532	5,635	16,277	14,620	1,293,953	0.0282	0.0126
Illinois	45,683	6,896	5,013	33,774	12,419,293	0.0037	0.0004
Indiana	9,754	6,366	1,376	2,012	6,080,485	0.0016	0.0002
Iowa	65,212	11,375	6,541	47,296	2,926,324	0.0223	0.0022
Kansas	2,451	155	2,296	0	2,688,418	0.0009	0.0009
Kentucky	4,012	741	1,545	1,726	4,041,769	0.0010	0.0004
Louisiana	13,645	260	13,385	0	4,468,976	0.0031	0.0030
Maine	141,240	50,238	61,452	29,550	1,274,923	0.1108	0.0482
Maryland	146,776	7,825	125,334	13,617	5,296,486	0.0277	0.0237
Massachusetts	209,967	103,045	50,061	56,861	6,349,097	0.0331	0.0079
Michigan	79,456	33,654	20,877	24,925	9,938,444	0.0080	0.0021
Minnesota	16,788	5	16,703	80	4,919,479	0.0034	0.0034
Mississippi	4,405	180	4,225	0	2,844,658	0.0015	0.0015
Missouri	9,347	6,939	1,452	956	5,595,211	0.0017	0.0003
Montana	505,659	5,244	449,445	50,970	902,195	0.5605	0.4982
Nebraska	16,772	14,577	2,150	45	1,711,263	0.0098	0.0013
Nevada	12,225	6,930	0	5,295	1,998,257	0.0061	0.0000
New Hampshire	288,197	57,616	96,468	134,113	1,235,786	0.2332	0.0781
New Jersey	138,249	30,488	6,383	101,378	8,414,350	0.0164	0.0008
New Mexico	271,623	230,555	41,039	29	1,819,046	0.1493	0.0226
New York	552,220	135,695	280,499	136,026	18,976,457	0.0291	0.0148
North Carolina	112,141	12,342	40,573	59,226	8,049,313	0.0139	0.0050
North Dakota	4,912	4,232	0	680	642,200	0.0076	0.0000
Ohio	23,938	11,975	9,390	2,573	11,353,140	0.0021	0.0008
Oklahoma	5,151	5,151	0	0	3,450,654	0.0015	0.0000
Oregon	24,567	1,177	13,597	9,793	3,421,399	0.0072	0.0040
Pennsylvania	340,788	35,230	88,316	217,242	12,281,054	0.0277	0.0072
Rhode Island	29,950	18,636	9,292	2,022	1,048,319	0.0286	0.0089
South Carolina	97,573	5,608	71,209	20,756	4,012,012	0.0243	0.0177
South Dakota	9,625	280	7,760	1,585	754,844	0.0128	0.0103
Tennessee	43,734	8,016	4,198	31,520	5,689,283	0.0077	0.0007
Texas	85,675	11,986	40,621	33,068	20,851,820	0.0041	0.0019
Utah	56,483	1,151	28,404	26,928	2,233,169	0.0253	0.0127
Vermont	444,036	38,076	319,580	86,380	608,827	0.7293	0.5249
Virginia	236,160	41,801	180,255	14,104	7,078,515	0.0334	0.0255
Washington	41,728	9,742	21,285	10,701	5,894,121	0.0071	0.0036
West Virginia	58,321	4,472	4,004	49,845	1,808,344	0.0323	0.0022
Wisconsin	25,262	12,690	10,883	1,689	5,363,675	0.0047	0.0020
Wyoming	40,759	1,390	10,664	28,705	493,782	0.0825	0.0216
United States	6,225,225	1,247,342	2,589,619	2,388,264	281,421,906	0.0221	0.0092

⁵ Total Acres, Acres Owned by Land Trust, and Acres Transferred / Preserved by other means are taken from the 2002 Land Trust Census, published by the Land Trust Alliance. The state population is taken from the 2000 US Census. The derivative data was computed by the author.

This table also calls attention to the influence that the open space protection trend will have on land use planning in the future. Vermont and Montana have protected roughly 3/4 and 1/2 of an acre of open space per resident, respectively. Planners will have to come up with more and more creative ways to maintain that balance as these states continue to grow. In the case of Montana, its vast size and small population should make it relatively easy to maintain the open space/population balance for years to come, even if it were to continue with traditional development patterns. Most states are not so fortunate, however, and like Vermont, will have to continue in their struggle to maintain this element of the quality of life that residents have come to enjoy.

The Nationwide Convergence of Open Space Protection Policies

The purpose of this paper is to show that state governments are moving away from their reliance on traditional methods of open space protection [the open space “vernacular,” if you will], and are in the process of creating a nationally accepted open space protection toolbox by adopting policies that have proven successful in other regions of the country. Land trusts, conservation easements, urban growth boundaries, and an increased state role in land use planning are four of the tools most often copied outside of their traditional territories, and they are therefore the four tools which will be used in this paper to indicate participation in this policy convergence.

According to Gustanski and Squires, land trusts are “predominantly non-profit local, regional, or statewide organizations that work with private landowners to protect

their land for conservation, recreation, and other public benefit.”⁶ The title of oldest land trust belongs to The Trustees of Reservations, which is a Massachusetts land trust founded in 1891.⁷ The Society for the Protection of New Hampshire Forests is another early land trust, and was founded in 1901.⁸ The Nature Conservancy is a more widely known organization, and although its work is global in scope, it too is a land trust.

It is not the age or the size of the land trust which makes it important to this paper, but the rapid increase in its popularity. According to Gustanski and Squires, there were approximately fifty land trusts organized in the United States by the mid-20th century.⁹ By 1963 the number of trusts had more than doubled, and as of 2000, there were over 1200 land trusts organized across the country.¹⁰ The idea started in New England, was a part of the region’s traditional response to open space protection, and was then adopted by other conservationists throughout the country. That is the principle behind the nationwide policy convergence.

Although its beginnings are less clear than are those of the land trust, the recent history of the conservation easement also reflects the national convergence on a common set of open space protection tools. A conservation easement is a legal arrangement by which landowners can sell or donate their development rights to a third party, such as a land trust or a state agency. Selling the development rights of a parcel of land means that the land can no longer be developed. In some cases landowners and land trusts/state agencies might arrange for the building of one or two new structures, but further use is

⁶ Julie Ann Gustanski, and Robert H. Squires, Protecting the Land: Conservation Easements Past, Present and Future (Washington DC, Island Press, 2000): 12.

⁷ Ibid., 17.

⁸ www.spnhf.org

⁹ Gustanski and Squires, Protecting the Land, 17.

¹⁰ Ibid.

very highly restricted.¹¹ Conservation easements are usually sold or donated for the purpose of land conservation, or in an attempt to protect its use as agricultural land. In some cases there can be substantial rewards for the donation of a conservation easement on property. State governments often offer some incentive for this type of land conservation, and there are federal income tax breaks which a landowner can receive if he or she chooses to donate an easement.¹²

The most important year for the conservation easement was 1981, when the National Conference of Commissioners on Uniform State Laws wrote the Uniform Conservation Easement Act (UCEA).¹³ The UCEA established the basic language to be used by states when enabling conservation easements, and it has since been adopted in some form by 22 different states.¹⁴ Other states adopted differently worded conservation easement enabling legislation as early as the 1960s, but the principle behind the legislation is the same: to allow the development rights of the land to be separated from the land for the purpose of land conservation.¹⁵

The Urban Growth Boundary (UGB) is another tool which is gaining popularity across the country, and whose acceptance is illustrative of the emerging national open space protection culture. Although it has not yet obtained the same widespread acceptability as have land trusts or conservation easements, the UGB is the rising star among the open space protection tools.

While its earliest modern ancestor may be the urban service line used in the City of Lexington/Fayette County Kentucky in the 1950s, or Honolulu's urban limits of 1961,

¹¹ Virginia Outdoors Foundation, Conservation Easement Draft, April, 2002

¹² Gustanski and Squires, Protecting the Land, 69, 70.

¹³ Ibid. 26.

¹⁴ Ibid, 72, 73.

¹⁵ Ibid.

it was the widespread use of the UGB in Oregon which first made the tool both nationally famous and infamous.¹⁶ A UGB is essentially a line drawn around a city, beyond which urban growth is not supposed to spread. According to Nelson and Duncan, the goals of urban containment programs such as the UGB are: “to promote compact development that can be efficiently served by public services, and to preserve open space, agricultural land, and environmentally sensitive areas that are not currently suitable for urban development.”¹⁷ The Portland, Oregon, example requires periodic review, to see if the boundary should be expanded. As it turns out, however, most UGBs tend to stay where they are without much further revision or expansion.¹⁸

UGBs are following in the footsteps of land trusts and conservation easements in the sense that the tool began in one place and was gradually accepted in many others. Colorado, California, Virginia, Washington, Maryland, Kentucky, Oregon, and Florida are all states whose cities have experimented to some extent with UGBs.¹⁹ Because of its recent widespread adoption, and because it is an idea new to the areas where it is being enacted, the UGB is a prime example of a tool which is associated with the nationwide convergence on a common set of open space protection tools.

As these three previously mentioned tools indicate, the scope of planning is changing. Many states, such as New Hampshire, which traditionally left planning issues to the discretion of local government, are now beginning to experiment with a larger,

¹⁶ Arthur C. Nelson, James B. Duncan, Growth Management Principles and Practices (Washington DC, Planner’s Press, 1995): 80; Fred Bosselman and David Callies, The Quiet Revolution in Land Use Control (Washington DC, US Government Printing Office, 1974): 5.

This citation refers to the information regarding the City of Lexington, and not to the infamy of the UGB. To the best of my knowledge, Dr. Nelson has made no such comment.

¹⁷ Nelson and Duncan, Growth Management Principles and Practices, 73.

¹⁸ Uri Avin, Michael Bayer, “Right-sizing Urban Growth Boundaries” *Planning*, Vol. 69, No. 2 (February, 2003): 22-27.

¹⁹ Avin and Bayer, “Right-Sizing Urban Growth Boundaries” 22-27; Nelson and Duncan, Growth Management Principles and Practices, 75-80; Town of Leesburg Annexation Filing, March 14, 2002.

more authoritative role in open space protection. In their 1992 work The Regulated Landscape, Knaap and Nelson point out that the shift towards state land use control does not take place of its own accord; it is the result of social pressure for policy change.²⁰ Although the comment was directed at Oregon, it has proven to be the case in New Hampshire as well. New Hampshire's citizens found that development pressures brought by late 20th century growth patterns required a new approach to increasingly new problems. The state's traditional principles of minimal government involvement and reliance on private sector conservation organizations resulted in voters demanding a larger government role in open space protection.²¹

Because of the multi-jurisdictional nature of the threats to open space, state governments occupy an ideal position from which to approach open space protection. State governments are beginning to realize this, and by taking advantage of this position, increased state involvement in open space protection is another tool reflective of the nationwide convergence on a common set of open space protection mechanisms.

Overview of Paper

The following pages will show that the convergence discussed above is actually taking place by examining the policy changes in three states representative of the rest of the country: New Hampshire, Virginia, and Oregon. Each chapter will first identify the traditional tools used or circumstances surrounding open space protection in that state,

²⁰ Gerrit Knaap, Arthur C. Nelson, The Regulated Landscape: Lessons on State Land Use Planning from Oregon (Cambridge, MA, Lincoln Institute of Land Policy, 1992): 208.

²¹ According to the Trust for Public Land publication LandVote 2002, New Hampshire voters approved more than 19 million dollars for open space protection throughout the state in 2002.

and will then show how it has begun to participate in this nationwide convergence by adopting one or more of the tools mentioned in the introduction.

The first case study will discuss New Hampshire and the early role of the land trust in forming that state's open space protection policies. This section will explain the position enjoyed by the state's oldest land trust, the Society for the Protection of the New Hampshire Forests (SPNHF), as well as several other smaller land trusts. This section will also illustrate how the early conservation efforts of the SPNHF and other groups have shaped the appearance of the state today. The second half of the New Hampshire section will explain how the state government's policies have changed since the 1960s. It will discuss the state's increased involvement in open space protection, starting with the adoption of conservation easement enabling legislation, funding land protection programs and continuing to the recent adoption of "Smart Growth" principles.

The second case study will begin by discussing Virginia and how a strong agricultural industry has traditionally preserved open space, and will also discuss the open space protected through Virginia's state park system. The second half of the Virginia section will discuss the Virginia Outdoors Foundation (the state funded conservation organization) and its impressive record of using conservation easements to protect open space. This section will also discuss some of Leesburg, Virginia's, experiences with its Urban Growth Area.

The final case study in this paper will be of Oregon. It will begin by explaining how Oregon's settlement patterns established the need for government involvement in the state's land issues from the very beginning. The second half of this case study will analyze how the State of Oregon was able to enact some of the most creative, and

aggressive, open space protection legislation in the nation. Urban Growth Boundaries and state mandated comprehensive planning are two of the tools which will be discussed, along with the state's recent participation in the land trust movement.

These three case studies provide enough evidence to show that traditional approaches to land conservation and open space protection are now being either supported or supplanted by new tools which are associated with the national open space protection ethic. The final section of this paper will discuss some of the problems which have arisen as a result of these recent changes in state policies. It will also make a case for supporting the adoption of enabling legislation for open space protection tools, and will discuss one particular risk that planners face by participating in this convergence.

Traditional Methods of Open Space Protection in New Hampshire

New Hampshire is a politically conservative state. It has neither a sales tax nor an income tax to provide revenue for its governmental programs. While this low tax burden contributes to the high quality of life enjoyed by New Hampshire residents, it also greatly limits the state government's ability to respond to social and environmental issues, such as the protection of open space. New Hampshire's private environmental organizations have a history of picking up where the state leaves off, and throughout the 20th century their efforts have resulted in the protection of many of the state's most important open spaces.

The Society for the Protection of New Hampshire Forests (SPNHF) was organized in 1901 by citizens trying to end clear-cutting in the White Mountains.²² Philip Ayres became its Chief Executive Officer in 1902 and he began in earnest the Society's campaign to establish a national forest within the White Mountains.²³ Ayres and the Society achieved their goal in 1911 when the Federal government passed the Weeks Act, which established a federal forest reserve in the White Mountains and set the stage for similar reserves throughout the United States.²⁴ From that point on, the SPNHF has enjoyed the position of being the dominant private conservation organization in New Hampshire.

The early work of the Society generally fell into one of two categories: purchasing land (usually for donation to state or local governments as parkland), or

²² Sherman Adams, The Weeks Act: A 75th Anniversary Appraisal (New York, NY, The Newcomen Society of the United States, 1986): 11-13.

²³ *Ibid.*, 11,12.

²⁴ *Ibid.*

promoting policy.²⁵ It was successful in both areas, and its first quarter century of work resulted in the protection of several of the core elements of New Hampshire's modern environmental identity. The Old Man of the Mountains, Mount Monadnock, The Flume, The Gorge, and Mount Kearsarge are just a few examples of the open spaces that the Society helped to protect during its first 25 years in existence.²⁶ Although they may not all be nationally known, these lands are thoroughly enjoyed and appreciated by New Hampshire residents.²⁷

The Society's early policy efforts were equally effective. Its successes included the White Mountain National Forest, encouraging the creation of a State Forester's Office in 1910, and opposing the construction of highways through the Presidential Mountain Range.²⁸

Tourism has become one of New Hampshire's most valuable industries in large part because of the lands preserved by the SPNHF. Skiing, hiking, and sightseeing in the White Mountains draw tourists to New Hampshire from throughout the United States. As of 1998, thirty one percent of the jobs held in the Mountain Region of New Hampshire were dependent on tourism.²⁹ Although the Society did not protect all of the landmarks that draw tourists to the state, its contribution to the image of New Hampshire as an eco-tourist destination is undeniable.

²⁵ <http://www.spnhf.org>

²⁶ Ibid.

²⁷ One would be hard pressed to find a Boy Scout anywhere in the state that has not paid a visit to at least two of those sites mentioned, and the Old Man of the Mountain is on everything having to do with New Hampshire from its driver's license to the back of its 2000 quarter.

²⁸ Sally K. Fairfax and Darla Guenzler, Conservation Trusts (Lawrence, KS, University of Kansas, 2001):169,170; and <http://www.spnhf.org>.

²⁹ Economic and Labor Market Information Bureau, Economic Conditions in New Hampshire: New Hampshire Employment in Tourism (Supplement) (Concord, NH, Economic and Labor Market Information Bureau, 2000): 1.

The SPNHF is New Hampshire's oldest land trust, but it is certainly not its only land trust. The Squam Lakes Association is a near century-old land trust which was founded in 1904, and the New Hampshire Audubon Society has been protecting the state's environment and wildlife since its organization in 1914.³⁰ At least ten currently operating land trusts were founded before the state passed its conservation easement enabling legislation in 1973.³¹

The date that New Hampshire adopted conservation easement enabling legislation is important because the authority of a land trust to hold conservation easements is one of the factors that encouraged land trusts to multiply so rapidly in recent decades. These ten organizations are important, then, because they show that even before these favorable conditions existed, land trusts were already a common part of New Hampshire's system for protecting open space.

³⁰ <http://www.lta.org>

³¹ *Ibid.*; and Gustanski and Squires, Protecting the Land, 73. There may very well be more than 10. These ten are the land trusts which are registered with the Land Trust Alliance, and which included the date of the organization's founding on the directory page.

Evidence of the Policy Convergence in New Hampshire

New Hampshire's participation in the national policy convergence began in 1973, with the state's adoption of conservation easement enabling legislation.³² Although conservation easements had been used in the state since 1967 (the state's first easement was made in the town of New London in that year), the tool was not officially adopted at the state level until 1973.³³ So although a case could be made that some of New Hampshire's citizens were participating in the cultural convergence six years earlier, the later date is more appropriate for discussion on the evolution of the state's policy.

The adoption of conservation easement enabling legislation in New Hampshire was part of a national movement, not a regional or a local one. Montana had adopted conservation easement enabling legislation in 1969, and Virginia state agencies had been authorized to collect conservation easements since 1966.³⁴ The adoption of a tool which had already been proven in other distant states gives proof of New Hampshire's early participation in the convergence on a common set of open space protection policies.

Gustanski and Squires point out that New Hampshire's conservation easement enabling legislation is remarkably flexible, because it allows a wide variety of organizations to hold easements.³⁵ In New Hampshire, conservation easements, historic preservation easements, and agricultural preservation easements may be held by the following groups:

...any governmental body or by a charitable, educational or other corporation, association, trust or other entity whose purposes include conservation of land or water areas or of a particular such area ... preservation restriction [may be] held by any governmental body or by a

³² NH RSA 477:45

³³ Gustanski and Squires, Protecting the Land, 91.

³⁴ *Ibid.*, 73; 1966 Virginia State Code, §10-151, 10-152 (since changed to 10.1-1701).

³⁵ Gustanski and Squires, Protecting the Land, 91,92.

charitable, educational or other corporation, association, trust or other entity whose purposes include preservation of structures or sites of historical significance or of a particular such structure or site and ... agricultural preservation restriction [may be] held by any governmental body or charitable corporation, trust or other entity whose purposes include preservation of land or water areas predominantly in their agricultural state...³⁶

The state's broad definition of permitted easement holders made the conservation easement very accessible to small organizations.³⁷ This early policy decision undoubtedly helped to create the high total acreage preserved by easement per capita shown in Table 1.

The state's decision to use public funds to purchase conservation easements was a gradual process. In 1985 the state created the Agricultural Lands Preservation Committee, whose purpose was to hold agricultural conservation easements in order to protect farm land.³⁸ The program was voluntary, and landowners who agreed to put their land under easement for the purpose of agricultural land preservation were reimbursed for their donation using funds from the Federal Soil Conservation and Domestic Allotment Act.³⁹ Establishing this committee was an important step for open space protection in New Hampshire, because it set the precedent for buying development rights with public money (even if the money used was federal, not state).

In 1987, the state created the Land Conservation Investment Program, which in 2000 was accompanied by the Land and Community Heritage Investment Program (LCHIP).⁴⁰ The purpose of these two programs was to protect the state's most important

³⁶ NH RSA 477:46 "Conservation and Preservation Restrictions."

³⁷ Gustanski and Squires, Protecting the Land, 92.

³⁸ NH RSA 432:19, 20.

³⁹ NH RSA 432:4.

⁴⁰ NH RSA 162-C:6, NH RSA 227-M:1; American Farmland Trust Saving American Farmland, 86.

natural, cultural, and historic resources through the acquisition of lands or interests in the lands.⁴¹ These programs are important for establishing New Hampshire's participation in the national convergence of open space tools for two reasons. The first reason is that these programs further entrenched the use of conservation easements in the state's open space protection policies. The second reason is that through these programs the state spent, or is spending, its own money for the purchase of easements whose sole purpose can be open space protection. The money being spent is far from insignificant. LCHIP had a budget of as much as six million dollars in 2002, though the present fiscal crisis has cut funding for LCHIP to 4 million dollars.⁴²

"Smart Growth" is another tool that New Hampshire has begun to experiment with, despite the well known problems of defining the term. On August 20th, 2000, the state officially adopted a one line statement explaining the state's economic growth, resource protection, and planning policy: "It shall be the policy of the state of New Hampshire that state agencies act in ways that encourage smart growth."⁴³ For this purpose, the state of New Hampshire operationalized smart growth as follows:

the control of haphazard and unplanned development and the use of land which results over time, in the inflation of the amount of land used per unit of human development, and of the degree of dispersal between such land areas. "Smart growth" also means the development and use of land in such a manner that its physical, visual, or audible consequences are appropriate to the traditional and historic New Hampshire landscape.⁴⁴

⁴¹ NH RSA 227-M:1.

⁴² <http://www.lchip.org/pressreleases/pressreleases2002.htm>: Citizens for New Hampshire Land and Community Heritage, email sent on Feb. 14, 2003

⁴³ NH RSA 9-B:3.

⁴⁴ Ibid.

The state's definition goes on to say that smart growth may include higher densities in existing communities, and that it may promote ease of movement within and among communities.⁴⁵

Important as smart growth principles are for open space protection, that is not the reason for their inclusion in the New Hampshire section of this paper. New Hampshire's smart growth policies are included because they mark a subtle but important shift in the relationship between state and local governments on planning issues.

The Planning and Zoning chapter of New Hampshire's revised statutes, Chapter 672, states in its declaration of purpose that "planning, zoning, and related regulations have been and should continue to be the responsibility of municipal government."⁴⁶ The spirit of a state-wide smart growth policy seems to be in conflict with the hands-off approach to land use planning identified by section 672. Since all of the land in New Hampshire is already incorporated into a town or a city, the state's new policy has the potential to influence the development decisions made by local governments.⁴⁷ While this does not equate to statewide land use planning, it should be recognized as a step in that direction.

⁴⁵ Ibid.

⁴⁶ NH RSA 672:1

⁴⁷ Kelly, Managing Community Growth, 8,9.

Traditional Methods of Open Space Protection in Virginia

Virginia's agricultural heritage and its state park system are two factors which have traditionally played a major role in the state's effort to protect open space. Virginia's farmland had been left largely untouched by development until recent decades because of the land's high productive value and minimal pressure for suburban growth. Economic conditions in the state have changed, however, revealing some of the problems with leaving agriculture to fend for itself against suburban development. Virginia also has a strong tradition of protecting land through the creation of state parks, and those parks have given the public access to many of the state's most unique open spaces since the early 1930s.⁴⁸

Agriculture is an industry that requires large quantities of undeveloped land in order to be productive. In 1965, over 12 million acres of land in Virginia were under agricultural use. This large volume of land is what makes agriculture such a powerful, and at the same time, weak, protector of open space. As long as development pressures are at a minimum, farmers may keep large quantities of land under production and thus, in open space. Development pressures in Virginia have not stayed at a minimum, however, and the total amount of land under agricultural production in the state is steadily declining. Of the 12 million acres identified earlier, just over 8 million are still in agricultural production today.⁴⁹

The case of Fauquier County helps to illustrate some of the problems with relying on agriculture as an open space protection mechanism. Fauquier County is one of the

⁴⁸ http://www.dcr.state.va.us/parks/his_parx.htm (Department of Conservation and Recreation web page)

⁴⁹ 1997 Census of Agriculture Vol. 1: Part 46, Chapter 1. United States Department of Agriculture.

state's most productive counties and has been for years.⁵⁰ In 1935, it had 2,328 individual farms, and one acre of farmland was worth approximately \$59.⁵¹ Over the course of the next few decades, conditions in Fauquier County changed drastically. Washington, DC, became a much larger regional economic force than it had been, and the counties within commuting distance of the city have absorbed much of its growth. By 1997, the value of one acre of farmland in Fauquier County had risen to \$3,787, and the number of individual farms had declined to 957.⁵² Clearly, the practice of agriculture alone does not provide a sufficiently strong deterrent to suburban growth.

While the practice of agriculture may not be able to prevent the spread of development into the state's open spaces, the idea of agriculture may prove to be more successful. Authors at the American Farmland Trust make the very valid observation that "American democracy is rooted in our agricultural past and founded on the principle that all people can own property and earn a living from the land."⁵³ The idea of agriculture is a fundamental part of the American identity, even for those who do not actively practice it. The threat that suburban development now poses to this element of the American identity may explain some of the recent support expressed for Virginia's open space protection programs.⁵⁴

Another way in which Virginia has traditionally protected its open space is through the establishment of state parks. In 1926, Virginia established the State Commission on Conservation and Development, which would later become the

⁵⁰ www.nass.usda.gov/va/fauquier.pdf

⁵¹ www.nass.usda.gov/census/census97/profiles/va/vapst.pdf According to page vii of the agricultural census, land values are given in current dollars.

⁵² Ibid.

⁵³ American Farmland Trust Saving American Farmland, 9.

⁵⁴ www.virginiaoutdoorsfoundation.org The past three years have been the VOF's most successful in terms of acres placed under easement.

Department of Conservation and Recreation. The Department of Conservation and Recreation is now responsible for the administration of the state's parks and natural areas.⁵⁵

The initial movement for a state park system began in the late 1920s as a cooperative effort of the Virginia Academy of Science, the Garden Club of Virginia, and the Izaak Walton League, along with several other groups.⁵⁶ Shortly thereafter, open space protection in the state was able to benefit from the poor economic conditions of the early 1930s by making the construction of the state park system a project for the Civilian Conservation Corps.⁵⁷ The state's first generation of parks consisted of:

Seashore (located in the City of Virginia Beach)
Westmoreland in Westmoreland County
Stanton River in Halifax County
Douthat in Bath and Alleghany Counties
Fairy Stone in Patrick and Henry Counties
Hungry Mother in Smyth County.⁵⁸

Since the 1930s, the state park system has expanded to include 67 different parks and natural areas located throughout the state.⁵⁹ Roughly 76,000 acres of land are protected by their status as state parks.⁶⁰ That is approximately equivalent to the amount of land preserved by the soon-to-be-discussed Virginia Outdoors Foundation between 1966 and 1990.⁶¹

⁵⁵ http://www.dcr.state.va.us/parks/his_parx.htm

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ <http://www.dcr.state.va.us/parks>

⁶¹ <http://www.virginiaoutdoorsfoundation.org>

Evidence of the Policy Convergence in Virginia

In 1966 the Virginia legislature passed the Open Space Land Act, which permitted greater state involvement in open space protection.⁶² The act was truly ahead of its time in its early recognition of the problems associated with rapid urban and suburban growth. The purpose of the act was as follows:

To authorize and enable public bodies...to preserve permanent open space land in urban areas in order to assist in the solution of the problems stated in [the General Assembly's] findings. Some of those findings were: ...the rapid growth and spread of urban development are creating critical problems of service and finance for the State and local governments...that the provision and preservation of permanent open space land are necessary to help curb urban sprawl...

To carry out the purposes of this chapter, any public body may (i) acquire by purchase, gift, devise, bequest, grant or otherwise title to or any interests or rights of not less than five years' duration in real property that will provide a means for the preservation or provision of open-space land and (ii) designate any real property in which it has an interest of not less than five years' duration to be retained and used for the preservation and provision of open-space land. Any such interest may also be perpetual.⁶³

The Act also included a line which stated that the use of property for open space protection had to be in accordance with the comprehensive plan for the area, and another line which prohibited the use of eminent domain for the purpose of protecting open space.⁶⁴

The Act is relevant to this paper for several reasons. One is that the state of Virginia did not translate the momentum for land conservation into a state-directed land use planning program, as would be the case in other areas of the country. The other reason is that the Act created the Virginia Outdoors Foundation, which relies almost entirely on conservation easements to protect the state's open space resources.

⁶² 1966 Virginia State Code, §10-151, 10-152. (since changed to 10.1-1701)

⁶³ *ibid*

⁶⁴ *Ibid.*

The Virginia Outdoors Foundation began holding its first easement in 1968, and has since gone on to place nearly a quarter-million acres of land under conservation easement.⁶⁵ In the past three years alone, the VOF has placed over 88,000 acres under easement.⁶⁶

Many people familiar with the term “conservation easement” are not necessarily aware of the extent to which easements limit the use of the land. What follows is a summary of the restrictions placed on land under conservation easement with the VOF.

1. Accumulation or dumping of trash, refuse, or junk on the property is prohibited,
2. Display of billboards, signs, or other advertisements is not permitted on the property,
3. Division or subdivision of the land is prohibited, or, in some cases, the land may not be divided into more than a previously agreed upon number of parcels,
4. Forestry practiced on the property must be in accord with a forestry stewardship plan approved by the VOF,
5. (encouraged, but not required) A forested buffer extending to a minimum of 35 feet from each bank of the named creek shall be maintained,
6. Grading, blasting, or earth removal shall not materially alter the topography of the property, except during the construction of private ponds, lakes, previously approved buildings or roads,
7. No new permanent or temporary building or structure may be built other than a single family dwelling, an agreed upon number of secondary dwellings, and farm buildings or structures,
8. No industrial or commercial activities may be conducted on the property other than (1) agriculture, viticulture, aquaculture, silviculture, horticulture, and equine activities, (2) temporary or seasonal activities which do not permanently alter the physical appearance of the property, (3) activities which are conducted within the permitted buildings,
9. With permission of, or reasonable notice given to the owner, representatives of the VOF may enter the property to inspect and enforce the terms of the easement, and
10. The landowners must notify the VOF 60 days prior to the sale of the property.⁶⁷

⁶⁵ <http://www.virginiaoutdoorsfoundation.org>

⁶⁶ Ibid.

⁶⁷ Virginia Outdoors Foundation, Conservation Easement Draft, April, 2002

Clearly these are substantial compromises on the potential use of the land; however they do prevent the conversion of farmland into commercial, residential, or industrial use, and they do protect the potential for future agricultural use of the land.

In recent years, some Virginians have gained experience using another tool associated with the national open space protection ethic: The urban growth boundary (UGB).⁶⁸ While the experiences of Leesburg and Loudoun County have been far from an unqualified success, they do serve to highlight the importance of inter-agency cooperation when implementing a program that crosses as many jurisdictional boundaries as does a UGB.

Leesburg is the principal town in Loudoun County. Leesburg and Loudoun County have cooperated in the planning of an “urban growth area” for Leesburg since at least 1984.⁶⁹ The urban growth area extended into Loudoun County, with the expectation that the town would adjust its boundaries to include those territories identified and expand into the area as it grew.⁷⁰

But there were problems with this arrangement. According to the Town of Leesburg, Loudoun County’s 2001 plan proposed that two large tracts of land within the urban growth area be used for purposes inconsistent with the use planned by the town.⁷¹ In July of 2001, the County’s Revised General Plan had proposed that a 237 acre site, known as the Orme Property, be used for low density rural development, while the town had identified the property’s future use as mixed use residential and commercial.⁷²

⁶⁸ Urban Growth Boundaries have not yet been enabled in Virginia, which is the reason for Leesburg/Loudoun County’s Urban Growth Area. It is different in name, but very similar in intent.

⁶⁹ Town of Leesburg Annexation Filing, March 14, 2002

⁷⁰ Town of Leesburg, Annexation Filing “Justification for Annexation”

⁷¹ *ibid*

⁷² *ibid*, 8.

Similarly, in 2000, the County purchased the land known as the Shellhorn Property, which was also within the urban growth area.⁷³ The County plan proposed that this property be used for recreational or other public facilities, while the town had planned to use it for light industrial and commercial uses.⁷⁴ In March of 2002, the ensuing legal wrangling resulted in the Town's application to adjust its boundaries to include some of the land in question, though it withdrew that petition in November of 2002.⁷⁵ How this will effect the town's urban growth area in the future remains to be seen.

⁷³ Ibid, 7.

⁷⁴ Ibid.

⁷⁵ www.leesburgva.org/annexation.asp last accessed February 4, 2003.

Traditional Methods of Open Space Protection in Oregon

Oregon is a national leader in natural resource protection. The policies that make it famous (Urban Growth Boundaries and Statewide Land Use Planning) are two tools very strongly associated with the national convergence of open space protection cultures. Even in Oregon, however, open space continues to be protected by conditions which preceded those tools in use today. The state's settlement pattern, and the time period in which settlement took place, are two factors that required government involvement in Oregon's land issues from its very beginning.

In 1844, Oregon's provisional government established the pattern by which land claims were to be made. All private land claims were limited to 640 acres in size or less, and the claims were to be either square or oblong in shape.⁷⁶ Two years later, the pace of settlement in Oregon by US citizens accelerated greatly as a result of the 1846 treaty between Great Britain and the United States, which permanently established the southernmost border of Canada at the 49th parallel.⁷⁷ The rectilinear settlement pattern was reinforced with the 1850 passage of the Oregon Land Claim Act, which required that new claims adhere to the pattern established by rectilinear survey lines.⁷⁸

This pattern is relevant because, unlike eastern states where settlers staked their claims based on the physical characteristics of the land (the metes and bounds system), Oregon's settlers made their claims based on what the General Land Office said was available, in the shape that the Land Office dictated. From the very beginning of

⁷⁶ Peter G. Boag, Environment and Experience: Settlement Culture in Nineteenth Century Oregon (Berkeley, CA, University of California Press, 1992):52.

⁷⁷ United States and Great Britain, "Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains" 15 June, 1846. The Avalon Project, Yale University (www.yale.edu/lawweb/avalon/diplomacy/britain/br-1846.htm).

⁷⁸ Boag, Environment and Experience, 50.

Oregon's life as a political division of the United States, government has proscribed how its land was to be shaped.

Another factor that has shaped the way open space is protected in Oregon has less to do with how much land was given away, and more to do with how much land was not given away. As of 2000, the Federal Government still retained ownership of over 52% of Oregon's total land area.⁷⁹ This places Oregon fifth in the nation in terms of federal land ownership behind Nevada, Utah, Idaho, and Alaska, in that order.⁸⁰

These lands are managed primarily through the Bureau of Land Management and the National Forest Service. The issue of who manages the land is important for two reasons. One is that ever since the Donation Land Law went into effect in December of 1850, the policies that govern most of the land in Oregon have been established primarily in Washington, DC, not locally. Because of that history, and the amount of land in question, Oregonians have had to come to grips with government involvement more than almost any other state.

The other reason why the ownership issue is important is that although these government lands are open for mineral extraction and forestry by the private market, the lands under federal ownership have been largely protected from conversion to residential or commercial uses. That by itself has done much to create the image of Oregon as rural sanctuary from development.

⁷⁹ US Census Bureau, Statistical Abstract of the United States, 2002, 227

⁸⁰ Ibid.

Evidence of the Policy Convergence in Oregon

This section will discuss two tools used in Oregon which have become synonymous with the nationwide policy convergence: statewide land use planning and the urban growth boundary. Many states and cities have come to see Oregon as a model for open space protection efforts because of its early adoption of these tools, and its subsequent success in using them. While these policies have brought Oregon its fair share of attention (both positive and negative), its experiences have moved these tools into the spotlight, and have helped to draw attention to the relationship between government policies and open space protection.

In 1973 Oregon Governor Tom McCall gave a speech that would become famous in planning circles. His identification of “sagebrush subdivisions, coastal condo-mania, and the ravenous rampage of suburbia” were the speech’s surefire attention grabbers, but he also made several very relevant observations which altered the shape of planning in Oregon.⁸¹

We are in dire need of a state land-use policy, new subdivision laws, and new standards for planning and zoning by cities and counties. The interests of Oregon today and in the future must be protected from grasping wastrels of the land. We must respect another truism: that unlimited and unregulated growth leads inexorably to a lowered quality of life.⁸²

The most significant product to come out of that speech was Senate Bill 100, which was shepherded through the legislature in May of 1973.⁸³ SB 100 and its accompanying legislation created the Land Conservation and Development Corporation,

⁸¹ From Gov. Tom McCall’s opening address to the 1973 Legislative Assembly, January 8, 1973. (Quote made available by the LCDC website, www.lcd.state.or.us/history/htm).

⁸² Ibid.

⁸³ Carl Abbot, Deborah Howe and Cy Adler, Planning The Oregon Way: A Twenty Year Evaluation (Corvallis, OR, Oregon State University Press, 1994):xii-xiv.

or LCDC, enacted 14 statewide planning goals, and mandated that every city, county, or regional agency with planning authority create a comprehensive plan in accordance with those 14 goals, shown in Table 2.⁸⁴ The number of those goals was soon raised to 19, to include protection for additional areas not covered by the first 14 goals.⁸⁵

Table 2 Oregon's Statewide Planning Goals
1. Citizen Involvement
2. Land Use Planning
3. Agricultural Lands
4. Forest Lands
5. Open spaces, Scenic and Historic Areas, and Natural Resources
6. Air, Water, and Land Resource Quality
7. Areas Subject to Natural Disasters and Hazards
8. Recreation Needs
9. Economy of the State
10. Housing
11. Public Facilities and Services
12. Transportation
13. Energy
14. Urbanization (UGBs)
15. Willamette Greenway
16. Estuarine Resources
17. Coastal Shorelands
18. Beaches and Dunes
19. Ocean Resources
Each of these topics is treated in detail on the LCDC's website: http://www.lcd.state.or.us
Source: LCDC, "A Summary of Oregon's Statewide Planning Goals"

The LCDC had an interesting way of encouraging compliance with the state's new comprehensive planning policy. If a city or town did not create and implement an approved comprehensive plan, the LCDC had the authority to place a moratorium on all building permits in the given city or town.⁸⁶ If it turned out that the town had wanted to stop growth, and was using the lack of a plan to stop further development, the LCDC could then grant building permits in place of the town.⁸⁷

Oregon is often given much of the credit for having brought statewide land use planning to center-stage, but the planners involved with shaping Oregon's policies frequently tip their collective hat

⁸⁴ Knaap and Nelson, *The Regulated Landscape*, 22-25.

⁸⁵ Ibid.

⁸⁶ Ibid., 24.

⁸⁷ Ibid.

to Fred Bosselman and David Callies' 1971 publication for the Council on Environmental Quality titled The Quiet Revolution in Land Use Control.⁸⁸ This work explored early local, state, and regional level land use planning policies from across the country, and brought together examples from Hawaii, Vermont, Minneapolis/St. Paul and others.⁸⁹ If one work could be credited for accelerating the convergence towards a common set of open space protection tools, Bosselman and Callies' work would be it, because of the influence it had in forming the Oregon model.

Another of the tools made famous by Oregon is the Urban Growth Boundary. Goal 14 of Oregon's 19 planning goals calls for each city to separate rural land from urbanizable land, estimate how much land it will need for future growth, and then plan and zone enough land to meet that need.⁹⁰ As a strategy for preventing the spread of the suburbs into the countryside, Portland's growth boundary has been an undeniable success. During the 18 years since its inception and the printing of his 1997 article, Allan Katz found that the Portland UGB had expanded only 5 square miles, compared to Denver, which had expanded 180 square miles during the previous 37 years.⁹¹

While there is little debate that the UGB has prevented the outward expansion of the city, there are some very legitimate concerns over potential side effects of the UGB. One concern over the Portland UGB is whether the boundary has created housing shortages. In the more than twenty years since the UGB was enacted (it was officially

⁸⁸ Fred Bosselman and David Callies, The Quiet Revolution in Land Use Control (Washington DC, United States Government Printing Office, 1971),

Knaap, Nelson, The Regulated Landscape, 15.

Abbot et al., Planning the Oregon Way, xiii.

⁸⁹ Bosselman and Callies, The Quiet Revolution in Land Use Control, iii-v.

⁹⁰ OAR 660-015-0000(14) (Oregon's Statewide Planning Goals and Guidelines, Goal 14: Urbanization) Available at www.lcdc.state.or.us/goalpdfs

⁹¹ Allan Katz, "Developing the Future" *Denver Post*, February 10, 1997, A1 as cited in Phillips and Goodstein, "Growth Management and Housing Prices," 335.

enacted in 1979), that question has never quite died down. William A. Fischel observed that if Portland did not expand the UGB when it was reached, land values would rise beyond what an economically rational person would pay to live in Portland.⁹² On the other side of the issue, Anthony Downs' 2002 article argues that over the past two decades housing prices have not risen any faster in Portland than they have in other comparable cities, despite the presence of the UGB.⁹³

Another tool which Oregon residents have begun to use is the land trust. Although land trusts are not yet as numerous in Oregon as they are in the Northeast, they are gaining popularity. There are presently 25 land trusts listed in the Land Trust Alliance directory for the state of Oregon, and the vast majority of those trusts were created during the 1980s.⁹⁴ As mentioned earlier, the combination of Federal tax incentives, and the ability for land trusts to hold conservation easements has created a very friendly atmosphere for the continued growth of land trusts.

⁹² William A Fischel, "Comment on Carl Abott's "The Portland Region: Where Cities and Suburbs Talk to Each Other – and Often Agree," *Housing Policy Debate*, 8 (1), 1997 in Robert W Wassmer (Ed.), Readings in Urban Economics: Issues and Public Policy (Sacramento, Blackwell Publishers, 2000): 118.

⁹³ Anthony Downs, "Have Housing Prices Risen Faster in Portland than Elsewhere?" *Housing Policy Debate*, Fannie Mae Foundation, Volume 13, Issue 1, (2002): 7-31.

⁹⁴ www.lta.org

Future Challenges for Open Space Protection

Two concepts emerge from this paper. One concept is that most states have some kind of traditional open space protection system which is no longer capable of protecting land to the degree that local residents desire. The other concept is that the states have begun to copy each other's successful open space protection tools and apply those tools to their own situations.

This shift has made evident several challenges for the planning profession in the near future. The first challenge is to make the newly copied planning tools fit better than they currently do. The second challenge is to encourage the adoption of legislation enabling the use of open space protection tools. The third challenge is to stay aware of the possibility that this convergence may not be leading planners down the right path and that the best way to be prepared for that eventuality is to have a good supply of new ideas at the ready, should they be needed.

Challenge 1: Making It Fit

Each of the four tools discussed in this paper have the potential to be very effective at protecting open space. The problem lies in their implementation. No tool can be borrowed wholesale from one location and dropped into a new environment where it will immediately work as well as expected. Either the tool has to change to fit the new location, or the location has to change to fit the tool. Even in the midst of the present convergence of similar beliefs about the value of open space, each state still has its own peculiarities that shape the way planning takes place within its bounds, and those peculiarities are ignored at the planner's risk.

The urban growth boundary provides two good cases to illustrate the idea that tools have to be adjusted to their new environments before they can be expected to work. For example, many cities that experiment with urban growth boundaries do so to keep urban development from spilling into county land. New Hampshire is one of several states where the county controls no land at all. If a town were to initiate an urban growth boundary in New Hampshire, it would first have to adjust the tool to reflect the fact that one of the UGB's most important concepts – the possibility for eventual, paced, outward expansion into the surrounding county- is not possible. Because the surrounding towns are not likely to surrender their territory to accommodate the city, the city would either have to limit the UGBs scope to within its own boundaries (and in so doing dump the growth on neighboring areas) or it would have to come to some kind of regional arrangement that would approximate a city-county relationship. Regardless of which method would be used, the point is clear that the UGB would have to be altered to fit its new environment.

An example of how the location could change to fit the tool comes from the previously discussed case of Leesburg and Loudoun County, Virginia. These two jurisdictions borrowed part of the idea of the urban growth boundary, but did so without the overarching state policy that established the process to be followed. As a result, when Loudoun County decided to propose low density residential development in Leesburg's expansion area, Leesburg couldn't fall back and cite the equivalent of Oregon's State Planning Goal no. 14. And there was no oversight by a higher authority, such as Oregon's LCDC, to say whether either jurisdiction's plan had been appropriate in the first place.

This confusion over how to work through the details of a UGB stems from the fact that urban growth boundaries are not yet enabled in Virginia. As a result, Virginia's cities are experimenting with different ways to try to achieve equivalent results, which can be good, but they do so on very shaky legal ground, which is not good. This sets the stage for Challenge 2.

Challenge 2: Enable the Tools

The second challenge that planners should accept in the near future is to enable and use the current generation of open space protection tools. The American Planning Association's 2002 *Growing Smart Legislative Guidebook* gives model enabling legislation for everything ranging from establishing an office of state planning to creating

inter-jurisdictional tax-base sharing programs, and of course it includes a section on how to initiate an Urban Growth Area.⁹⁵

Until states actually enable these tools, planners will have to rely on trial and error to first figure out what is legally permitted, and then to learn what actually succeeds in protecting open space. Given how complicated open space protection has become, it is unlikely that state planning staffs have the time or the resources to create and implement an open space protection program that includes all of the information that it should, or that is as conceptually complete as it should be. What results instead are cities establishing UGBs without the cooperation of their neighbors, or states adopting policies full of buzzwords that cannot possibly be turned into effective policy. The APA has taken the guesswork out of enacting some of the present day's most powerful planning tools, but it is up to the practicing planners to put those tools to use.

Challenge 3: What if it Doesn't Work?

The possibility exists that the planning tools which are being so rapidly adopted across the country will not stop the conversion of open space to suburban uses. It is entirely possible that America's population will continue to bleed outward from the cities and into the countryside. But given the effect that this would have both on the face of country, and on the face of the planner's own community, simply letting it happen is not an option. This is why the third challenge is for planners and policy makers to be particularly vigilant in monitoring and evaluating the success of their open space protection programs.

⁹⁵ American Planning Association, Growing Smart Legislative Guidebook (Chicago: American Planning Association, 2002):4-15, 14-12, 6-44.

All plans should include some type of an evaluation mechanism. It is conceptually one of the most simple ideas in a plan, but it can easily be lost in the flood of visions and objectives which follow the initial decision to create an open space protection plan. The purpose of the evaluation is to find out whether or not the strategies used are achieving the goals of the plan. The evaluation has to ask “does it work?”

One way to answer that question is through the use of indicators. Indicators are essentially yardsticks written into a plan which are used to measure the progress the organization has made towards achieving its stated goal.⁹⁶ For example, if a town wants to protect a certain amount of open space, and it wants to protect that land through the creation of public parks, appropriate indicators of the town’s success would be the number of acres it has protected through the purchase of park land, or the size of the budget created for park land purchase.

Following the example given above, an annual or semi-annual review of the indicators would show whether or not the number of acres purchased for park land was on schedule to reach the total number of acres desired within the time frame desired. With that knowledge, the program administrators could confirm that the strategy was achieving the identified goal. If the number of acres purchased was not on schedule to meet the specified goal, the program administrators would know that the strategy was not working, and they would then have to determine the reason for its failure. This is not a complicated addition to a plan, but regular, scheduled reviews of previously identified

⁹⁶ Doug Appler, Brad Belo, William Butler et al. “Open Space & Water Resource Components of the Montgomery County Comprehensive Plan.” Preliminary comprehensive plan elements presented to the Montgomery County, Virginia Board of Supervisors, Christiansburg, Virginia, December 10, 2002, 67.

indicators will give program administrators a much clearer idea of whether or not they are succeeding in reaching their goals.

Conclusions

One problem with using indicators is that they may not always show program success. When a program has clearly failed, the planner needs to come up with a new approach for achieving the program goals. One hazard of depending too heavily upon this new set of open space protection tools is that planners may cease to innovate. If it should turn out that the current set of tools does not protect open space as thoroughly as previously expected, the planners who depend upon these tools will be faced with a serious problem: they won't have any new alternatives. Planners today cannot become complacent and think that the flurry of ideas that has taken place in recent years will continue of its own accord. They must both constantly create, and constantly look for, new solutions to their problems.

When land trusts were first created, they were the result of concerned citizens seeking a way to protect the few unique places from destruction by industry or other incompatible uses. And the entire state of New Hampshire benefits daily from their early vision. Nothing is more valuable to a strong and vibrant community than people who care enough to personally fix its problems. Local citizens need to think of new ways in which they can fix the problems that they see in their communities. More than anything else, that is the lesson that should be carried away from the discussion of traditional methods for open space protection.

The other lesson that should be carried away from this paper's discussion is that there are significant benefits to be gained from studying the experiences of others. The first chairman of the State Land Use Commission of Hawaii made the observation that Hawaii's land use laws (which included what was arguably the nation's first urban growth boundary) were really remnants of feudal law from the islands' days as a Polynesian kingdom.⁹⁷ Just as Bosselman and Callies found the Hawaiian example thirty years ago and brought it to the attention of planners in Oregon, who turned it into the modern example of an urban growth boundary, planners today need to keep looking for new open space protection ideas beyond those which are currently popular. Mankind has approximately 9,000 years of urban history from which to draw its inspiration. There have to be a few winners in there somewhere.⁹⁸

⁹⁷ Bosselman and Callies, The Quiet Revolution in Land Use Control, 6,7.

⁹⁸ Orrin C, Shane III and Mine Kucuk, "The World's First City", Abstracts, *Archaeology* Volume 51 Number 2 March/April 1998.

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Appendix

Governments, planners, and conservation organizations have defined “Open Space” in different ways in order to grapple with the conceptual issues discussed in this paper’s opening section. What follows is an identification and brief discussion of three different approaches used to define “Open Space.” The first approach requires that some kind of special recognition or status be given to the land before it can be considered open space. The second approach bases “Open Space” status on how the land is used. The third approach centers on the benefit the public gains from the land. These groupings are not exclusive, and many definitions manage to incorporate something from all three areas, but the discussion here helps to highlight just how complicated creating a working definition of open space really is.

The definitions which make the identification of open space easiest are those which require some kind of special recognition or protected status in order to qualify as open space land. Virginia is one such state, as its code defines open space land as land which is “provided or preserved for” parks, recreation, conservation, historic or scenic purposes, wetlands protection or the shaping of community development.⁹⁹ The New Illustrated Book of Development Definitions and Webster’s Encyclopedic Unabridged Dictionary of the English Language define open space as land which has been either “set aside, dedicated, designated, or reserved” for public use, or as land which is “protected from development by legislation” respectively.¹⁰⁰ Georgia calls its open space by a

⁹⁹ Virginia State Code, § 10.1-1700. “Open Space Land” means any land which is provided for or preserved for (i) park or recreational purposes, (ii) conservation of land or other natural resources, (iii) historic or scenic purposes, (iv) assisting in the shaping of the character, direction and timing of community development, or (v) wetlands as defined in §28.2-1300.

¹⁰⁰ Harvey S. Moskowitz and Carl G. Lindbloom, The New Illustrated Book of Development Definitions

different name, Greenspace, but it still requires some kind of protected status for the land before it can be called Greenspace. Georgia defines Greenspace as:

...permanently protected land and water, including agricultural and forestry land that is in its undeveloped, natural state or that has been developed only to the extent consistent with, or is restored to be consistent with, one or more of the following goals.¹⁰¹

This first group of definitions is good from a policy perspective because it limits the use of the term “open space” to lands where the open space functions have already been identified and settled. If the land has never been protected or preserved by the owner or by government, it is not open space. Another benefit of this type of definition is that by defining the term so narrowly, other related issues are not painted with the “open space protection” brush. This can set the stage for new programs aimed at treating specific land-related issues such as water quality protection, or farmland protection, without using the sometimes inflammatory “open space” term.

The potential hazard of using this type of definition is that in the rush to prevent the conversion of land to higher intensity uses, states and localities could adopt a policy of giving protected “open space” status to as much land as possible, more out of fear of development than out of any real growth plan. The permanent nature of some of the tools used to achieve this protected status could cause serious long term impacts on the shape of growth in the area. Land permanently protected without any kind of guiding

(New Brunswick, NJ: Center for Urban Policy Research, 1999): 191; Webster's Encyclopedic Unabridged Dictionary of the English Language, (Avenel, NJ: Gramercy Books, 1996): 1357.

¹⁰¹ Official Code of Georgia Annotated § 36-22-2 (2002). The “following goals” identified by the Greenspace definition are: Water quality protection for rivers, streams, and lakes; Flood protection; wetlands protection; Reduction of erosion through protection of steep slopes, areas with erodible soils, and stream banks; Protection of riparian buffers and other areas that serve as natural habitat for native plant and animal species; Scenic protection; Protection of archaeological and historic resources; Provision of recreation in the form of boating, hiking, camping, fishing, hunting, running, jogging, biking, walking, and similar outdoor activities; and Connection of existing or planned areas contributing to the goals set out in this paragraph.

conservation strategy may do little more than push growth away from existing urban centers.

The second group of open space definitions consists of those centered around the idea of how the land is used. This group is probably the most common among academic discussions of the issue. The definition offered on page 3, and the contributing definitions mentioned in footnote #2, all fall into this category because they rely on the absence of urban uses in order to identify open space. A good example of this type of definition was given in Hollis and Fulton's 2002 article for the Brookings Institution, which defined open space as: "land that is not devoted to urban development, especially if that land is located in a metropolitan region."¹⁰²

By basing the definition on land use, this group of definitions includes much larger quantities of land than does the previous group. Accordingly, policies designed around this second type of open space definition have the potential to influence how a larger quantity of land is used. A working example of this group is the New Hampshire "Open Space Land" definition.¹⁰³

"Open space land" means any or all farm land, forest land, or unproductive land as defined by this section. However, "open space land" shall not include any property held by a city, town or district in another city or town for the purpose of a water supply or flood control, for which a payment in place of taxes is made in accordance with RSA 72:11.¹⁰⁴

¹⁰² Hollis and Fulton, Open Space Protection, 3.

¹⁰³ NH RSA Sec. 79-A:2

¹⁰⁴ NH RSA Sec. 79-A:2:

"Farm land" means any cleared land devoted to or capable of agricultural or horticultural use as determined and classified by criteria developed by the commissioner of agriculture, markets and food and adopted by the board.

"Forest land" means any land growing trees as determined and classified by criteria developed by the state forester and adopted by the board. For the purposes of this paragraph, the board shall recognize the cost of responsible land stewardship in the determination of assessment ranges.

"Unproductive land" means land, including wetlands, which by its nature is incapable of producing agricultural or forest products due to poor soil or site characteristics, or the location of which renders it inaccessible or impractical to harvest agricultural or forest products, as determined and classified by criteria

The greatest problem with trying to turn this type of definition into policy is the sheer variety of circumstances surrounding the lands included. It includes private land, public land, land under active agricultural use, land which lies fallow, wetlands, lands which are too rocky to farm, and land under many other types. As discussed in the paper's opening, it becomes very difficult to set policies that fairly influence all types of open space using a definition with this wide a scope.

The final group defines open space by the benefits it provides to the public. Some states, such as Maryland, Oregon, and Illinois, require that open space land benefit the public in one or more of the following ways: by enhancing the value of surrounding land, by protecting the air, streams, or water supply, by protecting historic sites, or by conserving natural or scenic resources.¹⁰⁵ Similarly, in Urban Land Use Planning,

developed by the board. The board shall develop only one category for all unproductive land, setting its current use value equal to that of the lowest current use value established by the board for any other category.

¹⁰⁵ Oregon Revised Statutes Chapter 308A.300:

(1) "Open space land" means:

(a) Any land area so designated by an official comprehensive land use plan adopted by any city or county; or

(b) Any land area, the preservation of which in its present use would:

(A) Conserve and enhance natural or scenic resources;

(B) Protect air or streams or water supply;

(C) Promote conservation of soils, wetlands, beaches or tidal marshes;

(D) Conserve landscaped areas, such as public or private golf courses, which reduce air pollution and enhance the value of abutting or neighboring property;

(E) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;

(F) Enhance recreation opportunities;

(G) Preserve historic sites;

(H) Promote orderly urban or suburban development; or

(I) Retain in their natural state tracts of land, on such conditions as may be reasonably required by the legislative body granting the open space classification

Maryland Code Ann. § 5-1201 (2002): Open space; open area. -- In this subtitle, "open space" or "open area" means any space or area characterized by great natural scenic beauty, or whose existing openness, natural condition, and present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or maintain or enhance the conservation of natural or scenic resources.

Illinois State Code 70 ILCS 410/2 (2003): "Open land" or "open space" means any space or area of land or water the preservation or the restriction of development or use of which would maintain or enhance the

Kaiser, Godschalk and Chapin, suggest that open space should be divided into categories based on the purpose that the land is to serve.¹⁰⁶ Some of their suggested purposes include the protection of natural and cultural amenities, protection of property and people from environmental hazards, and the provision of outdoor recreation.¹⁰⁷ These are all benefits that the general public could derive from its surrounding open space lands. This third group requires many of the same benefits expected from the first group of open space definitions, but it does not require that the lands be officially protected or preserved in order to be open space.

One of the chief benefits of this type of definition is that by specifically identifying the benefits that open space land is supposed to provide, the locality could easily create a set of indicators to determine whether local residents were receiving those benefits or not. For example, the values of the surrounding land could be compared to similar lands without the benefit of open space to determine if land value had increased. Or it could measure the quality of a stream's water before and after entering land that could potentially be classified as open space. This type of definition creates the possibility of a much more measured approach to open space than is frequently shown by policy makers.

Unfortunately, there are some drawbacks to this approach to defining open space as well. If a municipality makes no effort to determine whether or not would-be open

conservation of natural or scenic resources; protect natural streams or water supply; promote conservation of soils, wet lands or shores; afford or enhance public outdoor recreation opportunities; preserve flora and fauna, geological features, historic sites or other areas of educational or scientific interest; enhance the value to the public of abutting or neighboring highways, parks or other public lands; implement the plan of development adopted by the planning commission of any municipality or promote orderly urban or suburban development.

¹⁰⁶ Edward J. Kaiser, David R. Godschalk, and F. Stuart Chapin Jr., Urban Land Use Planning (Chicago, University of Illinois Press, 1995): 297.

¹⁰⁷ Ibid.

space lands are meeting expectations, this group loses its chief advantage over the other two.

Another potential drawback to this approach is that so many benefits could be included in the definition of open space as to make it include as much land as the second group. For example, the Oregon definition of “open space land” goes so far as to identify public and private golf courses as a form of open space, because of their role in reducing air pollution and because they increase surrounding property values.¹⁰⁸ This in spite of the well-known high levels of water consumption and heavy use of fertilizers usually associated with golf courses.

The Oregon statute also begins by saying that any land designated as open space in an approved comprehensive plan automatically qualifies as open space land.¹⁰⁹ This provision all but negates the advantage to be had by its subsequent identification of the benefits required from open space land. So although this group does show promise for legislating the protection of open space, it too can have several substantial flaws.

The purpose of this discussion was to show that there are several distinct approaches to defining open space, each with its own set of benefits and drawbacks. Moving the idea of open space out of the conceptual stage and into a policy setting has not been easy for any of the parties who try it, and as the discussion above shows, open space protection is likely to remain a complex and controversial issue for years to come.

¹⁰⁸ Oregon Revised Statutes Chapter 308A.300

¹⁰⁹ Ibid.

Vita

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Education:

Master of Urban and Regional Planning (Expected Completion: May 2003)
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Riva San Vitale, Switzerland, (Spring 1998)

Relevant Job Experience:

Peace Corps Recruiter, Blacksburg, Virginia
August 2002-May 2003.

- Currently responsible for organizing all Peace Corps recruiting events at Virginia Tech and the surrounding universities. These events require fostering professional contacts with interested administrators, professors, and student groups.
- Routinely give public presentations (class talks, slide shows, information tables) to promote the Peace Corps.
- Responsible for coaching candidates through the application process, answering their questions, and nominating successful candidates to specific volunteer positions.

Peace Corps Volunteer (Municipal Development Program), Sacapulas, Guatemala

May 2000-July 2002. All work done as a Peace Corps Volunteer was conducted in Spanish.

- Worked with Guatemalan counterparts in the local government to establish a municipal planning office.
- Designed and performed a community diagnostic, which identified and ranked the development priorities of the surrounding villages. This information was to be used by the Mayor and his council for the creation of their municipal development plan.
- Coordinated and gave training sessions for community leaders, explaining how to organize development groups and how to carry out the duties associated with those charges.
- Worked with community leaders to write proposals for projects including a computer center, a reforestation project, and one proposal to finance the making of costumes for the indigenous Mayan "Dance of the Conquest."
- Spent free time teaching a group of local children how to play baseball.

Planning Intern, Hudson Town Planner's Office, Hudson, New Hampshire.

Summer 1999.

- Created maps of the town's historic resources, its conservation areas and its subdivisions, grouped by age. These maps required a substantial amount of library research and communication with the head of the town's Historical Society.
- Updated street map for the Town of Hudson, NH. The information for this map was obtained primarily by reviewing subdivision plats and the minutes of Planning Board meetings. All streets on the map were verified by site visits.

Lab Assistant, Office of Public Archaeology, National Park Service Cultural Resources Center. Lowell, Massachusetts.
Summer 1998.

- Responsibilities included the cleaning and labeling of artifacts as they came in from the field.
- Taught another lab assistant how to clean and label artifacts prior to my departure.

Relevant Skills

Computer Skills: ArcGIS 8.1, all Microsoft Office programs including Word, Excel and PowerPoint.

Language Skills: Received a rating of Advanced High on the ACTFL language exam in Spanish in July of 2002.

Honors/ Activities:

- Co-author of the Open Space component of the Montgomery County VA Comprehensive Plan, which was nominated for the 2002 Outstanding Student Project Award of the Virginia Chapter of the American Planning Association.
- Member, American Planning Association (APA)
- Eagle Scout
- Intramural Volleyball, Soccer, Bowling, Skiing
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