AN ANALYSIS OF CONSERVATION EASEMENTS AS A MEANS OF PRESERVING OPEN SPACE

by

DOUGLAS KENNEDY CALDOW

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Department of Community and Regional Planning

The University of British Columbia
Vancouver 8, Canada

Date April, 1969

ABSTRACT

Open space is one of the most important and most neglected parts of the urban fabric. The rush of rapid urbanization has consumed much land which might better have been left open to exploit its values to society for recreation, food production, flood prevention, aesthetics, and even for shaping urban development. In order for open space to fulfill these functions the use of the land must be planned in advance of development, and open land which has natural qualities that are valuable to society should be preserved. One method which is being used to preserve this land is through the use of conservation easements.

The purpose of this study was to determine whether or not conservation easements are an effective means of preserving open space, and which level of government is best able to use them. Therefore, the hypothesis was posed that,

> Conservation easements are an effective means of preserving open space, and they should be implemented by local public agencies.

To reach a conclusion about this hypothesis an exhaustive review of all the available literature on the subject of conservation easements was conducted. This was followed by correspondence and interviews with representatives of several public and private bodies which were known to have been involved in the acquisition of easements, or were known to have considered the use of conservation easements.

The analysis indicates that the successful use of conservation easements, their acceptance by both public officials

and private landowners, and the resolution of the technical difficulties which are inevitable in the application of a developing concept, are evidence that conservation easements are an effective means of preserving open space. Furthermore, the analysis shows that various factors in the use of conservation easements mitigate for different conclusions as to which level of government can best implement them. Therefore, it is concluded that only some conservation easements should be implemented by local public agencies, and that the choice as to which level of government or private organization is most suitable should be based on a knowledge of the easement's purposes and the circumstances under which it is to be acquired and held, as well as on a knowledge of the capabilities of the various public and private bodies.

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INTRODUCTION

Objectives

The many important functions which open space serves indicate why it should be preserved, and the usurpation of this much needed resource by rapid urban development is evidence of the urgent need for methods of preservation. Conservation easements are essentially a means of preserving open space. They are not the only way, and they may not even be the best way. However, it is the intention of this study to determine whether or not they are an effective means of preserving open space, and which level of government is best able to use conservation easements for this purpose. To this end the hypothesis is posed that, CONSERVATION EASEMENTS ARE AN EFFECTIVE MEANS OF PRESERVING OPEN SPACE, AND THEY SHOULD BE IMPLEMENTED BY LOCAL PUBLIC AGENCIES.

Scope

The scope of the study extends to a comprehensive analysis of what conservation easements are, and how they work. The basis for this analysis was an exhaustive review of all the available literature on the subject. This was followed by correspondence and interviews with representatives of several public and private bodies which were known to have been involved in the acquisition of conservation easements, or were known to have considered the use of conservation easements. Due to the time and resource constraints of this study and the relatively small number of organizations which have at least studied the use of conservation easements, these interviews and correspondence

were limited to central California where most of the groups on the West Coast which have experience and knowledge of this technique are located. Furthermore the literature on the subject comes almost entirely from the United States due to the lack of Canadian experience with conservation easements.

No attempt was made to present a detailed comparison between conservation easements and other accepted and proposed methods of preserving open space. Therefore, this study does not attempt to define the conditions under which particular methods of preserving open space are superior to other methods, although it is realized that any large scale open space preservation program can best be implemented through an intelligent integration of techniques. Furthermore, the concept of conservation easements as used in this study does not include the widely accepted technique of using existing utility easements to provide linear open space networks. Finally, the question of financing the acquisition of conservation easements, important as it is, is considered as external to the purpose of this study. Therefore it is not dicsucced, although the subject of the costs of easements is thoroughly analyzed.

Organization

The subject of this study, conservation easements, and the hypothesis to be investigated, are the points immediately brought to attention in the Introduction. These are followed by a discussion of the scope and limitations of the study, as well as an organizational preview. The definition of open space, a demonstration of its value and the need for its preservation, as

well as methods for identifying its value, are indicators of the relevance of the subject. Conservation easements are then placed in the framework of the other methods of preserving open space to serve as the basis for a general distinction between approaches. The detailed analysis which follows contains chapters on important individual aspects of conservation easements. First their background and history are related. Then there is a resume of what conservation easements are used for, where they are used, and who uses them. The legal technicalities are next brought to light, followed by a discussion of how easements are acquired and how much they cost. Taxation is the next subject of inquiry, and then the role of private conservation organizations in acquiring easements. The problems and solutions of enforcement are followed by an analysis of the acceptability of easements to the people most directly involved. Finally the study is summarized and the conclusions regarding the effectiveness of conservation easements are reached.

CHAPTER I

OPEN SPACE

Title VII of the United States Housing Act of 1961 defines open space as meaning, "...any undeveloped or predominately undeveloped land in an urban area which has value for (a) park and recreational purposes, (b) conservation of land and other natural resources, or (c) historic or scenic purposes."[1] Open space "...is not a separable element of the urban organism but, in reality, is a form of land use and an integral part of the urban structure."[2] These concepts point out the functions of open space as a vital land use, and they relate these functions to the urban structure. Because of this they have particular relevance to the solution of the current problems of urban growth faced by city and regional planners.

The Effect of Urban Growth

Since World War II United States metropolitan areas have expanded at an estimated rate of 3,000 acres per day.[3] This consumption of vast amounts of land for housing, industries, shops and roads has important implications for the preservation of open space. The problem is not that there is too little land since, "Together, our metropolitan areas take thirty thousand square miles--less than two percent of the total land area of the country."[4] The problem is that development, brought about by an increasing population is permitted to consume land which should remain unbuilt to serve some of the vital functions of open space.

One reason this has been allowed to occur is that open space is often regarded as a negative concept. Many people "...think of 'open space' as unused, unproductive, absorbing tax money, and as something that the community cannot afford.[5] In many cases these feelings have been justified. Due largely to the effects of urban scatteration and leap-frog development almost half the land inside U.S. metropolitan areas is unused.[6] Thousands of relatively small, vacant, unkempt parcels of land scattered throughout the metropolitan area lie as testimony to the negative view of open space. This open land is unproductive and unused because it exists not through conscious planning to take advantage of its natural open space qualities, but rather it lies empty and open through man's inability to cope with the rapid urbanizing process.

Functions

This does not have to be the case. Open space can be used as a productive part of the urban fabric. For example, open space is used for a wide range of outdoor recreation activities from playgrounds and playing fields to city and regional parks. Every plaza or small urban park forms a functional part of the total open space system. They provide a resting or socializing place, and can give some visual relief from continuous urban development, by bringing out a sense of spaciousness or scale.

> Changes in spatial arrangement, among other things, may provide the variety that eliminates the sameness that would cause us to become visually satiated by our surroundings. The masses of buildings contrasted by their open spaces and the activity and movement that takes place in these spaces in an area of intensive use, no doubt, benefit the psyche.[7]

Open space is also productive in an economic sense. A recent study in the San Francisco Bay Area stated that businesses and institutions which are free to choose their locations are attracted to an area whose environment has been preserved through open space. This gives an area a competitive advantage over areas whose environment has not been preserved.[8] Metropolitan areas which propose to use open space to shape urban development such as Washington, D.C., also expect to produce economic advantages from the concentration of urban services and utilities. The same San Francisco Bay Area study concludes that,

> ...the proposed open space program would produce dramatic savings in governmental and utility costs resulting from concentrating urban development and preventing suburban sprawl. The projected differences between the cost of serving the growth patterns that would result without an open space program and the more compact pattern with open space is approximately $300 million for municipal services and $835 million for gas, electric, and telephone utilities over a 30-year period.[9]

Open space surrounding urban areas also has valuable uses which are vitally linked to the interests of the developed areas. Here transportation corridors, additional parks, hunting preserves, and food producing areas are found. Open space in the outlying areas acts as a catch basin for the urban water supply and soaks up run off to prevent flooding. And it can preserve unique natural characteristics such as swamps, forests, water bodies, and wildlife habitat. Another idea which has been discussed[10] is the use of open space as a means of reserving land for future urban uses such as sites for public buildings, parks, industrial reservations, and expanded residential areas.

Environmental Corridors and Physiographic Determinism

In order for open space to assume the role that it should, the use of the land must be planned in advance of development, and those areas which are to serve open space functions must be preserved. It is the task of city and regional planners to determine how the land can best be used. In the case of open space it has been suggested that the existing natural features have already established logical plans. Philip H. Lewis, Jr., a landscape architect, has been one of the chief proponents of this concept.

A few years ago Lewis was asked to analyze the landscape and resources of Wisconsin for the state's open space program. He examined a few key elements that were thought to be worthy of protection and enhancement; water, wetland, flood plains, sand soils, and slopes. Each of these elements was individually charted throughout the state. Then the charts of each element were laid one on top of the other, and a pattern emerged. The combined elements defined a series of natural corridors which were termed "environmental corridors."

> Each of these corridors was not only a key resource element in itself; together they formed a system that linked the parts of the state.
>
> "At the end of the first year of inventory," says Lewis, "it was apparent that the elements, and glacial action, through the ages, have etched linear patterns on the face of the Wisconsin landscape. The flat, rolling farmlands and the expansive forests have their share of beauty. But it is the stream valleys, the bluffs, ridges, roaring and quiet waters, mellow wetland, and sandy soils that combine in elongated designs, tying the land together in regional and statewide corridors of outstanding landscape qualities."[11]

In addition to locating the areas of scenic attractiveness, these corridors, when examined in detail, designate the flood plains (where intensive development should not be allowed), and areas of steep topography (which is difficult to build on). Corridor patterns can also serve as urban "form-determinants" to guide the future growth of cities. "These could give the growing city a built-in system of open spaces and recreational and scenic areas."[12] And within urban areas the corridors can divide the city into various land uses.

Besides the corridor resources, 220 additional natural and cultural resources which occupy a limited space in the landscape were identified. It was found that more than 90 percent of such interesting features as historical buildings, battlefields, chasms, swimming beaches, waterfalls, and natural bridges lay within the linear system of the corridors, often clustered in "nodes of interest."[13] By determining which corridors contained the most resources, a system of priorities could be established for their development as open space or parks, and for planning highway system improvements. As far as highways are concerned Lewis feels this approach enables them

> ...to understand the fabric of the land, with its patterns of resources arranged in their natural corridors, and then to fit the highway system into this fabric in such a way as to create variety, surprise, and visual experiences which otherwise would be lacking. In this way our highways surely will become much more valuable to us than they are if they are conceived and planned merely to move traffic.[14]

Ian McHarg, head of the Department of Landscape Architecture and Regional Planning at the University of Pennsylvania, is an advocate of an approach similar to environmental corridors

in its emphasis on natural features. "Physiographic determinism" stresses the importance of the functions which nature performs for man. "The forests of the 'upland sponge,' for example help moderate floods. Underground formations store water for us to drink. Prime soils produce food for us to eat. Marshes provide spawning grounds for fish and wildlife."[15] McHarg says, "If we want a development plan that makes sense we should look to nature first. The aquifiers, the slopes, the wetlands, and the other elements should be identified and mapped and the design that comes through should be the core of any plan."[16]

Both of these approaches, "environmental corridors" and "physiographic determinism," emphasize the significance of identifying and preserving open space in a manner consistent with the natural capabilities of the land to serve and enhance man's own environment. If these or similar approaches are employed to establish and locate nature's capabilities, then all that remains is to devise the means for preserving the vital areas.

FOOTNOTES

[1]U.S. Housing Act, 1961, sec. 706.

[2]D.A. Cotton, "Open Space: Its Value and Conservation in the Urban Environment," Southern California Law Review, Vol. 37, No. 2, (1964), p. 305.

[3]Lawrence Levine, "Land Conservation in Metropolitan Areas," Journal of the American Institute of Planners, Vol. 30, No. 3, (August, 1964), p. 204, quoting "The City's Threat to Open Land," Architectural Forum, Vol. 108, No. 1, (January, 1958), p. 87.

[4]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Inc., 1968), p. 9.

[5]Marion Clawson, "Positive Approach to Open Space Preservation," Journal of the A.I.P., Vol. 28, No. 2, (May, 1962), p. 125.

[6]Whyte, The Last Landscape, pp. 9-10.

[7]Cotton, p. 317.

[8]People for Open Space, The Case for Open Space, (San Francisco: 1968), p. 12.

[9]Ibid.

[10]For example see Cotton p. 315; and Clawson pp. 125-126.

[11]Whyte, The Last Landscape, p. 192.

[12]Philip H. Lewis, Jr., "The Environmental Corridor," Conference Proceedings--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), p. 30.

[13]Ibid., pp. 30-31; Whyte, The Last Landscape, pp. 192-193.

[14]Lewis, "The Environmental Corridor," pp. 33-34.

[15]Whyte, The Last Landscape, p. 182.

[16]Ibid., p. 183.

CHAPTER II

METHODS OF PRESERVING OPEN SPACE

There are many different approaches to preserving open space and recreational areas. These techniques can be classified into five general categories--police power, taxation, compensable regulations, fee simple acquisition, and less than fee acquisition. It is important to understand where conservation easements fit into the range of methods of acquisition, and how an integration of techniques is essential for a successful program of open space preservation.

Police Power

The police power is the power to legislate for the promotion of the public health, safety, morals and general welfare. Since the beginning of the century, the scope of the police power has been expanding with society's changing attitudes toward individual versus community interests. However, in the U.S. this power is subject to the constitutional limitations of due process of law, and the guarantee of equal protection under the law.[1] Sometimes the borderline between the use of the police power and the power of eminent domain, where compensation must be paid, is very difficult to draw.

Zoning and subdivision regulations are the most common methods of preserving open space through the police power. "Since both are ways of shaping land-use patterns without any payment to landowners, they are limited in the extent to which they may be used. They also are frequently subject to pressures

from developers and others for relaxation, and thus offer no certainty that land which comes under their provisions will remain open permanently."[2]

There are several types of zones which have been developed for preserving open space under various circumstances. Exclusive agricultural zoning attempts to keep land open and in agricultural production by setting large lot requirements and prohibiting uses which are incompatible with farming. Floodplain zoning restricts building on the flood plains of streams. This not only is instrumental in reducing flood damage, but also often preserves attractive scenic areas. Large-lot zoning prohibits the creation of parcels of less than one or even up to twenty acres. This can often provide areas of visual open space, "...and it is regarded also as a means to control the timing and location of development."[3] Cluster zoning permits developers to keep portions of their subdivisions in permanent open space by establishing a maximum density for an area, then permitting clusters of higher densities so long as the overall density does not exceed the maximum allowed in the district.

> Of all the zoning techniques now in use, only floodplain zoning and cluster zoning offer promise for keeping land in permanent open space. Imposition of either does not constitute a taking; flood plains are not safe for development in any case, and the market value of land subject to cluster provisions will not be diminished by them. Large-lot and agricultural zoning can only spread out or postpone development.[4]

Subdivision regulations can help achieve open space objectives by preventing development where lack of public sewerage and water systems would make residential use unhealthy and unsafe. They can also require developers to dedicate a specified

proportion of land in subdivisions to the local jurisdiction for open space, or pay an equivalent amount of money to be used for this purpose.

The official map device offers a temporary means of protecting land from development by pre-mapping park and recreation areas. Land for public purposes may be reserved by the use of this device for a limited length of time during which the local government must acquire it or let the restriction lapse.[5]

Taxation

While the main purpose of the taxing power is to raise revenue, it has also been found to be a useful tool for preserving open space. In the United States, most state constitutions provide that property subject to taxation must be assessed at its full value or at its market value.[6] This often means that land which is desirable for open space, such as farm land on the outskirts of urban areas and land held open within subdivisions, is taxed as though it was ready for development. These taxes make it difficult for farmers to remain in agricultural production. In fact they provide an incentive for the farmer and the developer with open space within his subdivision to put this open land to more intensive use. In the past, local taxing authorities have been limited in what they could do to alleviate this situation since the taxing power is subject to the limitations of due process, and therefore there must be no arbitrary discrimination or classification.[7]

Recently, however, several techniques have been devised which make it easier for desirable land to remain open while not

violating the due process limitation. Basically these methods of tax relief involve forms of tax exemption, tax deferral, and classification permitting low assessment. In some states[8] the legislature can wholly or partially exempt from real property taxes open space, such as parks, golf courses, and green spaces within cluster subdivisions, provided there is a public benefit involved. Tax deferral is another method which is being tried. Its advantage is that it reduces the temptation to sell open land by requiring that the amount of the tax reduction allowed must be paid back to the government when and if the land is committed to development. Under the preferential assessment idea farm land and other open areas are taxed only on their farming or open space values, not on their real estate market value.

"Compensable Regulation"

This approach was developed by Jan Krasnowiecki, James Paul, and Ann Louise Strong,[9] however, there is no indication that it has ever been tried. "Compensable regulation" involves imposing restrictions consistent with open space purposes on land development. A value is established for the property before the restrictions are imposed, and the owner is guaranteed that he will receive a price equal to this value when he sells the property on the open market. Thus, no compensation is paid at the time the restrictions are applied. Although the guarantee remains attached to the property for later owners, it is reduced by the amount, if any, by which the sale price of the property falls below the guaranteed value. "Compensable regulations" are designed to bridge the gap between

governments' exercise of the police power and the power to acquire land.[10]

Fee Simple Acquisition

Whyte says, "The best way to save land is to buy it outright--or in legal parlance, buy the fee simple."[11] However, due primarily to the financial constraints on governments this is not always the most feasible way of preserving open space. Ownership in fee can be acquired by purchase by voluntary agreement, condemnation under the power of eminent domain, tax foreclosure, or gift. Under voluntary purchase agreements, funds must generally be available to pay prevailing real estate prices, unless some form of donation or deferred payment agreement is worked out. This is also true in the case of expropriation where just compensation is guaranteed the landowner. Eminent domain proceedings are further restricted in that private property shall not be taken except for a "public purpose." (This concept is more fully discussed in Chapter IV.) Tax foreclosures offer additional possibilities for an open space land acquisition program. Frequently governments can foreclose on vacant tax delinquent property and convert it to recreation and open space use.[12]

Less Than Fee Acquisition

There are two or three variations of approaches under the less than fee acquisition method of preserving open space. One of these approaches is for a government agency to purchase "...large tracts of undeveloped land essentially allocated for private occupancy and sell or lease these lands back to the

original owners, subject to restrictions designed to secure open-space objectives."[13]

Another approach is the use of conservation easements which also falls within the category of less than fee acquisition. Essentially an easement is the acquisition of rights in the land without acquiring the fee simple title. These rights or interests might be that the land remain open and undeveloped, or that the public be allowed to fish from the banks of a privately owned stream, or that the vegetation not be cut or destroyed. It is possible to obtain these rights in the land by gift, by voluntary purchase agreement, or by condemnation, and they may exist for a given number of years or in perpetuity, i.e. run with the land.

In spite of the many attributes of each of these techniques it is important not to view them as mutually exclusive in an open space preservation program. Individually they don't possess the capabilities to be effective when applied in a wholesale manner to preserve large open space areas. The attributes of each approach should be recognized, and then each technique should be utilized in the particular situation for which it is best suited. As Whyte says: "The point is combination. Alone, any single device is limited; together they strengthen each other."[14]

FOOTNOTES

[1]Lucie G. Krassa, "Retaining Open Space in Maryland," Studies in Business and Economics, Vol 15, No. 1, (University of Maryland: Bureau of Business and Economic Research, June, 1961), p. 4.

[2]Ann Louise Strong, Open Space in the Penjerdel Region, Now or Never, (Philadelphia: Pennsylvania-New Jersey-Delaware Metropolitan Project, Inc., 1963), p. 38.

[3]Shirley Adelson Siegel, The Law of Open Space, (New York: Regional Plan Association, Inc., January, 1960), p. 39.

[4]Ann Louise Strong, Open Space in the Penjerdel Region, Now or Never, p. 40.

[5]Krassa, p. 6; Lawrence Levine, "Land Conservation in Metropolitan Areas," Journal of the American Institute of Planners, Vol. 30, No. 3, (August, 1964), p. 210.

[6]Krassa, p. 8.

[7]Ibid.

[8]Examples are Delaware, New Jersey, and Maryland.

[9]For a detailed discussion of their proposal see Jan Z. Krasnowiecki and James C.N. Paul, "The Preservation of Open Space in Metropolitan Areas," University of Pennsylvania Law Review, Vol. 110, No. 2, (December, 1961), pp. 179-239.

[10]Levine, loc. cit.; Ann Louise Strong, Open Space in the Penjerdel Region, Now or Never, p. 41; Cuyahoga County Regional Planning Commission, Open Space for Our Citified County, (Cleveland, Ohio: 1964), p. 81.

[11]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Inc., 1968), p. 54.

[12]Siegel, p. 8.

[13]Krasnowiecki and Paul, p. 196.

[14]Whyte, The Last Landscape, p. 80.

CHAPTER III

HISTORY AND USES OF CONSERVATION EASEMENTS

Easements are not a new device. Property has never been absolute or indivisible nor can the landowner do anything he pleases with his land.

> In medieval times, a great lord would grant a man a tract of land to use in return for which the man would be obligated to perform certain services, or fees. The land with the fewest strings attached--the simplest fee, you might say--was the closest to outright ownership. But there were always strings.[1]

Property is not an indivisible entity, but rather it is a bundle of rights--the right to sell the property, for example, or to encumber it, or to build upon it or to farm it. A property owner does not have all the rights in the land. He cannot build anything he wishes on the land, or dam a stream which flows across his land with impunity. The community at large also has interests in his land, and all of his rights are subject to the eminent domain of the state.

Since property can be viewed as composed of a bundle of rights it is not necessary to purchase the whole bundle of rights--the fee simple--when only one or a few of these rights may be needed. The rights which are needed can be bought in the form of an easement, and the rest of the bundle and the title left with the owner. The application of this concept of property ownership as a means of preserving open space has only received attention since 1959 when William H. Whyte published a report dealing with the use of conservation easements.[2]

Mr. Whyte, however, was not the first to recommend the

use of easements for conservation purposes. In 1927 Frederick Law Olmsted, Jr., presented arguments for what he called "scenic easements" in the California State Park Survey.[3] A number of easements were acquired there, and the following year, largely at his instigation, Congress, in the Federal Rights in Land Act (40 USC, Section 72A), enlarged the powers of the National Capital Park and Planning Commission to give it authority to acquire rights in the land.

Even before that in 1893 the Boston Metropolitan Park Commission was authorized by the Massachusetts legislature to acquire rights in land. In 1898 the legislature added further powers "to acquire by agreement or otherwise, the right forever or for such period of time as said board may deem expedient, to plant, care for, maintain or remove trees, shrubs and growth of any kind within said regulated spaces /along or near rivers and ponds/. (Chapter 463, Act of 1898.)"[4]

During the 1930's the National Park Service acquired scenic easements along many stretches of the Blue Ridge Parkway in North Carolina and Virginia, and the Natchez Trace Parkway in Mississippi, Alabama, and Tennessee. The New York Conservation Department also began acquiring fishing easements during the 1930's, and since 1933 the California State Division of Beaches and Parks has from time to time acquired scenic easements from landowners immediately adjacent to state parks.[5]

By and large, however, there were only a very few attempts to acquire easements until the 1950's. In 1952 Wisconsin began a program of easement acquisition along the Great River Road which borders the Mississippi River. This continuing program

and Mr. Whyte's publication have been the main impetus behind the growing interest of other public and private bodies in the use of easements.

Over the years, as the development of the concept of conservation easements has evolved, it has been found that there is a wide range of applications for this tool. There are five general ways in which land preserved by the use of conservation easements is used: for conservation, for recreation, for serving a public utility or facility, for preserving scenic areas, and for structuring urban growth. But it should be kept in mind that the multiple use concept which is becoming more prominent in land and resource management circles is causing increased overlapping of those uses on a single piece of land, so that each use should not be viewed as isolated or discreet.

Conservation

One of the ways in which conservation easements have been used is in protecting watershed land. These areas act as great catch basins which gather and retain the rainfall for future domestic use. By absorbing large amounts of water into the soil natural watersheds also act to modify the flooding affect of heavy rainfall. Thus they serve a dual purpose of retaining water for domestic use, and preventing floods. To conserve the sponge-like qualities of these watershed lands, easements can be acquired to prevent building and, thus, a higher rate of run-off from them.

The preservation of wildlife habitat is another way in

which conservation easements are being used. In the pothole country of Minnesota and the Dakotas the Fish and Wildlife Service of the U.S. Department of the Interior has been purchasing easements as well as the fee simple. This is the great breeding area for the ducks of North America. The thousands of little holes left by glaciers make a unique habitat. Unfortunately the farmers regarded these wet patches as a waste of crop land and began filling them in. To counteract this the Congress passed legislation permitting the sale of duck stamps with the revenue derived from the sales to be used to conserve these wetlands. Now the Fish and Wildlife Service is purchasing outright the large wetlands as "nucleus areas," and obtaining easements for the smaller wetlands. The easement agreements (See Appendix A) stipulate that the farmers won't burn, fill, or drain the wetlands on their property. So far 102,000 acres of wetland have been bought outright and 500,000 acres covered by easements.[6]

Recreation

Some states, notably Wisconsin and New York, purchase easements along the banks of privately owned streams to acquire fishing rights for the public. In New York the easement includes the bed of the stream plus a strip 33 feet wide along each bank. The agreement also gives the Conservation Department the right to carry out stream improvement programs. In order to do this they try to obtain easements along both banks.[7] By this time there are over 1000 miles of public fishing rights easements on over 70 major trout streams in New York.[8]

> In addition to the streambank easements, it has been found desirable to obtain numerous easements for parking of fishermen's cars and footpath rights-of-way from the highway to the stream. Parking areas for six cars are normally 50' x 60'. Footpaths are four feet in width and normally run along a property line between a highway and the stream. We try to get parking area easements wherever a bridge crosses the stream, and if possible, at about half mile intervals between bridges. Footpaths are always obtained in the vicinity of the parking areas. Occasionally a vehicle right-of-way is purchased with the parking area near the stream, if the distance from the highway is great.[9]

In September, 1961 Wisconsin started their fishing easement acquisition program. The easements consist of a strip of land 66 feet from the bank of the stream or lake, and most of them include both sides of a stream. A standard form for fishing easements is used (See Appendix B) which grants in perpetuity to the State of Wisconsin the public fishing right and the right of the state to protect and improve fish habitat by stream channel and bank devices. From September, 1961 through June, 1963 a total of 715 acres or 475,183 frontage feet of easement had been acquired.[10]

In addition to the above mentioned easements Wisconsin acquired, in one form or another, hunting, fishing, trapping, drainage and flowage rights on 3,774 acres of land between September, 1961 and June, 1963.[11] A standard form for game management easements was used (See Appendix C) which granted in perpetuity to the State of Wisconsin the drainage, filling and burning rights to wetland areas. In addition, public fishing, hunting and trapping rights were acquired.

The Wisconsin game management easement is an example of an easement whose use falls into more than one of the general categories of application previously outlined. This may well be

the beginning of a trend toward the integration of several objectives into a single easement agreement. However this will only be true when agencies with different objectives communicate with one another and coordinate their activities.

The development of a trail system is another valuable use for conservation easements. In this sort of easement the property owner grants the right of access for a specific purpose such as hiking, riding, and cycling. The agency acquiring the easement constructs and maintains the trail which is established along property lines or elsewhere to avoid disrupting the owner's use of his property. Provision is made for the property owner to avoid liability for accidents on the trail unless he creates a hazardous condition. The State Division of Beaches and Parks has used easements for the California Riding and Hiking Trail, and Marin County, California has required the dedication of an equestrian and hiking easement through new subdivisions as a condition of approval.[12] As is stated in the agreement of dedication (See Appendix D), however, the equestrian and hiking easements are expressly not dedicated to public use since the county couldn't afford to maintain them. Instead they are reserved for the exclusive use of the residents of the subdivision. It is to the advantage of the county to have these trail easements because they may want to take over the trail system later, and the easement insures that the area will be reserved.[13]

Another way in which easements can preserve open space for recreation is for privately owned golf courses to give an easement to a public body guaranteeing that the land will not be developed. In this way the property taxes on the golf course can

be held down to a point where it remains economic to operate. Unless an easement is granted the taxes which are based on the highest and best use principle may increase to the point where the course cannot afford to remain in existence. Naturally the easement would only be accepted by the public agency if the golf course conformed to the community open space objectives.

Scenic Preservation

One of the ways in which conservation easements were first used was for scenic preservation near state parks in California and along the Natchez Trace and Blue Ridge National Parkways. Scenic preservation is also the goal of one of the most outstanding examples of a large scale easement acquisition program--the Wisconsin Great River Road program.

The states of California and New York have made use of "scenic easements" on land located near state parks in order to protect the scenic amenities of the area surrounding the park. California uses a fairly standard easement agreement (See Appendix E), by which the landowner gives up the right to put up any buildings on the land without state approval, erect billboards, and the like. In New York the State Division of Parks has in a few cases acquired easements by condemnation, to prevent the construction of commercial facilities opposite the entrance to state parks.[14]

As noted above scenic easements have been used to conserve sections of natural landscape along the rights of way of the Blue Ridge and Natchez Trace National Parkways. These easements are defined as "a servitude devised to permit land to remain in

private ownership for its normal agricultural or residential use and at the same time placing a control over the future use of the land to maintain its scenic value for the parkway."[15] The highway departments of the various states involved purchased the easements, and then conveyed them to the National Park Service who laid down the general standards. Normally they covered an area extending out 350 feet on both sides from the center line of the roadway.[16] Under the agreements only farm and residential buildings could be located on the land, no mature trees or shrubs were to be removed without the consent of the Park Service. Furthermore, ashes, trash, or other offensive material could not be placed on the land, nor could billboards except those advertising the sale of the property or products raised upon it.[17]

The Wisconsin Great River Road scenic easement acquisition program is the best and most thoroughly studied example of the use of conservation easements for the preservation of scenic values. The Wisconsin Highway Commission has been acquiring easements along the Great River Road, which runs along the eastern banks of the Mississippi River, since 1952. In an attempt to preserve the scenic beauty of this route the Highway Commission purchased easements which prohibited dumping of any refuse, erection of billboards, destruction of trees and shrubs, fur farms, erection of or alteration of buildings, and commercial and industrial uses of lands and buildings (See Appendix F for deed). These easements used to extend 350 feet from the center line on either side of the highway. Lately, however, the rigid structure of the deed as well as the area to be covered by the easements has been changed to recognize the differing scenic qualities and

natural and man-made features of the land. (See Chapter V, Negotiation Techniques section, for an explanation of the change in the structure of the deed, and Figure 1 on the following page for the area to be covered by scenic easements.)

> Instead of acquiring a uniform strip 350' on either side, they now tailor the easements to the contour of the view. If a nearby ridge foreshortens it, they buy no further; in other cases they may extend the easement against unusual situations or very high-cost land. In areas just beyond town limits, for example, they do not try to buy all the development rights but secure an "urban scenic easement" permitting houses spaced three hundred feet apart. Where there is merchantable timber, they will buy the full fee simple, and will do the same with land that is of so little use that even the fee cost is nominal.[18]

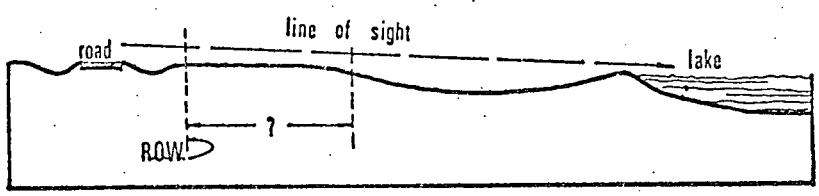
Whyte concludes that, "Had there not been an easement program, many stretches of this road would long since have become rural slums.... But the desecration has not taken place, save in stretches within town limits [where the Highway Commission is not permitted to acquire easements]."[19]

Structuring Urban Growth

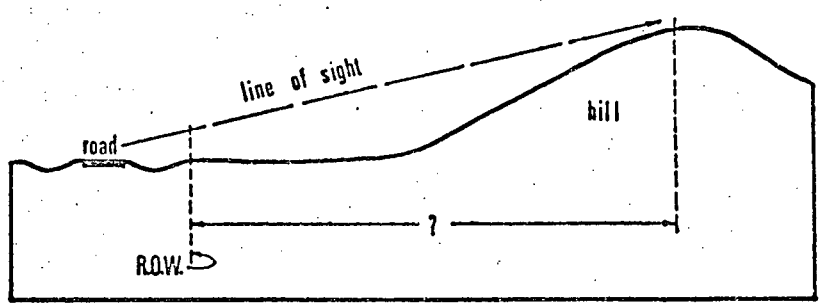
In this age of rapid urban expansion some see potential in one of the most ambitious, and least tried applications of conservation easements which is their use as an aid in shaping urban development. Essentially proponents of this approach argue that by purchasing easements which prohibit development on land surrounding urban areas development will be forced to occur within the confines of the urban area. In this way easements are valuable, not just for the land they save but also for the way they help concentrate development. The Washington, D.C. Year 2000 Policies Plan proposed a series of corridors of urban development radiating away from the central city, with wedges of

FIGURE 1

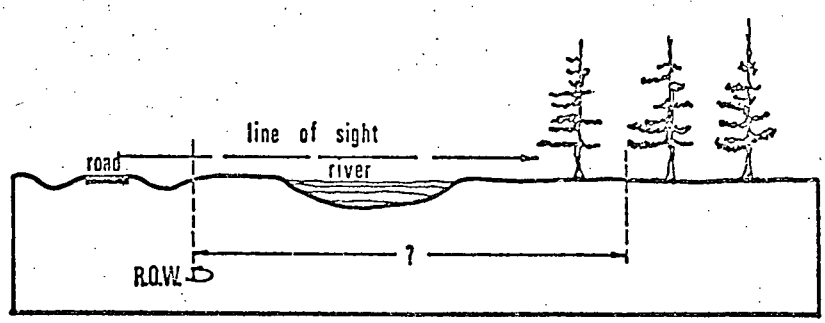
AREA TO BE COVERED BY SCENIC EASEMENTS



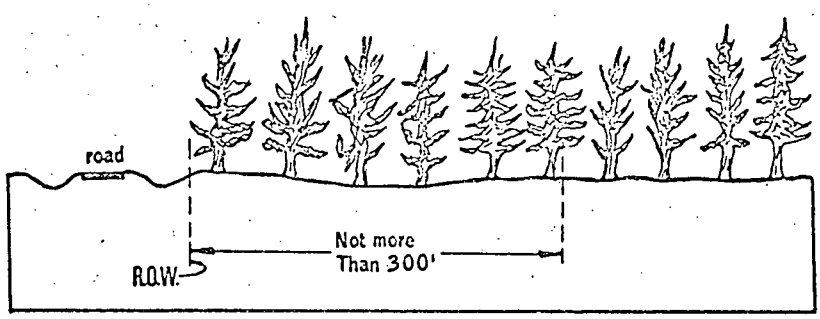
A DOWNHILL



B UPHILL



C FLATLAND



D HEAVY TIMBER

open space between the corridors. One of the primary functions of these open space wedges is to shape urban development in the metropolitan region and it was suggested that, "The entire 700,000-acre wedge area would be secured permanently by outright purchase, donations, or purchase of scenic or conservation easements and development rights."[20]

This reservation of land around urban areas also has the additional benefit of providing the community with future options as to what to do with the land.

> There is good fiscal sense in preserving open land now, at present-day values, for future public use such as schools, fire and police stations, parks and playgrounds, and other public uses, before encroaching urban development sends land values soaring. Outright purchase of large units of open land would soon deplete the County's budget, but purchase of conservation easements with the option to buy the land twenty years hence would cost considerably less.[21]

Another form of structuring urban development through the use of conservation easements has evolved as cluster development and planned unit development have become more prevalent. In areas where these sorts of developments are being built and where the public also has an interest in maintaining some open spaces it has been possible to convince the developer to leave open part of his land lying in the most scenic areas in exchange for a higher building density in the remainder. By deeding a conservation easement on the open space to the municipality, guaranteeing that it will forever remain open, the public interest in preserving the open space is protected. In many cases parts of the developer's land such as steep hillsides or streams are not worth building on at all or may be very expensive to develop through extensive grading, diking, or filling. However,

these same pieces of land may have great value as open space. If the developer can concentrate his building on the buildable parts, it is to his self-interest to keep the land as an open space and recreation area, and he should be more than willing to dedicate an easement to the public. Whyte describes this approach in the High Meadow development plan at Carmel, California:

> The High Meadows tract adjoins a developed area but is virgin land with forests of Monterey pine and oak dotted meadows. Set high on the slope of a large ridge it dominates the landscape, and a citizens' group, fearful of its desecration, had been vigorously opposing the owners on various zoning and development issues. When the owners decided to try the cluster approach, however, there was a surprisingly enthusiastic public response. Had the owners stuck to a conventional subdivision pattern the bulk of the open space would have been covered. Under the cluster plan (See Figure 2) the housing is tailored to the natural features, and the bulk of the land left open....
>
> To guarantee the integrity of the open space for the larger community, easements will be deeded to the county. The development rights to all open space, both natural and landscaped, beyond the 416 units in the present plan, will be dedicated to the county, with the fee simple remaining in private hands. This will be assurance that no increase in density will be sought later, and that the designated area will be open in perpetuity....[22]

Santa Clara County, California has also had some experience with the use of conservation easements within their zones for cluster development and residential planned development. In this case the county does not require dedication in fee simple because they do not have the funds to maintain the open space. By requiring the dedication of an easement the public interest in preserving open space is protected, yet no public funds are expended since the areas are maintained by the developer or a home owners association. The "Cluster Permit" section of the county zoning ordinance states that:

FIGURE 2

CLUSTER SUBDIVISION

> The Planning Commission shall require open space that will be adequate for the recreational and leisure use of the population that will occupy the cluster development and which will enhance the present or potential value of abutting or surrounding development. Insofar as possible the Commission shall assure that natural features of the land are preserved and landscaping is provided. In order to assure that open space will be permanent, dedication of development rights to such open space to the County of Santa Clara may be required.[23]

Within their Residential Planned Development zoning district it is stated that "The ordinance contemplates considerable open space and requires that this open space be assured by deeding the development rights to the County."[24] Essentially the developer is relinquishing the right to build any more buildings on the area which is designated for open space, although the deed (See Appendix G) may also prohibit off-street parking and the dumping of trash on the open space land.

Public Services

There has been considerable experience in the use of easements for such purposes as the reservation of highway and utility rights of way. Wisconsin and Ohio have both used easements to conserve future rights of way at relatively low cost, and many California highways are built on easements.[25] And of course, almost every piece of property has utility easements of one sort or another running through it.

Quite often easements are needed at airports to protect the approach areas off the runways. Easements are acquired which restrict the height of structures and vegetation so that they do not penetrate into the flight path of the aircraft. The right of entry to enforce these restrictions is also generally acquired.

One other use of easements which has become more prevalent in recent years with the increase in large scale public works flood control and irrigation projects is the purchase of the right to flood privately owned land, either temporarily or permanently. The Mississippi River flood control system includes provision for special emergency spillways. Here the land is left in private ownership and normally in agricultural use, but subject to a public right to flood these areas in time of emergency in order to ease the pressure on the levees.[26] Easements have also been acquired around large public reservoirs where the land is subject to periodic inundation. In this way the land remains in private use yet the public retains the right to flood it when necessary. (See Appendix H for example of flowage easement deed.)

Since the expanded use of conservation easements is a relatively recent phenomenon, information on the experience of the different uses of easements is somewhat limited. In many cases there is insufficient information to determine how successful they have been with regard to a particular type of application. It should not be assumed, however, that the potential uses of easements are unlimited. The question at law of the bounds for the subject matter of easements has not been resolved. Brenneman quotes U.S. Supreme Court Justice T.C. Clark as saying, "It is not the novelty of an interest which makes it objectionable. Rather it is the comparative inutility of the interest as contrasted with its power to render title unmarketable."[27] This would seem to indicate that while the door is not closed in the face of conservation

easements by reason of their being novel or not falling within set categories, it is at least questionable as to whether there will be legal acceptance of all new applications of conservation easements.

FOOTNOTES

[1]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Inc., 1968), p. 78.

[2]William H. Whyte, "Securing Open Space for Urban America: Conservation Easements," Urban Land Institute Technical Bulletin, No. 36, (1959).

[3]"City and Regional Parks and Playgrounds: Preservation of Open Spaces," Landscape Architecture, Vol. 48, No. 2, (January, 1958), p. 86.

[4]Whyte, The Last Landscape, p. 11.

[5]Whyte, "Securing Open Space for Urban America: Conservation Easements," p. 12.

[6]Whyte, The Last Landscape, p. 93.

[7]Jacob H. Beuscher, "Conservation Easements and the Law," Proceedings of the Conservation Easements and Open Space Conference, (Madison, Wisconsin: Wisconsin Department of Resource Development, 1961), pp. 43-44.

[8]Whyte, The Last Landscape, p. 94.

[9]Beuscher, "Conservation Easements and the Law," p. 44.

[10]Harold C. Jordahl, Jr., "Conservation and Scenic Easements: An Experience Resume," Land Economics, Vol. 39, (November, 1963), pp. 345-346.

[11]Ibid., p. 354.

[12]Walter S. Horchler, Planner, Marin County Planning Department, San Rafael, California, Interview with the Writer, January 3, 1969.

[13]Edward Ross Parkerson, Planner, Marin County Planning Department, San Rafael, California, Interview with the Writer, January 3, 1969.

[14]Whyte, "Securing Open Space for Urban America: Conservation Easements," p. 12.

[15]Ibid., quoting National Park Service, Requirements and Procedure to Govern the Acquisition of Land for National Parkways, (Washington, D.C.: U.S. Government Printing Office).

[16]Norman Williams, Land Acquisition for Outdoor Recreation--Analysis of Selected Legal Problems. Report to the Outdoor Recreation Resources Review Commission, Study Report No. 16, (Washington, D.C.: U.S. Government Printing Office, 1962), p. 44.

[17]Ross D. Netherton and Marion Markham, Roadside Development and Beautification: Legal Authority and Methods, Part I, (Washington, D.C.: Highway Research Board, 1965), p. 68.

[18]Whyte, The Last Landscape, p. 88.

[19]Ibid.

[20]National Capital Regional Planning Council, The Regional Development Guide 1966-2000, (Washington, D.C.: U.S. Government Printing Office, 1966).

[21]Fairfax County Planning Division, The Vanishing Land--Proposals for Open Space Preservation, (Fairfax County, Virginia: 1962), p. 46.

[22]William H. Whyte, Open Space Action. Report to the ORRRC, Study Report No. 15, (Washington, D.C.: U.S. Government Printing Office, 1962), p. 103.

[23]County of Santa Clara Zoning Ordinance, Section 7-8.2.11: Open Space, Supplement #3, (San Jose, California: December 31, 1964).

[24]County of Santa Clara Planning Department, Residential Planned Development Process and Administrative Procedures, (San Jose, California: June 1, 1964), mimeo., p. 2.

[25]Whyte, "Securing Open Space for Urban America: Conservation Easements," p. 14.

[26]Norman Williams, p. 40.

[27]Russell L. Brenneman, Private Approaches to the Preservation of Open Land, (The Conservation and Research Foundation: 1967), p. 24.

CHAPTER IV

LEGAL ASPECTS OF CONSERVATION EASEMENTS

Throughout the history of the United States, the concept of private property has always played an important role.

> There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[1]

The notion that individuals had rights of privacy and property became important during the English constitutional revolution of the 17th century, and was expressed in English constitutional law. The colonists brought these ideas to North America and incorporated them as "rights" in the federal and state constitutions.[2]

During the 19th century the status of private property in the law was further strengthened. In order to develop the vast resources of this continent the governments transferred public lands into private ownership. Transportation networks were built and land was opened up for development.

> In this process property law was an active instrument for encouraging this release of private energy, and the interpretations which 19th century courts and legislatures gave to the constitutional guarantees regarding private property were in accord with the evident economic necessities of the nation at that time.[3]

There was a prevailing "prairie psychology" attitude of general unconcern for the rate at which the land was consumed or the manner in which it was developed.

As the 20th century has progressed new forces are influencing the interpretation given to the constitutional guarantees of private property. These are (1) the transformation of the United States into an urban industrial nation, with all of the attendant economic and social problems; (2) the increasing shortage of land in many sections of the country, with a consequent sharpening of competition to develop the remainder; (3) a steady increase in the cost of building and maintaining public improvements; (4) the increased recognition of the public responsibility for planning and controlling community development.[4]

Under the pressure of these forces, the scope of public control over the private uses of property has steadily widened. The evolution of the legal viewpoint has been summed up this way:

> As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that one who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly but steadily broadens the recognized scope of social interest in the utilization of things....
>
> These adjustments have been guided by a generally prevailing desire to preserve the rights of individuals as far as they prove to be consistent with the welfare of the group by the necessities of distributing natural resources as effectively as possible among multiple claimants; and by the underlying effort to promote the social and economic policies finding current acceptance.[5]

Thus, it can be seen that a slow but steady shift in emphasis toward the interest of society as a whole is occurring. It is in the light of this new emphasis that the legal viewpoint of conservation easements and their role in furthering the interests of society will be examined.

Sources of Legal Powers

The first step in a discussion of the legal aspects of the use of conservation easements as a means of preserving open space and recreational areas should be to discover the sources of power for public bodies to acquire land for such purposes. Apparently the law is very clear on this matter as pointed out by Siegel: "The public purpose of adequate parks and recreational facilities is now so clear that, understandably there is no issue as to the fundamental legal power to spend money for land acquisition, or to condemn land, for such programs."[6]

In the early days of the United States, condemnation was authorized in urgent cases although no express constitutional powers existed. The power of eminent domain is often thought of as inherent in sovereignty, however it was not part of the original common law. The term "eminent domain" was not used in England. As used in early times in the United States, "the term was intended to express both the direction of governmental powers and the limitations placed upon the exercise of that power. So Justice Shaw in Jeduthun Wellington, Petitioners 16 Pick. 87, 102 (Mass. 1834) expressly read into it the limitations based on the requirement that the taking be for public purposes."[7] Constitutional provisions generally always contain a negative phrase which prohibits the taking of private property for a private use, as well as a positive command for just compensation.

The U.S. Constitution does not specifically provide the Federal Government with the eminent domain power, but the Supreme Court has held that it is a power inherent in a sovereign

state and does not depend upon constitutional or legislative mandate for its existence. The fifth amendment does state that private property may not be taken for public use without just compensation, but the Supreme Court has stated that this expresses the limit of the eminent domain power rather than the source of the power.[8]

The States also do not need constitutional or legislative sanction before they can exercise the eminent domain power. A State is also a sovereign power, and therefore, has the inherent right of eminent domain. However, it is subject to the limits of the fourteenth amendment which states that no State shall... "deprive any person of life, liberty, or property without due process of law...." A State is also subject to any applicable provisions within its own constitution.

It appears also that governments at the local level have the power of eminent domain subject to the same constitutional constraints as the States. Williams writes, "Since, [at the State and local] levels of government the power to provide recreation facilities is so clear, it does not make any substantial difference what means is used to that end--i.e., whether the land is acquired by purchase or by eminent domain."[9] The area in which a local agency can exercise the power is determined by the delegation of authority from the State legislature. Unless the statute delegating the authority states otherwise, it is applicable only within the local territorial jurisdiction. However, extraterritorial power is sometimes granted.

State and local governments are permitted to purchase land outside of their jurisdiction in any event if they can find a

willing seller. However, in situations of this nature these governments are treated like any other property owner and are therefore, subject to the authority of the governing body, including the exercise of eminent domain.[10]

Of primary concern to the subject of this thesis is whether the power of eminent domain may be used to purchase partial interests in land as well as the complete fee simple interest. The conclusion is reached that as long as a public purpose is achieved by the purchase, there is no constitutional objection to such a taking.[11] In the recent Kamrowski v. State case,[12] dealing with a part of Wisconsin's easement program along the Great River Road, a group of landowners argued that the easements were only for aesthetic goals and that this was no proper public purpose since the public didn't get to use the land. The Supreme Court of Wisconsin held that the acquisition of scenic easements by eminent domain was constitutionally valid because there was a legitimate public purpose--the easements provide "Visual occupancy." The court also felt that a stronger argument can be made to support the use of eminent domain to fulfill aesthetic goals than by the use of zoning restrictions. The court considered the preservation of a scenic corridor and rural scenery along a parkway, by preventing unsightly uses, a sufficiently definite and meaningful public purpose, so long as there are sufficiently described standards to guide the state agency.[13]

In situations where the public has some form of right of entry on the land, such as is the case with hunting and fishing easements,

> State and local governments have the same power to acquire such lesser interests as they do to acquire the fee so long as the form of public right of entry is sufficient to satisfy the test of public use. So long as public use can be proved, it is irrelevant whether what is acquired is the fee or an easement or some other lesser interest. At the least, no problem arises from taking less rather than more.[14]

The problem of proper statutory authorization is another very important aspect of a legal analysis of conservation easements. In U.S. v. Butler[15] the U.S. Supreme Court ruled that Congress had the power to tax and legislate for the general welfare. And in the course of its opinion in the case of Berman v. Parker the U.S. Supreme Court made the following statement regarding the constitutional validity of legislation containing aesthetic objectives:

> The concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[16]

California was the first state to authorize the use of easements for open space purposes. This act, which was adopted in 1959, came about as much through the initiative of landowning groups in Monterey County as through public officials.

> In Monterey County, California, a number of landowners, alarmed at the threat to their magnificent coastline, warmed to the idea of giving easements on key scenic tracts to the County. There was some doubt, however, as to whether the County could accept such easements, and there was a feeling some sort of legislation would probably be necessary.
>
> ...Their state senator, Fred Farr, was an ardent conservationist, and with state planner William Lipman, he worked up a bill for the California legislature.[17]

The first two sections of the California Act (See Appendix I for entire Act) read:

> It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitations of their future use, open spaces and areas for public use and enjoyment.
>
> The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.[18]

Within a short time after the passage of this act several other states enacted similar legislation. New York, Maryland, New Jersey, and Wisconsin were among these states. (See Appendix J for copies of these acts).

The states which have passed statutes authorizing the acquisition of land for recreation, aesthetic, and other purposes typically authorized the acquisition of the fee or of any "lesser interest" in land. The Maryland and New York acts add the words "development right, easement, covenant or any other contractual right."[19] New Jersey adds the words "or right consisting, in whole or in part, of a restriction on the use of land by others including owners of other interest therein; such interest or right sometimes known as a 'conservation easement.'"[20] These references to "lesser interests," "development rights," "covenants," "restrictions," and "conservation easements" are all designed to confirm a power which was not clearly granted before.

Of those acts mentioned New York's, Wisconsin's and New Jersey's provide for acquisition by condemnation. The California and Maryland Acts provide only for consensual acquisition. There are several precedents for statutes which provide the power to

condemn conservation easements. Statutes exist which permit the state or local government to condemn scenic easements for highway purposes,[21] easements to prevent the erection of buildings, or billboards in the vicinity of parks,[22] easements for paths and trails to scenic places,[23] and easements to plant and maintain shrubs and trees along rivers and ponds.[24]

Legal Classifications

An examination of the use of conservation easements is not complete without a discussion of the common law technicalities which have an important bearing upon the success of an easement program. These legal technicalities can perhaps best be discussed within the framework of classifications of easements. Basically easements are classified as being either affirmative or negative and appurtenant or in gross.

An affirmative easement is a limited right to make use of land owned in fee by someone else: hunting and fishing easements, hiking and riding trail easements, and flowage easements are good examples. A negative easement is a right to prevent a property owner from using his land in specified ways. Some examples of negative easements are: scenic easements, watershed protection easements, and airport runway clearance easements.

The other basic distinction in classes of easements is between easements appurtenant and easements in gross. Appurtenant easements must confer a benefit upon the ownership of nearby land. The most common example is the right-of-way easement across one piece of land. The land subject to the right-of-way is known as the "servient" tenement; and the land adjacent,

whose owner gets the benefit of the right-of-way, is known as the "dominant" tenement. The principal characteristic of an appurtenent easement is that there must be a dominant tenement. An easement in gross, on the other hand, is a personal interest in or right to use another's land without any connection to the occupancy of nearby land.

Transfers and Assignability

These classifications are of great significance when considering the durability of the easement or the problems of transferring the dominant or servient tenement or the easement itself. Rules about the transferability of easements could be awkward in situations where it is decided to shift administration of a conservation easement program from one governmental agency to another, or where the title to the servient tenement changes hands.

In the traditional English view easements are created for the benefit of the holder of the easement, and, therefore, are said to be appurtenant to that land. Therefore, easements, which were in gross were not recognized in England, or at least the burden would not run to subsequent owners of the burdened land.[25]

> The majority rule in the United States is broader. In those American jurisdictions which have decided the question, it is generally held that the burden of an easement in gross passes with the servient estate. Most American jurisdictions recognize the easement in gross as creating a valid interest in land to the extent of holding that if the servient land is transferred it does not terminate the rights of the holder of the easement....
>
> The question of the assignability of an easement in gross presents very much more difficult problems, and there is an enormous amount of confusion in the authorities. The general rule is that easements in gross are not assignable, but there are so many conflicts in the authorities that it is very difficult to generalize.[26]

Further problems are encountered when examining the legal position of negative easements in gross. There is virtually no case law on negative easements in gross.

> What authority there is does not recognize such a conveyance. The American Law of Property states as a matter of definition that a negative easement must be appurtenant. A District Court, overruled on constitutional grounds, held that the United States had no authority to condemn an obstruction easement for an airport because it had no property interest in the airport.[27]

It is obvious from the above discussion that, due to the confused legal position of easements in gross, they should be employed only when absolutely necessary, and only when enabling legislation authorizes their use to benefit the community at large. On the other hand since conservation and preservation of the natural landscape is recognized as a public purpose a conservation easement, if held to be affirmative, should be assignable and thereby generate fewer legal problems.[28]

Extinguishment

Another important point which planners should keep in mind is the ways in which easements may be extinguished. For one thing if the dominant and servient tenements come under the same ownership the easement will be extinguished. If the owner of the easement grants a release in proper form to the owner of the servient tenement, the easement is extinguished. An intentional abandonment of the easement, accomplished by an action, not merely consisting of words, indicating an intent to abandon the easement will also work its extinction. "Non-use by itself does not constitute abandonment in the absence of any adverse acts on the part of the landowner, even if the easement is not used for

the prescribed period of time for adverse possession."[29] Another way in which an easement will be extinguished is if the adjoining land which the easement is designed to benefit were to be no longer conserved. It is also necessary to consider the effect of any applicable marketable title act or other statute founded on the policy of ridding titles of obsolete interests. These laws may have the effect of extinguishing any easement after the passage of a stipulated period of time.[30]

The Easement Deed

The law does not always require that an easement be drawn up in a written legal document since it is an incorporeal interest in land. However, legal conservatism suggests that it is a good idea to have an instrument in writing under seal and executed by the owner of the servient tenement.

> The physical space to be subjected to the easement should be described with clarity. Ths use of the word "heirs" or such other language as may be appropriate to the creation of a corporeal interest of unlimited duration in land should probably be used to make it absolutely certain that there is an intention to create such an interest....It should be unnecessary to add that the precise scope of the easement should be defined with care, the conveyancer remembering that the constructional inclination is for a narrower interpretation of the scope of an easement in the case of a gratuitous transfer than where consideration is paid.[31]

Due to the non-use nature of many kinds of conservation easements it would be wise to include language in the easement deed to the effect that mere non-use of the easement shall not be deemed to constitute an abandonment. Furthermore, in cases where a conservation easement has been granted to a public or private body, safeguards should be incorporated into the easement deed to prevent the untimely release of the interest contrary to

the grantor's intent. One way of doing this is to create an executory interest in another conservation agency which would take effect upon any attempt to release the easement by the holder of it. (For further discussion of the untimely release of easements see Chapter VII.)

There should be a reverter clause which stipulates that if there is later condemnation of the property for another purpose, the easement becomes null and void. This can be very important in situations where a highway department for example is thinking of using the green space kept open by easements as a right of way for a new highway. Since it is undeveloped this sort of land is very attractive to highway departments who think it should be inexpensive and easy to build on. The reverter clause would however, require the highway department to pay the going market price for the land without restrictions, and in this way might discourage them from utilizing the protected area.[32] A reverter clause can also protect the landowner when the purpose for which the easement was acquired is abandoned. The easement will then automatically be voided and all rights will return to the owner of the fee simple. Although if the purpose is to preserve the open area without regard to the type of land use which may someday surround it, the creating instrument should so indicate.[33]

Since there can be some legal difficulties in the courts with a negative easement, it would be helpful if some affirmative rights were included. The right of entry to protect the natural habitat from trespassers and for minor management purposes are useful affirmative rights which can often be included in what

are otherwise essentially negative easements. A similar situation arises when the courts try to determine whether an interest in land is in fact benefitted by an easement. If it is the intent of the parties that an easement should be appurtenant, then this should be clearly stated. And if the burden is to run with the land or is to be assignable, even with easements in gross, it might be helpful to stage this.

Whyte suggests that, "The purpose must be stated clearly. In the case of open space easements, it is, simply, the preservation of open space for the public benefit, but it will be wise to buttress this statement with the notation of all the benefits that may be involved--the preamble of the California bill is an excellent model in this respect."[34] (See Appendix K.)

In Wisconsin the highway department has included in their easement deeds the power to grant a variance or special permit to take care of unforeseen contingencies or expansions of nonconforming uses. To get a permit, the landowner must show that what he proposes does not conflict with the basic easement purpose. It is necessary in Wisconsin to include this power in the deed. If it is not included then the granting of a variance is in effect the gift back to the landowner of a property interest that had previously been purchased from him, and the State Constitution forbids gifts of state property.[35] This flexibility can be very helpful in retaining public support for an easement program since the landowner is no longer absolutely bound to the status quo. However, as Whyte points out: "The danger here, of course, is the one so present in zoning matters; variances can make a sieve out of a community plan, and this could be the case with easements."[36]

An important question when dealing with the dedication of open space easements in cluster subdivisions is when the deed becomes effective. In most cases the filing and recordation of a subdivision plat constitutes a dedication to the public of all the common areas shown on the plat. However, in the United States the dedication of an easement is not normally complete until formal acceptance by the local public authority. The local authority need not accept immediately, and in fact may possibly withhold acceptance for periods up to twenty years.[37]

> Moreover, while dedication may be formally withdrawn before any lots are sold if this is not violative of local subdivision regulations, after the sale of one or more lots by reference to the plat there are cases which hold that the dedication becomes irrevocable and, in any event, a revocation must have the assent of each and every lot owner in the subdivision.[38]

Private Conservation Organizations

Non-profit corporations and trusts are usually allowed to hold legal title to land, although there may be a limit to the length of time it may be held. In Illinois and Wisconsin not-for-profit corporations have express authorization to purchase a less than fee interest, and The Nature Conservancy, a private non-profit conservation organization, has purchased conservation easements in Connecticut and Ohio.[39] However, the legality of a conservation easement held by a non-profit corporation has never been tested in the courts.

It may even be possible for a non-profit corporation organized for the purpose of acquiring and preserving open space for the public welfare to exercise the power of condemnation.

> In a 1945 Illinois case a grant of the power of eminent domain to Neighborhood Redevelopment Corporations was upheld, "It must be conceded that Neighborhood Redevelopment Corporations organized under the act are private corporations. Neither have they any of the attributes of public corporations." But rehabilitation of slum and blight areas was held to constitute a sufficient public use or purpose to support the legislation allowing eminent domain. (Zwin v. Chicago, 389 111.114, 59 N.E.2d 18 (1945).)[40]

The power to sell land is enjoyed by all forms of non-profit corporations, foundations, and associations, and some states specifically authorize non-profit corporations to make charitable donations. "The powers of a trust to sell, lease, or give away land are, for the most part, more limited than those of a corporation. But, it would seem that if the trust instrument so provided, the trust could be given extensive powers in this respect."[41]

FOOTNOTES

[1]Ross D. Netherton and Marion Markham, Roadside Development and Beautification: Legal Authority and Methods, Part II, (Washington, D.C.: Highway Research Board, 1965), p. 5, quoting 2 Blackstone, Commentaries 1-2.

[2]Netherton and Markham, Part II, p. 5.

[3]Ibid., p. 6.

[4]Ibid.

[5]Ibid., pp. 6-7, quoting 5 Powell, Real Property, sec 746.

[6]Shirley Adelson Siegel, The Law of Open Space, (New York: Regional Plan Association, Inc., January, 1960), p. 3.

[7]Jacob H. Beuscher, Land Use Controls--Cases and Materials, (Madison, Wisconsin: 1964), p. 525.

[8]S. David Levy, "The Law of Open Space in the National Capital Region," National Capital Open Space Program Technical Report, No. 2, (Washington, D.C.: September, 1965), p. 2.

[9]Norman Williams, Land Acquisition for Outdoor Recreation--Analysis of Selected Legal Problems. Report to the Outdoor Recreation Research Review Commission, Study Report No. 16, (Washington, D.C.: U.S. Government Printing Office, 1962), p. 2.

[10]Levy, pp. 4-5.

[11]Ibid., pp. 6-7.

[12]Kamrowski v. State, 31 Wisconsin 2d.2456; 1966.

[13]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Inc., 1968), p. 89; Jacob H. Beuscher, "Scenic Easements and the Law," Conference Proceedings--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), pp. 52-53.

[14]Norman Williams, p. 46.

[15]U.S. v. Butler, 297 U.S. 1 (1936).

[16]Berman v. Parker, 348 U.S. 26, 33 (1954).

[17]Whyte, The Last Landscape, pp. 84-85.

[18]California Government Code, ch. 1658, Statutes 1959.

[19]Maryland Annotated Code, art. 66C, sec. 357A, 1960; New York Municipal Law, sec. 247, 1960.

[20]Green Acres Land Acquisition Act, New Jersey Sess. Laws 1961, ch. 45, sec. 12b.

[21]For example 23 U.S.C., sec. 319 (1958); Wisconsin Statutes Annotated, sec. 84:09 (1)(1957).

[22]For example General Outdoor Advertising Co. v. City of Indianapolis, 202 Indiana, 85, 175 N.E. 309 (1930).

[23]For example Massachusetts General Laws, Annotated, ch. 132, sec. 38, (1958).

[24]Ibid., ch. 92, sec. 79.

[25]Peter Ames Eveleth, "An Appraisal of Techniques to Preserve Open Space," Villanova Law Review, Vol. 9, No. 4, (summer, 1964), p. 569.

[26]Russell L. Brenneman, Private Approaches to the Preservation of Open Land, (The Conservation and Research Foundation, 1967), p. 30.

[27]Oakes A. Plimpton, Conservation Easements--Legal Analysis of "Conservation Easements" as a Method of Privately Conserving and Preserving Land, (Washington, D.C.: The Nature Conservancy), mimeo., p. 14.

[28]Ibid.; For a more complete discussion of the implications of these legal classifications of easements see: Brenneman, pp. 22-23, 28-33; Plimpton, pp. 3-8, 10-21; and Norman Williams, pp. 49-53.

[29]Plimpton, p. 4.

[30]Brenneman, pp. 27-28.

[31]Ibid., pp. 25-26.

[32]William H. Whyte, "Securing Open Space for Urban America: Conservation Easements," Urban Land Institute Technical Bulletin, No. 36, (1959), p. 45.

[33]Brenneman, pp. 27-28.

[34]Whyte, "Securing Open Space for Urban America: Conservation Easements," p. 44.

[35]Conference Proceedings--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), pp. (D)7-8.

[36]Whyte, "Securing Open Space for Urban America: Conservation Easements," p. 45.

[37]"The Homes Association Handbook," Urban Land Institute Technical Bulletin, No. 50, (1964), p. 304.

[38]Ibid.

[39]Information Bulletin No. 33, (Washington, D.C.: The Nature Conservancy, June, 1965)

[40]Thomas Gose, Manual for Conference Workshops--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), pp. 30-31.

[41]Ibid., p. 31.

CHAPTER V

ACQUISITION OF CONSERVATION EASEMENTS

One of the primary questions concerning conservation easements is, how much do they cost? In theory easements are worth what the landowner is giving up. But in practice the costs of easements reflect a complex set of factors which includes: 1) the techniques and costs of appraisal, 2) the skill and enthusiasm of the negotiator, 3) the effect of the easement on land values, 4) the type of easement and the restrictions it imposes, and 5) the potential for gifts of easements.

Appraisal Techniques and Costs

As has been pointed out in Chapter IV, the Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without "just compensation."

> ...where a taking is "partial" the federal constitutional standard of just compensation recognizes and includes any diminution in the market value of the owner's remaining land resulting from the taking. That is to say, just compensation includes not only the market value of that which the condemning authority actually has taken or acquired but any resulting diminution in the market value of the condemnee's remaining property. This element of just compensation is known generally as "severance damages."
>
> It is important to realize that this element of just compensation is applicable whether the taking is partial in the sense of the kind of estate acquired. Thus, the taking of an estate less than the fee in some or all of a property unit is partial taking and raises an issue of severance damages, as does a taking in fee of part of a property unit. In short, all easement takings are partial takings and, if any diminution results in the market value of what remains to the condemnee, he is entitled to recover such diminution ...as a part of the just compensation guaranteed by the federal constitution.[1]

In most easement cases compensation is not based on the separate value of the easement. Rather, it is based on the damage to or diminution in the value of the owner's remaining property attributable to the taking of the easement and to the prospective use to be made of it by the taker. We have then what is called the "before and after" method of estimating the loss or damage as a result of the taking for an easement. In this case the appraiser determines just compensation by measuring the difference in the fair market value of the property immediately prior to the taking of the easement and immediately after it has been taken. The difference between the two appraisals represents the value of the easement, and if it is the exercise of eminent domain, this difference represents the loss and damage for which compensation must be paid.[2]

The "fair market value" is the amount a willing seller would take and a willing purchaser would pay if the property was voluntarily sold on the open market. In estimating this amount,

> The appraiser must put himself in the position of a willing buyer and ask himself, "How much less (or more) would I pay for this property subject to the easement than I would without it?" He must also put himself in the position of the willing seller and ask himself, "How much less (or more) would I take for this property giving consideration to the property right involved in the easement?
>
> The careful weighing and consideration of all of the factors involved in the willing buyer and seller concept and the application of seasoned experience and judgment by the appraiser is perhaps the most important step in the valuation of easements.[3]

In strictly rural areas, away from any development pressures, the appraisal of fishing, hunting, and scenic easements is quite easy. The factors which influence the price of fishing

easements include local land values, size and flow of the stream, fish productivity, fishing pressure, accessibility and distance from centers of population.[4] On the other hand hunting easements can largely be based on established lease payments for hunting rights, plus a nuisance value to compensate the landowner for the potential unrestricted public hunting pressure.[5] The value of scenic easements is generally based on the loss of a few dollars of income per year from billboard rental payments, and the inconvenience of the meetings leading up to the final negotiations of the easement.

In areas subject to more intense development pressures, however, appraisal becomes more complex. Here probable future use of the land takes on increasing importance. Careful judgment must be exercised in predicting future development and the present value of the property based on possible future uses such as industrial, commercial, and residential.

> In these cases, however, the purchasing agent cannot assume that all properties are potential motel or other commercial sites. There will be insufficient business for such total commercial development for many years to come. Consequently, damages are paid for a percentage of future development value based on the number of commercial units (or residential units) that forseeable future demand will support and the susceptibility of the particular property to such development, keeping in mind that unrestricted development can be carried out behind the...easement strip....[6]

Another factor to be considered by the appraiser is the effect of the taking on the total property. This is the measurement of the detriment or damage to the owner. This is especially important in smaller and more urban properties since they may be completely covered by the restriction and thus have no area behind the easement for unrestricted use. In rural

areas where large lots predominate and where development pressures are not great the taking of a conservation easement on part of the property probably won't have much effect on the value of the balance of the land.[7]

There is also the possibility in both urban and rural areas that taking a conservation easement in part of an owner's land may confer a benefit on the remainder of his property, such as the benefit of abutting scenic open land permanently restricted as to development. In such a case, the value of the benefit might be subracted from the damages in determining compensation. There are, however, only a very few studies which have been carried out to determine the effect of conservation easements upon land values.

One study of the Great River Road carried out under the direction of Ann Louise Strong showed that sales prices for small parcels of land (under 3 acres) close to an urban area were adversely affected by easement restrictions. While in rural areas where the parcels were larger (over 3 acres) and there was little development pressure the land subject to scenic easements had a slightly higher average sale price per acre than the unrestricted land. While admitting that the sample was too small for statistical reliability, Mrs. Strong concluded that, "....in an area such as this one, which is far from development pressure, it really was not necessary to pay at all for the restrictions since they had no effect on market value."[8]

Another study of the Great River Road by the Wisconsin Department of Transportation lends some support to Strong's study. They state that,

TABLE 1

LOSS IN VALUE OF LAND COVERED BY SCENIC EASEMENTS

Land Use	Examples Found	Indicated Loss in Value
Building sites and yards	2	70%
Improved pasture	5	10% to 30%
Native pasture	5	5% to 20%
Woods and brush	6	75% to 84%

Source: Howard L. Williams and W.D. Davis, "Effect of Scenic Easements on the Market Value of Real Property," Appraisal Journal, Vol. 38, No. 1, January, 1968, p. 24.

> In general, the interviews indicated that the scenic easement was not a factor in the owner's decision to buy or the price he paid. Many property owners did not associate the easement as an element of property value. It was only in the sale of vacant residential sites conforming to the easement's 300 foot frontage restriction that any effect caused by the easement could be measured.... The measurable decrease in value attributed to the scenic easement is minimal....[9]

Williams and Davis, in a study conducted along the Blue Ridge Parkway,[10] obtained slightly different results than the previously mentioned studies. Here again the sample size was very small, however it does give some indication of how buyers and sellers consider the effect of the imposition of scenic easements on particular parcels of land. Their figures (See Table 1) show a significant loss in value on land restricted by scenic easements. (See Chapter III, Scenic Preservation section, for an outline of the easement restrictions imposed along the Blue Ridge Parkway.) However,

> In the transactions studied, the appraisers found no indication of severance damage caused by the imposition of the scenic easements. Thus, there were no losses in value suffered by the unencumbered areas of those properties which included land subject to scenic easements. However there may be properties where severance is a problem, because it is quite possible that the size and shape of that portion of a property remaining unencumbered will be such that severance damage might occur.[11]

The results of these three studies are not conclusive enough to permit the establishment of any rules regarding the positive or negative effect of easements on property values. But, they do not eliminate the possibility that easements might confer a benefit on the unencumbered portions of property which includes land restricted by scenic easements.

One possible solution to the problems of easement valuation would be tc set a flat rate for the acquisition of a

particular type of easement with similar restrictions: i.e. set a per-foot or per-acre price and make it the going rate for all purchases. As has been pointed out, this technique is already used by the New York Conservation Department for acquiring fishing easements. The problem with this solution is that near urban areas where land valuation is subject to a great many variables and each parcel of real estate is unique, it might be struck down by the courts as being in violation of the "just compensation" rule. It might be possible to get around this problem if the legislature or the department in charge of the acquisition created flat rates for various types of terrain and locations; that is, set a value which the state will presume is a fair and equitable price to pay. This puts the burden on the landowner to show that the amount thus arrived at is too low. The advantage of having the department in charge set the rate is that once the legislature sets a price, it has a tendency to remain unchanged for several years. And then the courts would say that the rates are obsolete and do not equal just compensation.[12]

For situations involving valuation along scenic corridors, mass appraisal practice might be the best solution. "It is totally impractical to require detailed individual parcel appraisals for a lengthly corridor project if controls are to be by scenic area easement.[13] The mass appraisal technique involves establishing from previous appraisals the basic land value for various types of land along an entire project. And then applying these values in awarding compensation to landowners for the taking of an easement.

The mass appraisal and flat rate techniques for easement valuation may help to cut down costs, but as Whyte points out,

> Appraisal costs, of fee purchases as well as easements, seem to have gotten out of hand. The [Wisconsin] highway department has recently professionalized its appraisal staff and one result is such a display of zeal in survey and documentation that it frequently costs as much or more to figure out what an offer to a landowner should be as the offer amounts to itself.[14]

In Wisconsin the cost of scenic easement acquisition includes: checking the merchantability of title by examining local public records; carrying out precise engineering surveys for preparation of a detailed plat and a precise description; and the appraisal fees and costs of negotiation. An estimate of these identical expenses amounted to $88,000 for 184 miles of easement protection along the Great River Road or an average cost per mile of $483.00.[15] However, it should be remembered that comparable expenses are involved in connection with fee acquisitions as well.

Negotiation Techniques

As has been previously noted in Chapter III, the U.S. Bureau of Sports Fisheries and Wildlife is carrying on a successful easement program for protecting wetlands in Minnesota, and North and South Dakota. The field personnel who negotiate with the landowners indicate that they have little difficulty in acquiring easements.[16] The technique they use to negotiate for easements involves an explanatory brochure to acquaint landowners with the legal aspects of signing an option form, and also contains photographs illustrating several types of wetland. However, there is no broad-scale publicity program to promote the

acceptance of wetland easements. "The negotiator normally makes three contacts: first, to determine landowner interest; second, to confer regarding price and merchantability of title; and third, to sign the agreement."[17] Generally about one-half the landowners agree to sell an easement. Since this high success ratio is acquiring the desirable acreage, it is not necessary for negotiators to invest any appreciable amount of time with reluctant landowners. Also, it has been found that an owner will often change his mind at a later date, so it is predicted that the success ratio will ultimately be above 50 percent. Moreover, on the average, land changes ownership every eight years in this region. Thus, new landowners continually enter the scene and present renewed opportunities for acquiring choice wetlands. In 1961 the Bureau testified before Congress, when an accelerated program was pending, that condemnation would not be used. In keeping with this testimony, the policy is not to condemn easements or even to mention this possibility in negotiations with owners.

During the negotiations a legal description is drawn up which covers the entire farm and includes all wetlands on the property. A map locating all of the wetlands is also prepared. Owners are then offered a price which approximates the appraised value of the easement. Normally the prices offered per acre to various owners ave very similar since acquisition areas have a high degree of homogeneity. Where variations in per acre offering prices do exist the differences between wetlands are readily explained to landowners. "The Bureau has also found that once acquisition begins in an area, the knowledge spreads rapidly among owners. In general, this has been an advantage to negotiators."[18]

Another part of the acquisition procedure is the preparation of a "memorandum of title" by an abstract company under contract to the Bureau for each parcel. The title file is reviewed by the office the the United States Attorney General, and the costs of this review are borne by the government. The negotiators point out the advantages of having a thorough title review at no cost and use this as one selling point.[19]

In New York negotiators for fishing easements have found that it is important to offer the same price per mile to each owner along a stream in order to maintain good will. Once a tentative price has been selected, the negotiator tries to identify the influential landowners along the stream. First contacts are made with these people, and the program is carefully explained to them. The negotiator then attempts to purchase the fishing rights from them at the selected price. If evidence in support of a higher price is submitted the price offer may be increased provided no other purchases have as yet been made to establish the price. Occasionally it is necessary to obtain a right-of-way easement for a footpath to the stream. Since the price on the stream easement is inflexible, the negotiator can sometimes use the footpath to give the landowner a slightly higher price. Condemnation is not used to acquire these fishing easements.

Generally several return trips are necessary for the negotiator to "sell himself" to the owner before he can get a purchase contract signed. This often involves spending several evenings socializing and answering questions. During this time he points out that influential neighbors have already signed

agreements to sell fishing easements. As soon as the owner indicates a willingness to sell the negotiator tries to close the deal quickly. If possible he has the purchase agreement all prepared and ready to sign in advance. It also saves time if the negotiator is qualified to notarize documents such as affidavits.

After purchase agreements are signed they are submitted to the Law Department, which conducts a title examination and prepares the deed and other closing papers. These papers are sent back to the field representative who gets them signed and notarized and attempts to clear any title objections or questions which have been raised.[20]

The Wisconsin Highway Commission is the agency with by far the most extensive experience in negotiating for the acquisition of scenic easements. Negotiating personnel note that landowners are not generally very enthusiastic about selling rights in their land when first approached.

> Farmers can understand the need for new highways which results in a fee condemnation of part or all of their land. They can see more and more cars traveling older, inadequate roads, and they read about predicted future needs. But a farmer who spends a great part of his time in wide open space has trouble understanding why its use needs to be restricted. In addition, a surprising number of rural landowners have at least a vague hope that their lands may have a development potential, resulting in a rich unearned increment. Such a person sees the granting of an easement in perpetuity as a destruction of his capital gains dream.[21]

As an aid to the negotiator in explaining what easements are, how they work, and the need for them, a brochure has been prepared. This brochure and the ability of the negotiator to answer the landowner's questions regarding payment for the easement, the rights he is giving up, the cloud on his title,

and the effect of the easement on land values and property taxes are important factors in clarifying the issues involved in easement acquisition.

As a further aid in clarifying the issues the highway commission redrafts the easement deed, eliminating a lot of legal jargon, and stating plainly the uses of the property which will or will not be permitted in the future (See Appendix L for a copy of the new deed). Field personnel are permitted to look at each parcel of land and make the judgment as to what rights should be conveyed. A list of restrictions is provided as a guide in developing the particular combination best suited for a particular setting (See Appendix M for a copy of this guide). Also, additional provisions not included in the guide may be added if they will help accomplish the objectives. This flexibility in restrictions is the focus of most of the negotiations since the highway commission adheres pretty well to the price established in the appraisal. If an agreement cannot be reached with the landowner, the property is condemned.

The power and the willingness to condemn easements can also be used by the negotiator as an inducement for the property owner to sell an easement. He can assure the owner that if he gives up an easement as part of a conservation area, his flanks will be protected since his neighbors must do the same. There is no danger that other landowners will reap the benefit of what he has done by commercializing or profiting.

Due to the delicate nature of the negotiations and the desire to maintain good public relations to promote the easement acquisition program, Bernard Mullen, Director of the Wisconsin

Highway Commission's Right of Way Division, suggests the use of "top men, /the/ intelligent right of way agents who have the background and know the business of acquisition. These are the people who will help make a success of /the/ job."[22]

Indeed, this point seems to be well taken. As Whyte notes,

> ...some of the easement programs have worked significantly better than others. Many factors are involved, but it is evident that the skill and enthusiasm of the personnel involved are probably the most important of all.
>
> Occupational bias is important. The attitude that agencies take towards easements depends a great deal on whether or not they have been used to working on a continuing basis with landowners. In most states the highway engineers want to buy land in fee and be done with it. Recreation and park officials tend to feel the same way. Forest service and fish-and-game people, by contrast, have been more used to working with landowners and tend to be receptive to any tool which helps them in this mutual relationship. They have been responsible for some of the most successful easement programs, though the news not always seems to reach other conservation agencies down the hall in various capitals.[23]

Costs of Easements

One of the most commonly held notions about conservation easements is that they cost as much as the fee simple. Whyte says, "This is simply not true, but it has been repeated so often in the literature, accumulating footnotes along the way, that it has become a fact in itself."[24] He feels that this misconception is the major reason why there has not been more widespread use of easements.

The greatest mistake in considering easement costs is the failure to distinguish between types of easements. The assumption that easements generally cost almost as much as the fee is largely based on the experience of right of way easements or

flood easements. It is true that these easement costs are likely to run to about 80 percent of the cost of the fee.[25] However, it is one thing to ask a landowner to keep his land looking nice and restrict certain types of development, as in a scenic easement, and quite another to get permission to inundate the land periodically or to build a highway through it, as in the cases of flood and right of way easements. The interests taken in the latter two types of easements are obviously much greater, and therefore should cost more, than the interests which are taken in a scenic easement. It is necessary, therefore, when discussing easement costs to speak in terms of specific types of easements.

There has been considerable experience in Wisconsin and in the Federal Government as well as elsewhere, in the acquisition of various types of easements, and cost information is available. One of the most well documented cases of the cost of scenic easements is Wisconsin's Great River Road easement program. Between 1951 and 1961, easements were secured along fifty-three miles of the road covering 1,579 acres. Prices paid to landowners averaged $19.17 an acre, versus $41.29 for comparable land in the fee simple. Between 1961 and 1964 an additional 2,645 acres of easements were purchased along fifty-nine miles of the Great River Road, and the average payment to the landowners in this period was $20.50; very little more than the figure for the earlier period.[26]

The average payment to landowners for scenic easements taken for the protection of other highways in Wisconsin during the period 1961 to 1964 was $53.50 per acre. "The higher price

of these easements seems to have resulted from the fact that to a large extent they were taken in developing areas, whereas those taken along the Great River Road were in areas where development pressures were less intensive."[27] None of the figures quoted above include the administrative costs incurred during the acquisition procedure, however, as mentioned previously, these would likely be similar in the case of fee simple acquisition. It should also be pointed out that condemnation has been resorted to in about 10 percent of the cases, "...but juries can be extremely generous at times; one recently upped a $250 award to $6,000. The highway department would like the option of disengaging from the purchase when juries ask that kind of money, but under present law it has to go through with the deal."[28]

In 1961 Wisconsin's Conservation Department began acquiring fishing easements along the banks of lakes and streams. Since that time, "They have secured easements on 200 miles of lake and river frontage and at a fraction of the fee simple cost. For each dollar they get about three and a half feet of frontage with easements; only a half foot with fee simple."[29] The easements cost about 30 cents per foot of frontage, as opposed to $2.38 for the fee simple.[30] It should be recognized, however, that the areas acquired by fee acquisition may have other conservation values besides control over watercourses.

New York State's Conservation Department has been buying fishing easements along trout streams for quite a number of years. They have a long history of cost figures, and the increasing price of these easements can be seen from the following table.

TABLE 2

COST HISTORY OF NEW YORK STATE FISHING EASEMENTS

Year	Average Cost/Mile
1936	$114
1940	525
1950	735
1960	940

Source: William H. Whyte, Open Space Action. Report to the Outdoor Recreation Resource Review Commission, Study Report No. 15, (Washington, D.C.: U.S. Government Printing Office, 1962), p. 90.

Since 1950, New York has secured easements along 1000 miles of stream; acquisition costs are currently running about $1,000 a mile.[31]

Wisconsin's Conservation Department has also been purchasing game management or hunting easements since 1961. These easements grant in perpetuity the drainage, filling and burning rights to wetland areas, as well as public fishing, hunting and trapping rights. Since the beginning of the program they have "...covered some 9000 acres with wetland and hunting easements at an average cost of $8.30 an acre. (Comparable fee simple costs; $26.00 an acre.)"[32]

The United States Bureau of Sports Fisheries and Wildlife program to preserve duck nesting and rearing habitat in Minnesota, and North and South Dakota began in 1959. Since the inception of the program through June 30, 1963, the Bureau had acquired the fee on 51,893 acres at an average cost of $27.45 per acre and wetland easements on 19,371 acres at an average cost per acre of $6.41.[33] They now have easements covering 500,000 acres for which they paid an average price of $11.50 an acre.[34]

Thus far in this discussion the examples of easement costs have been drawn primarily from rural areas. It has long been assumed that in urban areas easements would be extremely expensive. This conclusion would seem to be obvious, based upon the very high average cost of open land in urban areas. However, as Whyte points out, the land itself has to be looked at.

> ...If you do, you will find that average land costs can be highly misleading, for they mask all sorts of variations and unexpected opportunities....
>
> Let us take a closer look at the land. Assume a tract of 100 acres for which a developer paid $500,000. The average value was $5,000 an acre. But is each acre worth $5,000? This figure is only an arithmetic average, and it covers a wide variation in the value of different parts of the tract--variation assessors usually take into account as a matter of routine. It is the frontage land, the highly buildable part that the developer was after, and in some cases only a third of the tract may account for the bulk of the value.
>
> The chances are that some of the property is not worth building on at all--a patch of swamp, perhaps, a stream, or an extremely steep hill. What is the development value of these acres? They may have no development value; and if there is any value, the bulk of it will have to be realized by the developer through extensive grading, diking, filling, and such; and this costs him a great deal of money.[35]

Whyte suggests that it is this same land which has little value for development which may be very desirable as open space. And he concludes that, "...it has become apparent that in the urban areas we may find some of the best opportunities of all, for less-than-fee acquisition. Here is where the pressure for more intensive land use is strongest, but it is because of this fact, not despite it, that all the ingredients for some excellent bargains are at hand."[36]

Gifts of Easements

It has been demonstrated above that the cost of conservation easements is substantially below the cost of the fee simple in most instances. Another attribute of the easement concept, which again reflects on costs, is the gift potential for easements. As Whyte points out, "The gift potential for easements has been stronger than was generally expected, and it has turned out to be strongest in the urban areas."[37] The

willingness of developers to donate an easement on open land in exchange for permission to cluster their development on the most buildable areas has already been illustrated. Many other landowners are quite willing to donate easements to public or private conservation agencies, most of which are authorized to accept such gifts.

An example of the potential for gifts of easements has occurred along the Sudbury River.

> The river winds through a lovely valley on the outskirts of Boston. Along its banks lie beautiful expanses of marshlands, which from earliest times have tempered the floods, nourished wild life, and delighted the eye. In the 1950's developers began eying it, and the Massachusetts legislature passed an act envisioning their protection by a combination of state and federal action. The key wetlands were being bought in fee simple by federal Fish and Wildlife Service. The rest of the job would be up to the state.
>
> The then Conservation Commissioner of Massachusetts, Charles Foster...suggested that maybe the local people could work up a scheme that would preserve all of the wetlands. He wasn't too concerned what devices they used just as long as there was a real guarantee of permanence....
>
> The response was almost instantaneous. Within a matter of weeks all the owners who had land along a key stretch had voluntarily given easements on the wetland portions to the local land trust.[39]

There are certain types of landowners who are more susceptible to the idea of giving easements than others. Landowners who live in large estate type areas are often extremely interested in and concerned about the preservation of the scenic attractiveness of the area. These people are usually wealthy, and they generally own the most desirable land on the outskirts of urban areas. When they see that the donation of scenic easements can help to preserve the beauty of the area, and provide their property with flank protection from undesirable development they

can often be induced to give easements. Again this points up the necessity of having the power of eminent domain to ensure that there are no holdouts who would exploit their neighbors.

Landowners, such as farmers, on whose property taxes are increasing might also see advantages in the donation of conservation easements. This is particularly true near urban areas where development pressures are increasing. Not only will the land continue to be assessed at its open space value, rather than on the basis of its development potential, but the landowner can deduct the value of the easement from his federal income tax. (For a more detailed analysis of the tax benefits of easement gifts see Chapter VI.)

FOOTNOTES

[1]J.B. West, "Condemnation of Limited Use Easements," Proceedings of the Sixth Annual Institute on Eminent Domain, April 30-May 1, 1964, (Dallas, Texas: Southwestern Legal Foundation, 1964), p. 114.

[2]For a more detailed examination of the "before and after" method of easement appraisal, see West, pp. 109-133.

[3]William H. Crouch, "Appraisal of Easements and Rights in Land," Conservation Easements and Open Space Conference, (Madison, Wisconsin: Wisconsin Department of Resource Development, 1961), pp. 57-58.

[4]R.B. Colson, "New York's Trout Stream Easement Program," Conservation Easements and Open Space Conference, (Madison, Wisconsin: Wisconsin Department of Resource Development, 1961), pp. 43-44.

[5]Harold C. Jordahl, Jr., "Conservation and Scenic Easements: An Experience Resume," Land Economics, Vol. 39, (November, 1963), pp. 348-349.

[6]Thomas Gose, Manual for Conference Workshops--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), pp. 17-18.

[7]Ibid., p. 18.

[8]Highway Research Board, "Roadside Development Land Acquisition," Highway Research Circular, No. 23, (April, 1966), pp. 8, 10.

[9]Wisconsin Department of Transportation, "A Market Study of Properties Covered by Scenic Easements Along the Great River Road in Vernon and Pierce Counties," Special Report, No. 5, (Madison, Wisconsin: October, 1967), p. 22.

[10]Howard L. Williams and W.D. Davis, "Effect of Scenic Easements on the Market Value of Real Property," Appraisal Journal, Vol. 38, No. 1, (January, 1968), pp. 15-24.

[11]Ibid., p. 24.

[12]Gose, pp. 17-18.

[13]Highway Research Board, "Highway Corridor Planning and Land Acquisition," Highway Research Record, No. 166, (1967) pp. 45-46.

[14]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Inc., 1968), p. 88.

[15]Gose, p. 15.

[16]During the initial stages of the program the Bureau was attempting to negotiate a 20-year easement. However, they changed this policy when it became apparent that landowners were just as willing to sell an easement in perpetuity at a higher consideration.

[17]Jordahl, p. 358.

[18]Ibid., p. 359.

[19]Ibid., pp. 356-359.

[20]Colson, pp. 43-45.

[21]Gose, p. 19.

[22]Conference Proceedings--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), p. (B)-8.

[23]Whyte, The Last Landscape, pp. 92-93.

[24]Ibid., p. 86.

[25]The U.S. Army Corps of Engineers has determined that the average price paid by them for flood easements around reservoirs was 79 percent of the fee value of that land; William H. Whyte, Open Space Action. Report to the Outdoor Recreation Resources Review Commission, Study Report No. 15, (Washington, D.C.: U.S. Government Printing Office, 1962), p. 18.

[26]James A. Olson, "Progress and Problems in Wisconsin's Scenic and Conservation Easement Program," Wisconsin Law Review, (1965), p. 354; Gose, p. 15.

[27]Gose, p. 15.

[28]Whyte, The Last Landscape, p. 88.

[29]Ibid., p. 92.

[30]Ibid., p. 94.

[31]Ibid.

[32]Ibid., p. 92.

[33]Olson, p. 359.

[34]William H. Whyte, "Securing Open Space for Urban America: Conservation Easements," Urban Land Institute Technical Bulletin, No. 36, (1959), p. 92.

[35]Whyte, The Last Landscape, pp. 95-96.

[36]Ibid., p. 95.

[37]Ibid., p. 97.

[38]Ibid., pp. 100-101.

CHAPTER VI

TAXATION AND CONSERVATION EASEMENTS

It has been noted previously that donating or selling an easement creates opportunities for receiving tax advantage. These tax advantages are an incentive to the landowners to have the development potential of their land restricted. They also provide an inducement for the gifts of conservation easements. Tax breaks can be acquired through one or a combination of advantages offered in real property taxes, estate taxes and income taxes. Each of these tax advantages is analyzed below.

Income Taxes

The United States Internal Revenue Service in a recent ruling has clarified what was previously a very confused picture with regard to the income tax advantages of giving an easement as a gift. A few years ago several landowners in the Washington, D.C. area offered the federal government scenic easements on land along the heights above the Potomac River. One of the donors asked for a ruling on whether the value of the easement could be entered as a charitable deduction on her income tax return. In reply the Internal Revenue Service sais that, "...a scenic easement granted to the government restricting the development of one's property, including the type and height of buildings, the cutting of trees, and other matters, would constitute a charitable contribution of a valuable property right."[1] Later the Service broadened the application of its decision by covering the matter in an official ruling which states:

> A gratuitous conveyance to the United States of America of a restrictive easement in real property to enable the Federal Government to preserve the scenic view afforded certain public properties is a charitable contribution.... The grantor is entitled to a deduction for the fair market value of the restrictive easement...; however, the basis of the property must be adjusted by eliminating that part of the total basis which is properly allocable to the restrictive easement granted.[2]

Brenneman feels that the principles set forth in this ruling are applicable to contributions made to non-profit organizations--as defined in Sec. 501(c)(3) of the Internal Revenue Code--as well as to donations to the United States Government.[3] Plimpton also feels the interpretation of the ruling should apply equally to the donation of a conservation easement to a charitable organization.[4] And Latcham and Findley extend their interpretation of the ruling to include donations to a "governmental unit," not just the federal government.[5]

An individual who makes a contribution of a conservation easement to a government agency or to certain non-profit organizations is entitled to deduct up to 30 percent of his adjusted gross income in any tax year as a charitable contribution. If the contribution is in excess of 30 percent of the donor's adjusted gross income for the year, he may carry the excess over for a period of five years. That is in each of the five succeeding years a deduction is permitted for the portion of the excess not previously deducted.[6] On the other hand, a developer who dedicates an easement to a local public authority is allowed a deduction of not more than 5 percent of his adjusted gross income for the taxable year. The excess of the contribution made in any taxable year may be carried forward to the next two succeeding years.[7]

To be deductible, however, the restrictive easement must be made in perpetuity. Although the ruling itself does not mention this, it is explained by the Internal Revenue Service in a later discussion of the ruling.[8]

The subject of income taxes is important not only with regard to gifts of easements, but also when dealing with the sale of easements. Unfortunately there are no direct rulings by the Internal Revenue Service on the income tax effects of sales of conservation easements. Basically though the income tax treatment of easements depends on whether the amount received as payment is classed as ordinary income or capital gains. The Internal Revenue Code provides for a lower tax rate for capital gains than the rate for ordinary income so it is important to decide how the payment should be classified. In order to qualify for capital gains tax treatment it first must be determined that there was a sale and, second, that the sale was of property.

> The first requirement is that of a sale. The only criteria to be met here is that the easement granted should be perpetual in duration. If the transfer of the easement is for a term of years, the payment will be looked on as ordinary income in the form of rent for the land, and will be taxed as such. Thus the grantor should be anxious to grant a perpetual easement to satisfy the sale requirement.[9]

The type of easement granted may be determinative in the decision on the second requirement, as to whether the easement is property. The federal tax court rulings indicate the granting of affirmative easements will be viewed as sales of property so that is fairly clear cut. Unfortunately there have been no direct rulings on the tax treatment of the proceeds of sales of negative easements, however, "It appears that even if the easements are considered negative easements the capital gains

procedure will be available to the taxpayer receiving compensation.[10]

In cases of condemnation the problem of whether the easement is property is eliminated, since the fact that the transaction is an involuntary conversion automatically means that the payment will be given capital gains treatment.

The tax computation is relatively easy if the payment is found to be ordinary income. It is included in the tax return with other ordinary income and taxed at the same rate. If, however, as is most likely, the proceeds of a sale of a conservation easement are to be treated under the capital gains provisions of the Internal Revenue Code, then it is necessary to determine how to compute the capital gain or loss involved in the transaction.

> ...The taxable gain is the difference between the payment received for the easement and the basis of the easement rights. The general rule for determination of the basis of property is that the basis is equal to the original cost to the taxpayer. In the normal situation the landowner has purchased the entire title in fee to the land, and thus there may be some difficulty in computing what portion of the basis should be allocated to the easement rights.[11]

There are at least two methods which can be used for allocating the basis of the entire property between the easement rights conveyed to a public or private agency and the remaining rights held by the fee owner. When the entire property is affected by the easement, the ratio of current easement value to the current value of the full fee interest can be applied to the basis of the full fee interest of the property to arrive at a basis for the easement rights.

The second method of basis allocation can be used when the easement affects only a portion of the taxpayer's property and places severe limitations on the beneficial use of that portion. "This can be treated as a sale of fee title to the portion of the land encumbered. The entire part of the cost of the fee represented by that portion can be considered as the basis and be applied against the payment for the easement."[12]

In situations where no logical method for computing the basis of easement rights exists, the Internal Revenue Code allows the taxpayer to treat the entire payment as a deduction from the basis of the entire property. In this way the tax is postponed until the time when the entire fee is sold.

Estate Taxes

The majority of states and the federal government have taxes on transfers at death, as well as on lifetime gifts in contemplation of death. Generally, however, there is a provision for exemption from tax of the value of land transferred to government for public purposes, or to a private organization for a charitable purpose. Furthermore, the Internal Revenue Code sets no limitations on the amount of the deduction which may be taken under the gift or estate tax laws. While the literature does not specifically discuss the estate tax situation with regard to easements, presumably, since other Internal Revenue Service rulings recognize easements as a legitimate deduction, they would permit the exemption under the gift and estate tax laws as outlined above.[13]

Property Taxes

The effect of easements on real property taxation is an extremely important factor since property taxes recur annually. Real estate taxes are based upon the market value of taxable property. A conservation easement may lower the market value of land by restricting its use. If this occurs, the assessor should measure the decrease, and then reduce the assessed valuation of the land by an amount proportionate to the measured decreasd in land value. Whyte argues,

> In most state constitutions, there are guarantees against assessment at more than fair market value. If a man gives an easement on certain portions of his land, the assessor should recognize this in computing market value. He cannot rightly value it as developable land if there is a binding agreement that it is not developable.[14]

This may be a difficult argument for an assessor to agree with, especially when an area is developing rapidly and is in need of revenue. However, a group of property owners in Maryland has made some progress in convincing the county tax assessor that land restricted by easements should obtain special consideration. And the state assessor has specifically pointed out that easements should be taken into consideration when determining the value of land for assessment purposes.[15]

In other cases there has been less success. The Harvard Law Review notes, "Although it seems self-evident that a property tax cannot be levied upon development values which have been sold or condemned, nevertheless subdividers who dedicate permanent easements to the public sometimes still are assessed for the full value of the land."[16] And in Wisconsin, Olson reported on two limited observations.

> There have been six parcels encumbered by fishing easements in Dane County. All of these parcels except one either have the same or a higher assessed valuation than before the grant of the easement. The one exception is only slightly less and does not reflect the consideration paid for the easement. In 1962 the State Highway Commission attempted to determine whether local assessors made a deduction on their tax rolls on properties encumbered by scenic easements on the Great River Road. The two assessors who were contacted responded that they had not reduced the assessed valuation of any property because of the presence of a scenic easement.[17]

Unfortunately it was not discovered why the assessments in these cases were not reduced. A subsequent study by the Wisconsin Highway Commission in 1967 found that in three townships bordering the Great River Road scenic easements were still not an influencing factor in assessment practices.[18]

In order to encourage local tax assessors to take the affect of easements into consideration when establishing the assessment value of land, the state legislature should include in the enabling act a provision to limit taxes. New York's open space statute has such a provision which states: "After acquisition of any such interest pursuant to this act the valuation placed on such an open space or area for the purposes of real estate taxation shall take into account and be limited by the limitation on future use of the land.[19] Maryland has also passed a law permitting landowners in five counties to grant scenic easements on open space, and receive tax credit in return.[20] The legislation authorizes county governments to accept easements, and, by resolution or ordinance, provide tax credit to the landowners. The tax credit and easements granted would be perpetual. Land named as eligible for tax credit included river basin land, conservation areas, country clubs,

commercial golf courses, driving ranges and land along streams. The act further recognized that "granting of scenic easements by property owners provides the most economical way to preserve the maximum of open space at a minimum cost."[21]

Strictly speaking, however, it is the opinion of most experts[22] that no new legislation should be required. As has been pointed out above, most state constitutions guarantee against assessment at more than fair market value. "If the assessor disregards the easement and values the land on its market value as subdivision land, the landowner has clear legal redress; since he cannot market it as subdivision land the going rate for such land is patently not its fair value."[23] Even without additional legislation land subject to the restrictions of an easement should not be taxed as though it were not subject to these restrictions. However, it should be kept in mind that in order to receive favorable property tax treatment, as in the case of income taxes, the easement must be in perpetuity. Otherwise it will be very difficult to persuade the assessor to overlook the development potential.

The argument has been advanced that if land covered by an easement receives a tax advantage, everyone who wants his taxes reduced will offer an easement, and this, in turn, will place an additional burden upon the remaining landowners. It should be remembered, however, that a public agency must agree to accept the easement, and that they would not accept the easement unless there was a clear public benefit involved. On the other hand, this argument may have some merit for easements held by private organizations. Interests may be accepted by private agencies on

land which is not suitable in the overall planning of the area for open space purposes. Less concern might be given to fulfilling a valid public benefit. However, this problem can be easily eliminated by adopting legislation limiting the tax exemption or reduction to land approved for open space use by an appropriate government agency.

Furthermore, although it is true that a landowner whose property is restricted by an easement is not taxed as much as unrestricted property, it is also true that his demands for municipal services and facilities are not great. Indeed, studies have shown that since residential areas quite often require more in services than they contribute in taxes, some communities would be better off financially if their land was not fully developed into residential uses.[24] Siegel goes so far as to suggest that lower tax rates on open space may, in the long run, improve values for the community and result in greater taxable value.[25]

Since real property taxes are usually based on the market value of land, the question again arises of how to measure the effect of the easement upon the market value. It would seem logical that the price paid for the easement is the amount by which the market value of the land is reduced, and, therefore, the assessed value should then be decreased by this amount. In certain instances, however, this would not hold true. For example, it would be difficult to determine how much the value of land restricted by an easement has decreased, when the easement prohibits development of a sort which was never intended. Also, bargaining power, or compensation for negotiating, or for

a nuisance factor incurred from the easement may have had a bearing upon the amount paid for an easement. It is apparent, therefore, that the price is not always indicative of the value of the grant. In these cases the best solution is for the assessor to conduct a reevaluation of the property after the sale of the easement.[26]

Whyte sums up his feelings on the impact of easements on a landowner's property taxes in this statement: "If a man gives an easement, he will not necessarily get a reduction in his present taxes; in all likelihood, the assessor has been valuing the land only at its open-space value. What the easement does is ensure that he will keep on valuing it that way and not raise the assessment on the basis of the development potential."[27]

FOOTNOTES

[1]Northern Virginia Regional Planning and Economic Development Commission, "Open Space Easements," National Capital Open Space Project Technical Report, No. 4, (September, 1965), p. 13, quoting Letter from the Internal Revenue Service to Alfred H. Moses, attorney for Joanne B. Bross, donor of the easement in question, April 10, 1964.

[2]U.S. Internal Revenue Service Ruling 64-205.

[3]Russell L. Brenneman, Private Approaches to the Preservation of Open Land, (The Conservation and Research Foundation, 1967), p. 70.

[4]Oakes A. Plimpton, Conservation Easements--Legal Analysis of "Conservation Easements" as a Method of Privately Conserving and Preserving Land, (Washington, D.C.: The Nature Conservancy), mimeo., p. 29.

[5]Franklin C. Latcham and Roger W. Findley, "Influence of Taxation and Assessment Policies on Open Space," in Frances W. Herring, ed., Open Space and the Law, (University of California at Berkeley: Institute of Governmental Studies, 1965), p. 67.

[6]Internal Revenue Code, sec. 170(b)(5); For a detailed discussion of how an individual can maximize his deduction see Brenneman, pp. 72-73.

[7]Internal Revenue Code, sec. 170(b)(2); For a detailed discussion of how a developer can maximize his deduction see "The Homes Association Handbook," Urban Land Institute Technical Bulletin, No. 50, (1964), pp. 351, 354-355.

[8]See Internal Revenue Bulletin, No. 1964-30, (July 27, 1964), pp. 6-7.

[9]Jacob H. Beuscher, "Scenic Easements and the Law," Conference Proceedings--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), p. 54.

[10]Thomas Gose, Manual for Conference Workshops--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), p. 56.

[11]Ibid.

[12]Ibid.

[13]Ibid., pp. 31-32; Brenneman pp. 74-75.

[14]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Ltd., 1968), p. 82.

[15]Northern Virginia Regional Planning and Economic Development Commission, Open Space Easements, p. 14.

[16]"Techniques for Preserving Open Spaces," Harvard Law Review, Vol. 75, No. 8, (June, 1962), p. 1637.

[17]James A. Olson, "Progress and Problems in Wisconsin's Scenic and Conservation Easement Program," Wisconsin Law Review, (1965), pp. 364-365.

[18]Wisconsin Department of Transportation, "A Market Study of Properties Covered by Scenic Easements Along the Great River Road in Vernon and Pierce Counties," Special Report No. 5, (Madison, Wisconsin: October, 1967), p. 12.

[19]New York Minicipal Law, sec. 247(3).

[20]Laws of Maryland, 1965, ch. 669.

[21]Ibid., ch. 668.

[22]For example Siegel, Whyte, and Latcham and Findley.

[23]William H. Whyte, "Securing Open Space for Urban America: Conservation Easements," Urban Land Institute Technical Bulletin, No. 36, (1959), p. 38.

[24]For example see Ruth Rusch, "Look How Open Space Can Hold Down Your Taxes," Planning and Civic Comment, Vol. 28, No. 3, (September, 1962), pp. 24-26.

[25]Shirley Adelson Siegel, The Law of Open Space, (New York: Regional Plan Association, Inc., January, 1960), p. 43.

[26]For further information on the effect on real property taxes of a reduction in market value due to easement restrictions see Olson, pp. 366-372.

[27]Whyte, The Last Landscape, p. 82.

CHAPTER VII

PRIVATE CONSERVATION ORGANIZATIONS

Private conservation organizations have been discussed above with regard to taxation and property rights. The focus in this section will be upon their role in acquiring easements and their organization. Historically, private groups have been extremely successful in preserving open land, but they have generally dealt with the acquisition of the fee simple title. Lately, however, they too have turned some of their attention to the possibilities of obtaining conservation easements. Although public agencies have the most experience in the use of conservation easements, private conservation organizations also have an important role.

The Role of Private Conservation Organizations

Private conservation organizations have a unique role to play in preserving open spaces. For example, they can act to acquire easements on open land in situations where the local government refuses to do so. They are also capable of acting swiftly when there is a need for speed, while the more cumbersome processes of government might miss opportunities for important acquisitions. "There are many indications that important resources are being lost while the slow realization of the 'quiet crisis' is coming to the minds of the public and politicians and the translation of this realization into legislative and administrative action is taking place."[1] The Nature Conservancy, a private conservation organization in the U.S., has often stepped in to acquire land when swift action was needed or when

public agencies didn't have funds available. They maintain a revolving fund to buy land public agencies would like to have. When the governmental agency secures the necessary public funds, the Nature Conservancy sells the land to them and puts the proceeds back into the revolving fund.[2]

There are other reasons for the need for private action. It may be desirable to impose stricter controls over the easement areas than public officials deem necessary or politically possible. Private groups can also focus on certain types of areas, such as marshes, in which public agencies may not be interested. Or, like the Midwest Open Land Association in the greater Chicago area, they can make a unified coordinated effort to preserve open spaces over a large area which may cross state and local boundaries. Another justification for private control is the protection it offers against political or administrative pressures to divert the open space into other uses such as highways or public buildings.

Private conservation organizations can also be important to landowners who wish to ensure that their land will remain open after their death. In some areas the public agencies may not be authorized or are not prepared to accept easements. By granting an easement to a private group, the landowner's wishes can be maintained and his successors will be compelled to keep the land open. In another situation the landowner may want to convey an easement to a public agency and ensure that the restrictions imposed by the easement are maintained. Sometimes he can do this by conveying the title directly to the public agency, and creating a right of enforcement in a private corporation.

But this is not always possible. For this reason the most legally effective procedure is for the landowner to convey an unrestricted interest to a private organization. This group can then transfer these interests to the government agency for open space purposes and reserve to itself the private right of enforcement.[3]

Private groups might increase their effectiveness by qualifying for direct state or federal grants for acquiring easements on open space and recreation lands. Not much has been written on this subject, however, public financial support is already being used in the case of private schools and hospitals. As the demand for open space and recreation increases perhaps the role of private conservation organizations will be officially recognized and encouraged by making funds available for their preservation activities.

The role of private conservation organizations has been concisely summed up by Brenneman who says:

> The powers and reactions of government, as a historical fact, have by and large proved inadequate, or at the least untimely. As a consequence, there is a very real need for private action to insure the preservation of selected areas of open land, whether it be for recreational, conservation or purely aesthetic purposes. Private programs for the preservation of open land need not clash with the comprehensive programs of government, but rather they can and should be important supplements to these programs.[4]

Types of Organizations

Essentially a private conservation organization is a legal person with perpetual existence. Presumably it is managed by a self perpetuating board which selects as its successors persons with similar conservation objectives. Within this concept there are several alternative types of association for

persons interested in the conservation of open space. Each of these types has important attributes and restrictions which must be considered in accordance with the goals of the organization to be formed. For example, an unincorporated voluntary association, even if operating with a formal procedure, is not recognized in most states as a legal entity able to hold title to or interests in land. In most cases the formation of a corporation or a trust or some combination of both is the best choice.

If one of the goals of the organization is to hold title to land likely to be used by the public, the limited liability features of the corporate form will probably make it preferable. The powers to be held by a corporation or a trust are largely determined by the creators themselves, and, as noted above in Chapter IV, there are only a few restrictions on the powers assignable to either.[5]

A unique public-private cooperative experiment now exists in the Lake George area of New York. An area extending one mile back from the lake has been placed under the Lake George Park Commission. This is a public body with powers to act to preserve the amenities and natural characteristics of the area. The Commission relies mostly on voluntary agreements to achieve these ends. Even their zoning power is subject to the agreement of all landowners within the proposed zone. However, they are empowered to "acquire interests or rights in real property...for the purpose of prohibiting, restricting, or controlling the use of such real property for commercial purposes."[6] The success of the Commission has not yet been assessed.[7]

Another type of public-private arrangement for preserving open space is commonly found in planned unit developments like cluster housing. As has been discussed in Chapter III, the developer grants an easement to a public agency to insure the preservation of the open space. A private organization of property owners is organized to manage and keep up the open space. This approach has already been tried in California, but it is too early to assess the results.

FOOTNOTES

[1]Russell L. Brenneman, Private Approaches to the Preservation of Open Land, (The Conservation and Research Foundation, 1967), p. 91.

[2]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co. Inc., 1968), p. 62.

[3]Thomas Gose, Manual for Conference Workshops--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), pp. 28-29.

[4]Brenneman, p. 81.

[5]Gose, p. 30.

[6]New York Conservation Law, sec. 843.

[7]Gose, pp. 33-34; Brenneman, pp. 89-90.

CHAPTER VIII

ENFORCEMENT OF CONSERVATION EASEMENTS

A program of conservation easement acquisition is not complete without dealing with the problems of enforcing the restrictions imposed by the easements. The best possible acquisition program would be rendered useless if the controls established in the agreement were not adhered to. The National Park Service had the earliest experience with easement enforcement along the Natchez Trace and Blue Ridge Parkways, and it was here that many of the problems first became apparent. The Wisconsin Highway Commission has drawn from that experience as well as their own, and altered their enforcement procedures to make them more workable. This additional experience has lent itself to suggestions for even more improvements, and these are paralleled by unique enforcement methods in other areas.

Problems

The National Park Service began their scenic easement acquisition program along the Natchez Trace and Blue Ridge Parkways in the 1930's. The problems which ensued originated from the method used to acquire the easements. The purchase of the easements was negotiated by state highway personnel, and once the easement was granted the National Park Service took over responsibility for the enforcement of the restrictions. Since the state agent was only concerned with getting the landowner's signature on the conveyance, he did not take the time to carefully explain the conditions of the agreement or create

an understanding of the landowner's position. Consequently there have been frequent misunderstandings between the government and the landowners as to the meaning of the restrictions. The lack of understanding was compounded when succeeding owners came along who had not signed the agreement, and did not feel bound by it, or who did not even know about it.[1]

Although there has been relatively little litigation, the Park Service has experienced considerable difficulty in enforcing the restrictions. The Park Rangers were responsible for enforcement, and they attempted to be familiar with activities in the easement area. However, they had no effective authority except on land owned by the federal government in fee simple. For this reason the Rangers tried to discourage misuse of the easement area through personal contact, by pointing out the possible penalties for violation. In addition, the local and U.S. District Courts were reluctant to issue injunctions in advance to prevent violations of the agreement. Although in at least two cases enforceable injunctions were issued (See Appendix N).[2]

As a result of these problems experienced by the National Park Service, the Department of Interior discontinued its policy of acquiring scenic easements except in rare cases. They turned instead to a full fee purchase program for both parkways.

Solutions

The Wisconsin Highway Commission scenic easement program, which began in the early 1950's has also had its share of enforcement problems. However, these problems have been minimized by

examining the previous experience of the National Park Service, and by administrative action which is receptive to new ideas and techniques for aiding enforcement. They have found that almost all of the violations which have occurred are the result of the landowner misunderstanding the terms of the agreement, not of willful transgression. To remedy this they have redrafted the conveyance to state plainly, without legal jargon, the uses of the property which will or will not be permitted. Then the negotiator must "...state, restate, clarify and reclarify the rights and duties of all parties to the agreement at the time of negotiation."[3] As a further aid to enforcement all of the state purchasing agents keep a "negotiator's diary." In it are summaries of every conversation with the landowner, signed by the agent and telling in detail exactly what was discussed at the meeting or during the telephone call. In addition, some highway districts maintain complete records showing the location, terms and conditions of each easement, and a history of each property. As changes are made, or variances granted, they are noted in these records.

Much of the success of the easement enforcement along the Great River Road is due to the Highway Commission staff who "...are obviously conscientious in identifying violations early before they get out of control. All of the men seem aware of the importance of the program and are imbued with a sense of respnsibility to do the best job possible."[4] Enforcement responsibilities are assigned to individuals so that responsibility is specific. These men carry out periodic inspections of the easement areas, and report any violations. If any are

found the landowner is given notice to correct the violation, and if he fails to do so a court injunction is obtained. Occasionally, under the terms of the easement, state agents enter the property to remove the violation. The local courts have been fully informed of the easement program, and have been more cooperative in issuing injunctions than was the case with the National Park Service.

The most common type of easement violation is the erection of new billboards. Under a statutory procedure landowners get notice to remove the violating signs. If they do not comply after a second notice, the road crews enter the property and remove the signs. The signs are held for 30 days and if not claimed, they are destroyed.[5]

To insure success a systematic program of communications between agencies and owners whose land is encumbered was established. Landowners are encouraged to contact the Commission for information at any time. If a variance is requested, the decision is made on the basis of the effect of the proposed use upon the scenic attractiveness of the environment. If it is decided there will be no detrimental effect, then the use is permitted even if it is not allowed under the easement. Sometimes in return the Highway Commission barters with the landowners to remove objectionable items or discontinue objectionable uses. R.C. Leverich, District Chief of Right of Way reports, "Generally, we are having excellent results by this common sense type of approach."[6]

To further aid the enforcement agent who must be familiar with varying provisions of each easement deed, it has been

suggested that a book of plats be provided which shows the restrictions on each parcel. Another suggestion to simplify the problems of policing is to standardize the easements into three or four groups. However, this latter suggestion would mean surrendering the flexibility sought earlier to enable the easement to conform to the individual characteristics of each site.

Just as the easement should fit the characteristics of each site, so should the methods of enforcement be adapted to the requirements of different situations. For example, the U.S. Fish and Wildlife Service has adopted a unique method of checking to see that the restrictions of their wetland easements in the pothole country are being maintained. Periodically, field men fly over the area and take aerial photographs. By checking previous photos they can quickly spot where wetland has been filled in or protective cover removed.[7]

The problems involved in enforcing conservation easement agreements have been well documented, as have the solutions to these problems. It can be seen that a certain amount of administrative effort is required for adequate enforcement, however it should be kept in mind that easements are not alone in this respect. All the other methods of preserving open space and recreation areas, including fee simple acquisiton also require expenditures for maintenance and enforcement.

FOOTNOTES

[1]Thomas Gose, Manual for Conference Workshops--Scenic Easements in Action, (Madison Wisconsin: University of Wisconsin, December 1966), pp. 11-12; Norman Williams, Land Acquisition for Outdoor Recreation--Analysis of Selected Legal Problems. Report to the Outdoor Recreation Resources Review Commission, Study Report No. 16, (Washington, D.C.: U.S. Government Printing Office, 1962), p. 44.

[2]Howard L. Williams and W.D. Davis, "Effects of Scenic Easements on the Market Value of Real Property," Appraisal Journal, Vol. 38, No. 1, (January, 1968), pp. 16-19; Norman Williams, pp. 44-45.

[3]Gose, p. 23.

[4]Ibid.

[5]Ibid.

[6]Robert C. Leverich, "Appraisal, Communication, Negotiation, Administration," Conference Proceedings--Scenic Easements in Action, (Madison, Wisconsin: University of Wisconsin, December, 1966), p. 47.

[7]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Inc., 1968), p. 93.

CHAPTER IX

ACCEPTABILITY OF CONSERVATION EASEMENTS

The question of whether the conservation easement device is an acceptable means of preserving open space and recreation areas is not unanimously resolved. Experts in the field most intimately connected with conservation easements disagree; public agencies who have used, or are considering the use of easements for their recreation and open space programs disagree; and landowners who are or may be affected by the taking of rights in their land disagree. Obviously there is no unanimity of opinion on this matter. However, there does appear to be a clear consensus among these groups that there are some values attached to the use of conservation easements which make their use an acceptable means of preserving open space and recreation areas. In order to better understand these differing viewpoints, each group will be examined separately.

The Experts

Most of the people who are knowledgable in the field of conservation easements are willing to concede the overall value of the approach. Siegel says:

> Acquiring less than a fee, the whole bundle of property rights in land, has been common for centuries, and there can be no objection to it in principle....
>
> In our opinion, public acquisition of such easements in appropriate cases is a public purpose warranting both the expenditure of tax funds and the exercise of the eminent domain power against recalcitrants. [1]

And the Harvard Law Review lends its support, saying: "Perhaps

the most significant proposal for the preservation of open space contemplates the acquisition of development or conservation easements."[2]

However, the less enthusiastic experts are careful to qualify their approval by pointing out many of the technical difficulties which have or might possibly arise. For example, Krasnowiecki and Strong say, "Although the acquisition of development rights has great merit and we see for it some functions..., as a means of shaping the character, direction, and timing of community development it suffers from a number of defects...."[3] Quite often the analysis which follows seems to revolve almost entirely around the problems, which have been discussed in previous sections of this work, thereby emphasizing the negative aspects.[4] It should be noted, however, that these sorts of analyses are most often found in the writings of the early 1960's when the technique was less well developed. Since that time many of the problems have been resolved through experience and legal and administrative findings. For example, as has been demonstrated in the previous section, many of the problems of enforcement have been resolved in the past few years through experience, and cases such as Kamrowski v. State and the Internal Revenue Service ruling 64-205 have clarified much of the uncertainty which previously existed in legal and taxation issues involving easements.

William Whyte, perhaps the leading proponent of conservation easements, is also one of the most thoroughly objective students of the subject. His experience and knowledge of the field have enabled him to place the use of this technique

within its proper perspective.

> To understand the benefits of the easement approach, it is important to understand its limitations. One of the reasons some observers have been critical of the device is that they have asked too much of it. They have considered it as a means for sweeping control of whole regions. In this scheme of things, a public agency would acquire easements for all the open land, not merely to keep it open but to stage development....But the problem is not the limitations of the easement device; it is the expansiveness of the goal.[5]

Public Agencies

Local public agencies also generally agree as to the validity of the conservation easement approach to open space preservation. That is, they agree in the published portions of their recreation and open space plans, a great many of which include proposals for the use of easements. For example, a 1965 report by the San Mateo County Planning Commission in California says:

> Portions of the Skyline area which need more protection than can be afforded through regulatory ordinances in order to maintain their scenic qualities should be kept in their present state through the acquisition of scenic easements or development rights by a governmental agency or private non-profit corporation.[6]

And the Marin County, California "Program Statement on Parks and Recreation" adopted by the Board of Supervisors in January, 1966 says:

> In addition to outright purchase by public funds, strong and continuing efforts will be made to acquire park areas and/or reserve green belts and open spaces by negotiation or gifts, scenic easements and development rights.[7]

And, furthermore, the implementation section of an Alameda County, California study which was adopted by the Board of Supervisors in May, 1966, suggests:

1. Application of existing legislative programs and development policy for additional legislative tools to acquire land, open space easements or development rights in scenic corridors.

2. Application to state and federal government bodies by the County Board of Supervisors and city councils for grants for acquisition of property, or open space easement or development rights in the scenic corridor, and for landscaping along all routes in the county.[8]

However, in practice the attitudes of many of these agencies undergo substantial changes from what they publish in their plans. In the case of San Mateo County it was learned that no scenic easements had been acquired in spite of the recomendations of the plan, which went so far as to include maps indicating the areas to be covered by easements. When asked why no easements had been acquired one planning staff member replied that, "It probably was not politically feasible to buy the easements, and the property owners were not willing to donate them."[9] In response to another question, this staff member also indicated that funds would be hard to raise in the county for purchasing easements, although they had not checked into the possibility of getting a federal grant for this purpose.

The following year after the county planning department study was published a citizens' study committee was appointed by the Board of Supervisors. The committee produced a report[10] (See Appendix O) recommending the prompt acquisition of scenic easements. At the same time they placed such severe restrictions on these acquisitions "in order to prevent any hardships to property owners," that the original recommendation for prompt acquisition was virtually rendered void. One committeeman reported that the study group was composed mostly of

property owners in the affected area who were concerned primarily with the resale value of their land. He also mentioned that the county had not offered any money to the property owners for the interests in their land, and the question of how the restricted land would be assessed was unclear.[11] In the face of resident attitude and the problem of raising the funds to acquire the easements the Board of Supervisors has apparently found it more politic not to act.

In Marin County there has been a similar experience. In spite of their adopted policy to make "strong and continuing efforts" to acquire easements in areas outlined in their plan, none have been acquired--except in the process of subdivision. The head of the recreation section of the Marin County Planning Department gives the following explanation:

> In an area such as ours (subject to extremely heavy pressure for urban development) the difference between the cost of easements vs fee acquisition is so minimal that anything less than fee can hardly be justified. The main reason is Marin's mediocre soils are unsuitable to more intensified agriculture which could offset increasing assessment values. It leads to the plainly discernable attitude by large land owners to yield to development as soon as the breaking point between assessment value and agricultural costs is reached. To cover such land with a conservation easement (or purchase of development rights) will remove all long-range potentials, forcing the owner to a near fee price unless such restriction builds up land values in adjacent parcels under the same ownership. Voluntary "scenic" easements have been recorded in some subdivision maps where doing so plainly enhanced the market value of the home sites. Where the objective is scenic highway or trail corridor preservation (which can obviously be initiated only by government) the endeavor faces not only conglomerations of small parcels but the very juxtaposed intent of strip commercial or dense residential development.[12]

Apparently the section of the above explanation dealing with the cost of the easements is based upon actual appraisals by the

County Assessor's Office in situations where the county had a real interest in acquiring an easement.[13]

The results of the Alameda County experience have been the same as the previous two counties--no conservation easements have been acquired in the areas suggested by their plans. The main reason easements haven't been implemented here is the lack of money--although the Board of Supervisors had officially approved the application to higher governmental levels for grants "for acquisition of property, or open space easements or developmental rights." Other reasons given were an erroneous one concerning the lack of state and federal enabling legislation, and the rather nebulous one that the public and law makers were not educated in the easement concept.[14]

Not all local experience with conservation easements has been so unproductive as the above three cases. For example, Monterey County, California as of October 1, 1968 had acquired scenic easements covering 771.00 acres (318.14 acres in perpetuity, and 452.86 acres valid until 1992) outside of subdivisions. Within approximately a dozen subdivisions the county now holds permanent easements covering 546.71 acres, and they have approved tentative maps of subdivisions with an additional 180.30 acres of easements to be dedicated.[15]

In addition to Monterey County's success with their easement program at least two other Bay Area counties, Santa Clara and Marin, are acquiring easements dedicated by developers through subdivision. Thus far they have only acquired small numbers of easements covering small areas. However, these programs are relatively new and some growth is expected.[16]

State governments, in spite of Wisconsin's success with conservation easements, and New York's and Minnesota's continuing acquisition programs for fishing easements, have shown no indication of acceptance and implementation of the concept. Several states have investigated the possibilites of the use of easements,[17] however only a few if any have actually acquired easements.

California, in the last two or three years, has obtained about $2\frac{1}{4}$ million of federal funds for the purchase of scenic easements along federal aid highways. So far they have located and made up a list of easement acquisition projects in areas throughout the state. This has been a relatively slow procedure because of the lack of experience in the use of conservation easements among the right of way agents. At this time there are no completed acquisitions.[18]

The federal government in spite of the National Park Service's problems with the use of conservation easements, has not given up in its use of this device. In 1964 The Department of Interior condemned an easement on the 47 acre Merrywood estate located along the Palisades of the Potomac River near Washington, D.C. at a cost to the government of $745,000.[19] Besides this the Fish and Wildlife Service is still acquiring wetland easements, and the federal grants are available to state and local agencies under various acts[20] for the acquisition of interests in land.

Two recent studies at the federal level have also added weight to the acceptability of the use of conservation easements. The President's National Commission on Urban Problems, which recently released the results of its two year study, recommends

that, "...states and localities, with the assistance of the federal government, use public land purchase and compensation techniques for the control of development in situations where such approaches would accomplsih better results than traditional police power regulations."[21]

The findings of President Johnson's Council on Recreation and Natural Beauty in their report From Sea to Shining Sea, A Report on Our National Heritage are even more explicit.

> The council finds that since potential park and other recreational lands in and around metropolitan areas are disappearing at an alarming rate and land costs are continuing to rise, open space and recreational funds should be devoted primarily to acquisition or reservation of new areas rather than immediate development of existing areas. Purchase of land or development rights or use of easements instead of full title represent the most effective ways of preserving open space in the path of urban sprawl.[22]

Landowners

Land developers, as has been discussed above, have found the dedication of conservation easements advantageous to certain forms of development, especially cluster development. The Homes Association Handbook has pointed this out to developers by saying, "The best way of assuring that the preservation of open space is encouraged and that the interests of all parties are protected is the device of granting open space easements to the local authority."[23] Developers like the idea and have been helping to spread it.[24] However, a study conducted by the Wisconsin Highway Commission revealed that in at least one area along the Great River Road, small developers who were building homes "...within the easement area contended that they could have sold more lots than the easement allowed. This, coupled with the loss of profit

from the additional homes they could have constructed, made them dissatisfied with the scenic easements."[25]

Commercial property owners who were interviewed along another part of the Road often expressed complete dissatisfaction with the easement provisions. They especially objected to the sign restrictions limiting the size, location, and use of signs within the easement area. These owners believed that signs were necessary to attract motorists traveling along the highway. "Many owners were also dissatisfied with the easement provisions restricting the expansion or rebuilding of existing commercial establishments. They asserted that it was necessary to allow for commercial expansion compatible with local needs and development."[26]

Residential landowners on the other hand, generally had a different view. In interviews with a number of them in one county the Highway Commission found that:

> New property owners affected by the easement revealed a feeling of apathy or indifference toward the easement restrictions. Many of the property owners indicated that although they were aware of certain frontage and use restrictions, they were unable to relate their participation with the stated intent of the scenic easement. This range of indifference may be a result of the property owners' inability to associate the preservation of the scenic beauty in his area with the public interest. Thus the property owner reveals a passive but guarded acceptance of the easement program.[27]

The study further concluded that some of the property owners' apathy toward scenic easements was due to the presence of undesirable development immediately outside of the easement area. It was also noted that respondents to a questionnaire sent to non-resident owners approved of the easements, and all

of the residential landowners interviewed in another area also approved of the easements.

Other landowners have expressed their acceptance of the concept through their willingness to donate gifts of conservation easements to public and private authorities. In the Washington, D.C. area there has been no "...indication that homeowners in the area, upon whose property...easements have been imposed, feel that the government's action has had a detrimental effect on their property."[28]

FOOTNOTES

[1]Shirley Adelson Siegel, The Law of Open Space, (New York: Regional Plan Association, Inc., January, 1960), p. 29.

[2]"Techniques for Preserving Open Spaces," Harvard Law Review, Vol. 75, No. 8, (June, 1962), p. 1635.

[3]Jan Krasnowiecki and Ann Louise Strong, "Compensable Regulations for Open Space a Means of Controlling Urban Growth," Journal of the American Institute of Planners, Vol. 29, No. 2, (May, 1963), p. 90.

[4]For example see Norman Williams, Land Acquisition for Outdoor Recreation--Analysis of Selected Legal Problems. Report to the Outdoor Recreation Resources Review Commission, Study Report No. 16, (Washington, D.C.: U.S. Government Printing Office, 1962), pp. 37-55.

[5]William H. Whyte, The Last Landscape, (Garden City, New York: Doubleday and Co., Inc., 1968), pp. 79-80.

[6]San Mateo County Planning Commission, Proposed Plan for the Skyline Scenic Route, (Redwood City, California: November, 1965), p. 18.

[7]Marin County Planning Department, Parks and Recreation Plan 1990, (San Rafael, California: 1965), p. 54.

[8]Alameda County Planning Commission, Scenic Route Element of the General Plan, (Hayward, California: May, 1966), p. 23.

[9]Mr. Dalton, Planner, San Mateo County Planning Department, Redwood City, California, Interview with the Writer, December 27, 1968.

[10]Report of the Skyline Study Committee, (San Mateo County, California: February 26, 1966), mimeo.

[11]Donald Aitken, Member Skyline Study Committee, San Mateo County, California, Interview with the Writer, December 27, 1968.

[12]Walter S. Horchler, Planner, Marin County Planning Department, San Rafael, California, Letter to the Writer, November 7, 1968.

[13]Horchler, Reply to a Questionnaire sent by the Writer, November 7, 1968.

[14]Betty Croly, Planner, Alameda County Planning Department, Hayward, California, Interview with the Writer, December 31, 1968.

[15]Beth Schardt, Chief Administrative Assistant, County of Monterey Planning Department, Salinas, California, Letter to the Writer, November 7, 1968.

[16]Duane R. Ellwood, Planner, Ordinance Administration Section, Santa Clara County Planning Department, San Jose, California, Interview with the Writer, January 2, 1969; Edward Ross Parkerson, Planner, Marin County Planning Department, San Rafael, California, Interview with the Writer, January 3, 1969.

[17]For examples California, Georgia, New York and Rhode Island.

[18]Donald P. Van Riper, Principal Landscape Architect, California Division of Highways, Sacramento, California, Interview with the Writer, December 30, 1968.

[19]Whyte, The Last Landscape, p. 99.

[20]For example the Wildlife Restoration Act, 50 STAT 917 (1937) as amended; the Fish Restoration Act, 64 STAT 430 as amended; the Housing Act, sec. 702, (1961) as amended 1967; the Highway Beautification Act, sec. 319, (1965); the Food and Agriculture Act, sec. 103, (1962).

[21]Quoted from ASPO Planning, Vol. 35, No. 1, January, 1969, p. 4.

[22]Ibid., p. 8.

[23]"The Homes Association Handbook," Urban Land Institute Technical Bulletin, No. 50, (1964), p. 225.

[24]Whyte, The Last Landscape, p. 96.

[25]Wisconsin Department of Transportation, "A Market Study of Properties Covered by Scenic Easements Along the Great River Road in Vernon and Pierce Counties," Special Report, No. 5, (Madison, Wisconsin: October, 1967), p. 20.

[26]Ibid., p. 14.

[27]Ibid., p. 11.

[28]Ross D. Netherton and Marion Markham, Roadside Development and Beautification: Legal Authority and Methods, Part I, (Washington, D.C.: Highway Research Board, 1965), p. 69.

SUMMARY AND CONCLUSION

Open space is one of the most important and most neglected parts of the urban fabric. It has often been viewed only in its negative aspects, without seeing the vital functions that well planned and carefully preserved open space is capable of performing. The rush of rapid urbanization has consumed much land which might better have been left open to exploit its values to society for recreation, food production, flood prevention, aesthetics, and even for shaping urban development. In order for open space to fulfill these functions the use of the land must be logically planned in advance of development. Two methods for determining which lands should be left open have been advanced in recent years; one method is termed environmental corridors, and the other method is called physiographic determinism. Both of these approaches stress the importance of identifying the natural qualities of the land, and then controlling development so these values are not lost. The pattern of land qualities which emerges from the use of these methods clearly shows the relationship between the land that should remain open and the natural features of the landscape.

Conservation easements are only one of several techniques for preserving open space and recreational areas. Various approaches involving the use of the police power, the power of taxation, compensable regulations, fee and less than fee simple acquisition have been illustrated. Conservation easements fit into the latter category, however, it should be remembered that these techniques must be used in concert for an effective open space preservation program.

Conservation easements are not a new idea, although, in spite of use by the National Park Service in the 1930's and the Wisconsin Highway Commission since 1952, they were not widely known until 1959. Since they were first applied they have evolved into a wide range of applications to serve the interests of society in conservation, recreation, public services, aesthetics and in structuring urban growth.

During the 19th century the legal concept of the individual's rights in private property was very strong. The 20th century has seen a shift in emphasis toward the interests of society as a whole in controlling the use of property. This has had an important bearing on the legal aspects of conservation easements. In order for governments to acquire land or interests in land they must be able to show that it is for a public purpose. Since the courts' interpretations of a public purpose have been broadening, the way has been paved for a fuller use of the conservation easement technique. Also, as the use of this technique has spread, valuable experience and reinforcement has been gained through legal decisions involving the use of easements.

One of the most widely held misconceptions about conservation easements is that they cost almost as much as the fee simple title. In fact, the cost of an easement is very largely a function of the kind of easement and the restrictions it imposes, i.e. whether it is a scenic easement or a flood easement. The cost also reflects the techniques of appraisal and negotiation, the possibility of a gift, the effect of the easement on land values, and to a large extent the enthusiasm of the

acquisition personnel. The experience, thus far, with most kinds of conservation easements, clearly indicates that a substantial savings can be realized through the purchase of easements rather than the fee simple.

The use of conservation easements has very great tax implications to landowners involved in an easement program. It has been clearly established that gifts of easements to a public agency or a private non-profit group are deductible from federal income and estate taxes. In the case of a sale of an easement to a public body it has not been definitely determined whether this should receive favorable tax treatment by being classed as capital gains or whether it should be treated as ordinary income. However, the weight of opinion seems to be that income from the sale of an easement will be treated as capital gains. Another important tax concern of an owner of land restricted by an easement is the property tax. In theory if the value of the property is reduced by the easement the assessment should be reduced accordingly. However in practice, limited studies have shown that easements were not considered in most assessment procedures.

Private conservation organizations, until this time have not been very active in acquiring conservation easements. However, there is an important place for them in an easement acquisition program, particularly in situations where public agencies cannot act swiftly enough to make an acquisition or don't have sufficient available funds. They also provide a valuable service in that their activities are not bound by jurisdictional boundaries, and they are not as subject to political pressures as public agencies. In addition they can act as

a perpetual enforcement agency to see that the restrictions are maintained on easements willed to public agencies. The form of organization adopted by the private group has important implications for its capacity to participate in an easement program.

The problems of enforcing the restrictions imposed by easements have largely centered on the landowner's confusion as to the conditions of the agreement. It has been found that by clarifying the terms of the agreement, and by instituting a systematic program of communications between the agencies and owners, many of the enforcement problems have been eliminated.

Finally, the question of whether conservation easements are an accepted means of preserving open space is subject to differing views. Most experts in the field are willing to concede the values of the aproach, however many are careful to point out the problems. Governments have not shown any widespread acceptance of the technique, although there does appear to be an increasing use of it and interest in it. Landowners too are not united in their views. Owners of commercial properties and some small developers are dissatisfied with the restrictions imposed by conservation easements. Residential landowners and other developers, on the other hand, are either apathetic towards the easements or favor them.

The findings of this analysis of conservation easements can now be brought to bear on the focus of the study: the effectiveness of the use of conservation easements as a means of preserving open space.

Perhaps the best way of demonstrating that conservation easements are in fact an effective means of preserving open

space is to point to the existing successful easement programs being carried out in Wisconsin, and New York, and by the federal Fish and Wildlife Service as well as by a few local jurisdictions in California and elsewhere. The unsuccessful easement program of the National Park Service and the untried proposals of several state and local government agencies should not detract from an assessment of their effectiveness. The Park Service failure was due largely to the lack of knowledge of how to carry out an easement program in the early years of the use of this technique. And the reason many easement programs have never been implemented is the lack of understanding in public agencies of what conservation easements are and how they function.

Not only have the successful programs shown that conservation easements can be used effectively, but also they have been instrumental in clarifying the issues and solving the problems which are inevitable in the application of a developing concept. The evolution of the technique has now progressed to the point where enough answers have been found and improvements made in the acquisition, taxation and enforcement procedures to make easement acquisition a valuable asset to open space programs.

The effectiveness of conservation easements is also indicated through their acceptance by the people who are responsible for implementing or recommending the implementation of this technique, as well as by many of the landowners who are affected by an easement program. All of these people look at at easements from their own viewpoint and introduce their own concerns and prejudices into their attitudes about easements. Not all

of them endorse the use of easements, however there is enough substance in the approach to present at least some appeal to both public officials and landowners.

Thus it can be concluded that the first part of the hypothesis has been proven correct, i.e. CONSERVATION EASEMENTS ARE AN EFFECTIVE MEANS OF PRESERVING OPEN SPACE.

Since it has been demonstrated that conservation easements are effective in preserving open space the analysis should now be extended to determine at what level of government they can best be implemented.

The land which should remain as open space to serve society's needs can logically be determined by a study of the natural features of the environment. These natural features are not restricted by local jurisdictional boundaries, and therefore large scale contiguous open space land often extends through several jurisdictions. Since each jurisdiction is motivated by its own concerns and prejudices, without regard to others, an open space program using conservation easements based on natural features can best be implemented by a level of government with jurisdiction over the entire area preserved for open space functions. This is true even in situations where a variety of open space preservation techniques are to be used. Although the methods of preserving open space which involve the use of the police power or offer real property tax advantages are primarily under the control of local governments, nevertheless it is the important integration of techniques between jurisdictions which can best come from a higher level of governments.

An analysis of the use of conservation easements shows that state and federal governments have had the most experience in their use, however it is evident that there are specific functions served by open space which can best be realized and preserved through action by only one of the levels of government. For example, the federal government is the appropriate level of government for the acquisition of wetland easements as a part of the interstate and international waterfowl concern. Another example is the local governments' use of easements to preserve open space within subdivisions, since they are the level of government which is concerned with subdivision control. The preservation of scenic beauty through the use of scenic easements along state highways is an example of the logical selection of state level of government for that purpose.

The state governments are responsible for authorizing the use of conservation easements for preserving open space through the passage of enabling legislation. By allowing the state agencies to acquire the easements instead of the local governments the necessity of all the lower levels of government making independent decisions and passing legislation of their own to acquire easements would be obviated. Furthermore, the legal knowledge of the workings of conservation easements may not be available in many local jurisdictions whereas at higher governmental levels this knowledge can be retained in fewer hands which are effective over broader areas.

Appraising and negotiating for conservation easements requires trained personnel. As argued above, this training might not be available in local jurisdictions, but at higher

levels a few specially trained individuals can handle appraisal and negotiation over a wider area. This training and more central control over appraisal would also ensure more fair and uniform compensation to the landowners. Since the enforcement of easement restrictions has been shown to be so vitally connected with acquisition procedure the same agencies which do the acquiring should be responsible for enforcement at whatever governmental level that might be.

As has been pointed out with regard to the costs of acquiring easements, the federal government will pay up to 50 percent of the cost of the acquisition. However, in a large scale easement acquisition program this might still involve considerable sums of money for local governments. For that reason it would be better to spread the costs over as large a tax base as possible within the area benefited by the program.

It has been shown that tax advantages provide incentives for the gifts of conservation easements, and that they can ensure that the property owner who sells an easement is treated fairly. Each level of government has its own tax policies, and each one can make a contribution toward the success of a conservation easements program by seeing to it that property owners who sell or give easements are afforded fair tax treatment. It has not been determined which level of government is in the best position to promote the use of conservation easements through offering tax advantages.

The role of private conservation organizations should not be overlooked. They have a very important role to play in acquiring easements. As far as coordinating their activities

with various governments is concerned it can perhaps be concluded that this would be easier at higher levels of government where there are not so many jurisdictions to cope with. Furthermore, since private organizations depend on the states for their organizational authorization, closer liaison with this level of government might promote the authorization of organizational capabilities more conducive to easement acquisition.

The acceptance of the use of conservation easements has not been overwhelming at any level of government, or by property owners either. By and large this has been the result of a lack of knowledge and misconceptions about what conservation easements are and how they work. The encouragement of the use of easements can best be accomplished by placing them in the hands of knowledgable people who can demonstrate their value to property owners and other officials. Since this requires a degree of specialized knowledge it is probably most practical to carry out at higher levels of government.

Through the process of this analysis it can be seen that various factors in the study mitigate for different conclusions as to which level of government can best implement conservation easement programs. No single level of government is ideally equipped to carry out such programs for all purposes and under all circumstances. Each level of government as well as private conservation organizations have a special contribution they can make depending upon the purposes the easement is to serve and the circumstances under which it is to be acquired and held. Therefore, it can be concluded that only <u>some</u> conservation

easements SHOULD BE IMPLEMENTED BY LOCAL PUBLIC AGENCIES; and that the choice as to which level of government or private organization can best implement a program should be based on a knowledge of the easements' purposes and the circumstances surrounding it, as well as on a knowledge of the capabilities of the various public and private bodies.

APPENDIX A

EASEMENT RIGHTS ACQUIRED BY THE U.S. BUREAU OF SPORTS FISHERIES, AND WILDLIFE

"The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or recurring due to natural causes on the above-described tract, by ditching or any other means: by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligation or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions metioned above."

APPENDIX B

WISCONSIN FISHING AND HUNTING EASEMENT

THIS INDENTURE made this.....day of....., 19...., by and between.....and ....., his wife, of ..... County, Wisconsin, Grantor..; and the State of Wisconsin (Conservation Commission), Grantee.

WHEREAS, the Grantor.., ...the owner.. in fee simple of certain real estate which is in, near to, or adjacent to a Wisconsin Conservation Department project area now known as.....and located in.....County, Wisconsin, and

WHEREAS, the Grantee, through its State Conservation Commission, desires to develop, operate and maintain such lands as a public hunting and/or public fishing area for use and benefit of the general public,

NOW, THEREFORE,

WITNESSETH: For and in consideration of the sum of $.....paid by the Grantee to the Grantor.., receipt whereof is hereby acknowledged, and in consideration of the covenants hereinafter contained, the Grantor..hereby agree..to sell, transfer, grant, and convey to the Grantee, upon acceptance by said Grantee, an easement and right in perpetuity to develop, operate and maintain a public hunting and/or fishing area on the following described real estate, which acceptance must be made by the Grantee within .....months from the date hereof:

the location of said easement is shown on Exhibit "A" attached, hereto, and made a part hereof.

The price to be paid to Grantor..by Grantee for such easement is $.....

The purpose and intent of this instrument is to create an easement for the use of the above described premises by the general public for fishing and hunting.

It is mutually covenanted and agreed by and between the parties hereto that the use of premises as a fishing and hunting area, for the use and benefit of the general public shall include the following rights, privileges and easements:

1. The general public shall have the right to hunt game on said premises and to catch and take fish in the waters thereon by legal means and for this purpose to travel in and along such waters and to utilize the lands above described to the extent necessary for the full enjoyment of this right, privilege and easement.
2. The Grantee shall have the right: (a) To develop such waters by installation and maintenance of current deflectors, covers, and retarders and any other means deemed necessary by the Grantee for the purpose of fostering, improving and enhancing fishing therein without interference with Grantor..use of land; and (b) To post such signs and posters along said lands as are deemed necessary and suitable to delineate the above lands and locate them for public use; and (c) To protect from erosion the land above described by mechanical means such as fencing and crossovers or by the planting of trees, plants or shrubs where and to the extent deemed necessary for the protection of the stream or lake.
3. The Grantor..reserve..to themselves, their heirs and assigns, the right (a) to the use of the said land, including the right of fishery in said stream, insofar as such right is not inconsistent with the use of the same as a public fishing and hunting area and with the rights, privileges and easements hereby granted, and (b) to use the water in the stream for domestic purposes including watering cattle and other stock.

The Grantee agrees to assist the Grantor..in correcting any conditions which are detrimental to the Grantor..resulting from such use, within six months following receipt of a written request for such assistance made to it by the Grantor.., within six months from the time the alleged damage occurred.

The Grantor..further agree..to release the Grantee from any claims of damage which may arise as a result of floods and flash floods on the lands described on the previous page.

To have and to hold the said easement hereby granted, unto the Grantee forever.

A covenant is hereby made with the State of Wisconsin that the Grantor..hold..the premises described on the previous page included in the "restricted area" by good and perfect title; having good right and lawful authority to sell and convey the same; that the premises are free and clear from all liens and encumbrances whatsover except as hereinafter set forth.

The Grantor.., for themselves, their heirs, executors, administrators, grantees, successors, and assigns, further covenant and agree that they will neither lease nor convey any other easement in any way affecting said "restricted area" without first securing the written permission of the State Conservation Commission of Wisconsin or its successor or successors.

And.....being the owner.. and holder..of.....certain.....lien..... ..... which is.....
(Insert detail concerning lien)
against said premises, do..hereby join in and consent to said conveyance free of said lien.

WITNESS the hands and seals of the Grantor..and of any person joining in and consenting to this conveyance on the day and year hereinbefore written.

APPENDIX C

WISCONSIN WETLANDS EASEMENT

THIS INDENTURE made this.....day of.....,
19...., by and between.....and
....., his wife, of.....
County, Wisconsin, Grantor..; and the State of Wisconsin (Conservation Commission), Grantee.

WHEREAS, the Grantor..,.....the owner..
in fee simple of certain real estate which is in, near to, or adjacent to a Wisconsin Conservation Department project area now known as.....,and located in.....County, Wisconsin, and

WHEREAS, the said lands contain and include wetland, marsh and water areas which the Grantee desires to obtain, protect and preserve.

NOW, THEREFORE,

WITNESSETH: For and in consideration of the sum of $.....paid by the Grantee to the Grantor..,
receipt whereof is hereby acknowledged, and in consideration of the covenants hereinafter contained, the Grantor..hereby agree..to sell, transfer, grant, and convey to the Grantee, upon acceptance by said Grantee, an easement and right in perpetuity to any and all portions of the following described real estate, including the right of access thereto, which acceptance must be made by the Grantee within.....months from the date hereof:

the location of said easement being shown on Exhibit "A" attached, hereto, and made a part hereof.

The price to be paid to Grantor..by Grantee for such easement is $.....

The Grantor.., for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid land as wetland, including streams, springs, lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or hereafter occurring on the above-described tract by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any of said wetlands by ditching or any other means; by not filling in with earth or any other material, any low areas or said wetlands; and by not burning any areas covered with marsh vegetation.

It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their heirs, successors, assigns, lessees, licensees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, and burning provisions mentioned above.

To have and to hold the said easement hereby granted, unto the Grantee forever.

A covenant is hereby made with the State of Wisconsin that the Grantor..hold..the premises described on the previous page included in the "restricted area" by good and perfect title; having good right and lawful authority to sell and convey the same; that the premises are free and clear from all liens and encumbrances whatsoever except as hereinafter set forth.

The Grantor.., for themselves, their heirs, executors, administrators, grantees, successors, and assigns, further covenant and agree that they will neither lease nor convey any other easement in any way affecting said "restricted area" without first securing the written permission of the State Conservation Commission of Wisconsin or its successor or successors.

AND.....being the owner..
and holder..of.....certain.....lien...
.....which is.....
(Insert detail concerning lien)
against said premises, do..hereby join in and consent to said conveyance free of said lien.

APPENDIX D

MARIN COUNTY, CALIFORNIA
SUBDIVISION EASEMENT DEED

The undersigned also hereby dedicates for public use all Drainage Easements, Public Utilities Easements, and View Easements as shown on said map, such easements as shown to be kept open and free from permanent buildings and structures of any kind.

The Equestrian and Hiking Easements shown upon Lots 7 and 13 are expressly not dedicated to public use but are reserved for the exclusive use of the undersigned, its successors and assigns.

That the subscribers to this statement are all who are necessary to pass clear title to the lands shown upon this map exclusive of streets already dedicated.

Signed_____

APPENDIX E

CALIFORNIA SCENIC EASEMENT DEED

*Approved as to form
by Attorney General
October 23, 1946

THIS INDENTURE, made this day of , 194 , by and between as Grantors and State of California, Grantee,

WITNESSETH:

WHEREAS, the said Grantors, are the owners in fee of the real property, hereinafter described, situate in Tuolumne County, California, in the Town of Columbia, and within the boundaries of the proposed Town of Columbia State Park; and

WHEREAS, the said State of California owns certain real property adjoining the said property of the said Grantors, or adjacent thereto, which property constitutes a portion of Town of Columbia State Park, and which park is a part of the State Park System of the State of California; and

WHEREAS, the State Park Commission of California has determined that the greatest use and benefit to be derived from said State Park by the people of the State of California is through the maintenance and preservation of said State Park and the surrounding area in its present natural state of scenic and historical attractiveness; and

WHEREAS, the said land of said Grantors likewise has certain attractive scenic features; and

WHEREAS, it has been determined by the said State Park Commission of California that the preservation and conservation of the scenic and historical area adjacent to lands owned by the State in the park and the securing, by the State, of a scenic easement, over, across and upon the said lands of the said Grantors is necessary to the extension and development of said State Park System; and

WHEREAS, the said Grantors are willing, for the consideration hereinafter named, to grant to the State of California the scenic use as hereinafter expressed of their said land and thereby the protection to the present scenic attractiveness of said area which will result in the restricted use and enjoyment by the Grantors of their said property because of the imposition of the conditions in connection therewith hereinafter expressed;

NOW THEREFORE, for and in consideration of the premises and the sum of One Dollar to the Grantors in hand paid, the receipt whereof is hereby acknowledged, said Grantors do hereby grant and convey unto the State of California, an estate, interest and scenic easement in said real estate of said Grantors, of the nature and character and to the extent hereinafter expressed to be and to constitute a servitude upon said real estate of the Grantors, which estate, interest, easement and servitude will result from the restrictions hereby imposed upon the use of said property of said Grantors, and to that end and for the purpose of accomplishing the intent of the parties hereto said Grantors covenant on behalf of themselves, their heirs, successors and assigns, with the said Grantee, its successors and assigns to do and refrain from doing, severally and collectively, upon the Grantor's said property, the various acts hereinafter mentioned it being hereby agreed and expressed that the doing and the refraining from said acts, and each thereof, upon said property is and will be for the benefit of the said State Park hereinbefore mentioned, of the State of California, and will help preserve the Town of Columbia as a Historic Site.

The restrictions hereby impose upon the use of said property of the Grantors, and the acts which said Grantors so covenant to do and refrain from doing upon their said property in connection therewith are and shall be as follows:

1. That no structures of any kind will be placed or erected upon said described premises until application therefor, with plans and specifications of such structures, together with a statement of the purpose for which the structure will be used, has been filed with and written approval obtained from the said State Park Commission;

2. That no advertising of any kind or nature shall be located on or within said property without written approval being first obtained from the State Park Commission;

3. That no painting or exterior surfacing which, in the opinion and judgment of the said State Park Commission, are inharmonious with the landscape and general surroundings, shall be used on the exterior of any structures now located on such property, or which may, as hereinbefore provided be constructed thereon;

4. That no structual changes or additions shall be made to any of the buildings on said property until an application therefor has been made to and written approval thereof obtained from said State Park Commission;

5. That all new plantings by the Grantors shall be confined to native plants characteristic of the Columbia State Park region, except flowers, vegetables, berries, fruit trees and farm crops;

6. That the general topography of the landscape shall be maintained in its present condition and that no excavation or topographic changes shall be made without the written approval of the State Park Commission;

7. That no use of said described property, which, in the opinion and judgment of said State Park

Commission, will or does materially alter the landscape or other attractive scenic features of said land, or will be inconsistent with State Park rules and regulations, or with the proper operation of a State Park, other than those specified above shall be done or suffered without the written consent of the said State Park Commission.

8. The land of the Grantors, hereinabove referred to and to which the provisions of this instrument apply, is situate in the County of Tuolumne, State of California, and is particularly described as follows, to-wit:

EXCEPTING AND RESERVING to the Grantor:

a. The right to maintain all of the buildings now existing and if all or any of them shall be destroyed or damaged by fire, storm, or other casualty, to restore the same in conformity with the design and type of building of the historic period which the State Park has been established to commemorate; the plans to be submitted and approved by the State Park Commission as provided in Paragraph 1 hereof;

b. Nothing in this instrument shall be construed to affect the right of the Grantors to construct on said premises wells, cistern, cellars, and septic tanks necessary to the maintenance of the property now being constructed or may hereafter be approved for construction by the State Park Commission.

c. If at any time the State of California shall abandon the Town of Columbia State Park, then on the happening of such event all the rights and privileges and easements by this instrument granted and given to the State shall cease and determine to the same effect as though this instrument had never been executed by the Grantors.

TO HAVE AND TO HOLD unto the said State of California, its successors and assigns forever. This grant shall be binding upon the heirs and assigns of the said Grantors and shall constitute a servitude upon the above described land.

IN WITNESS WHEREOF the Grantors have hereunto set their hands the day and year in this instrument first above mentioned.

STATE OF CALIFORNIA)
COUNTY OF) ss.

On this _____ day of _____, 19 ___, before me, _____, a Notary Public in and for said County, duly commissioned, personally appeared _____
_____
_____
known to me to be the person____ whose name _____ subscribed to the foregoing instrument, and acknowledged to me that ____ he ____ executed the same.

WITNESS my hand and official seal:

_____
Notary Public in and for the County of _____State of California.

BE IT RESOLVED, that Newton B. Drury and Everett E. Powell be, and they are each hereby, authorized to accept in writing deeds or grants conveying to the State of California, as Grantee, real estate or any interest therein, or easements thereon, the purchase of which is authorized by the State Park Commission and thereby consent, for and on behalf of said Grantee, to the recordation thereof in accordance with the provisions of Section 27281 of the Government Code of the State of California.

I HEREBY CERTIFY the foregoing is a full, true and correct copy of the resolution adopted by the California State Park Commission at its meeting held August 30, 1952.

_____
Executive Secretary

In accordance with the foregoing resolution, I, the undersigned, hereby accept the conveyance hereto attached from _____ to the State of California _____ day of _____, 19_____.

_____

APPENDIX F

WISCONSIN SCENIC EASEMENT DEED

THIS CONVEYANCE made on the.....day of ....., 19..., between.....[name deleted].... of Town of Holland, La Crosse County, State of Wisconsin, hereinafter called FIRST PARTIES, and the State of Wisconsin, hereinafter called SECOND PARTY, acting through the State Highway Commission of Wisconsin,

WITNESSETH: WHEREAS, the FIRST PARTIES are the owners in fee simple of certain real estate which is near to or adjacent to a certain highway now known as S.T.H. 93, which real estate is located in La Crosse County, Wisconsin, and is more particularly described as follows:

The NE-1/4 - NW-1/4 and the NW-1/4 - NW-1/4, Sec. 36, T 18 N, R 8 W.

Now being used for building site and agriculture or horticulture uses, all conforming to permitted uses.

AND WHEREAS, the said highway is so located as to be a logical portion of the proposed Mississippi River National Parkway, the SECOND PARTY, through its State Highway Commission, desires to construct the said highway to standards appropriate for such Parkway, and therefore desires to preserve, insofar as reasonably is possible, the natural beauty of the roadsides, and to prevent any unsightly developments that will tend to mar or detract from such natural beauty or to degrade the character of the project as constructed, or result in danger to travel on the highway, and to that end to exercise such reasonable controls over the lands within the restricted areas described hereinafter as may be necessary to accomplish such objectives,

NOW, THEREFORE, in consideration of the sum of $150.00 paid by the SECOND PARTY to the FIRST PARTIES, receipt whereof is hereby acknowledged, the FIRST PARTIES hereby sell, transfer, grant, and convey to the SECOND PARTY an easement and right in perpetuity to any and all portions of the real estate hereinbefore described (exclusive of any acquired and recorded highway right of way) described as follows:

Beginning in Sec. 25, said town and range, on the west line approximately 12.7 feet north of the southwest corner thereof; thence along a reference line S 89° 48' E, 1989.5 feet (this portion of restricted area being 350 feet in width lying to the south of the above described reference line); thence S 13° 44' E, 1362.0 feet (this portion of restricted area being 350 feet in width, lying to the east of the above described reference line and being bounded on the north and south by the respective boundaries of said NE-1/4 - NW-1/4 ..... which portion is hereby designated as the "restricted area" within which:

(1) no building or premises shall be used and no building shall hereafter be erected or structurally altered except for one or more of the following uses:

(a) Single family residences or tracts of not less than 5 acres.

(b) General farming, including farm buildings, except fur farms and farms operated for the disposal of garbage, rubbish, offal or sewage.

(c) Telephone, telegraph or electric lines or pipes or pipe lines or micro-wave radio relay structures for the purpose of transmitting messages, heat, light or power.

(d) Uses incident to any of the above permitted uses, including accessory buildings.

(e) Any use existing on the premises at the time of the execution of this easement. Existing commercial and industrial uses of lands and buildings may be continued, maintained and repaired, but may not be expanded nor shall any structural alteration be made.

(2) No dump of ashes, trash, sawdust or any unsightly or offensive material shall be placed upon such restricted area except as is incidental to the occupation and use of the land for normal agricultural or horticultural purposes.

(3) No sign, billboard, outdoor advertising structure or advertisement of any kind shall be erected, displayed, placed or maintained upon or within the restricted area, except one sign of not more than 8 square feet in area to advertise the sale, hire or lease of the property or the sale of any such products as are produced upon the premises.

(4) The conditions of this easement shall not prevent any permanent excavation or works necessary to the occupation or use of the restricted area for purposes of the permitted uses.

(5) No trees or shrubs shall be removed or destroyed on the land covered by this easement, except as may be incidental to the permitted uses.

(6) The grant of this easement does in no way grant the public the right to enter such area for any purpose.

To have and to hold the said easement hereby granted, unto the SECOND PARTY forever.

A covenant is hereby made with the State of Wisconsin that the FIRST PARTIES hold the above-described premises, included in the "restricted area" by good and perfect title; having good right and lawful authority to sell and convey the same; that the premises are free and clear from all liens and encumbrances whatsoever except as hereinafter set forth.

The FIRST PARTIES, for themselves, their heirs, executors, administrators, grantees, successors, and assigns, further covenant and agree that they will neither lease nor convey any other easement in any way affecting said "restricted area" without first securing the written permission of the State Highway Commission of Wisconsin or its successor or successors.

And.....[name deleted]....being the owner.. and holder . . . of a certain mortgage lien which is .....against said prem-
(Insert detail concerning lien)
ises, does hereby join in and consent to said conveyance free of said lien.

WITNESS the hands and seals of the FIRST PARTIES and of any persons joining in and consenting to this conveyance on the day and year hereinbefore written.

APPENDIX G

SANTA CLARA COUNTY, CALIFORNIA
EXAMPLE FORMAT FOR DEDICATION OF DEVELOPMENT RIGHT EASEMENT ON COMMON OPEN SPACE

THIS INDENTURE made this _____ day of _____

by and between _____

as Grantor and the County of Santa Clara, a political subdivision of the State of California, as Grantee;

WHEREAS, the real property described in Exhibit "A", which is attached hereto and by reference incorporated herein, is in a Residential Planned Development Zoning District; and

WHEREAS, the Official Development Plan for said Residential Planned Development Zoning District, which was adopted by the Board of Supervisors of the County of Santa Clara on _____, is filed in the office of the Clerk of the Board of Supervisors of the County of Santa Clara; and

WHEREAS, said Official Development Plan is the zoning for said district; and

WHEREAS, the intent of said zoning is, in part, to create open space that is to be maintained and controlled by the owners of said property and their successors in interest, but that is to be accessible and available for the leisure and recreational use of the occupants of the Residential Planned Development District; and

WHEREAS, the real property described in Exhibit "B", which is attached hereto and by reference incorporated herein, is designated on the Official Development Plan as open space; and

WHEREAS, such open space is for the benefit of the land in the Residential Planned Development District described in Exhibit "A".

NOW, THEREFORE, Grantor grants, dedicates, and conveys to Grantee and its successor in interest a continuing right and easement to restrict the use of the property described in Exhibit "B" in accordance with the Official Development Plan and to take any action necessary to prevent any of the following:

1) the construction of buildings, structures, advertising signs, and other facilities on said property not shown on said Official Development Plan; or

2) the use of said property for off-street parking and loading purposes; or

3) the dumping of trash, weeds, or any unsightly or offensive material on said property; or

4) any other use not contemplated by the Official Development Plan and the requirements of the Residential Planned Development Zoning District.

Grantor retains all rights not dedicated including:

1) the right to maintain, preserve, protect, and control said real property; and

2) the right to landscape, to provide recreational uses, and to maintain said open space; and

3) the right to use and develop the property in any way both consistent with the restrictions herein imposed and contemplated by the Official Development Plan and the requirements of the Residential Planned Development Zoning District.

Without limiting the foregoing Grantor covenants, promises, and agrees that the real property described in Exhibit "B" shall be left vacant, free, and open as an easement and servitude between Grantor and Grantee and its successor in interest and that no part of said property shall be built on in any way whatsoever not shown on said Official Development Plan adopted by the Board of Supervisors of the County of Santa Clara.

Grantor further covenants, promises, and agrees that Grantor shall not at any time build or cause to be built any buildings, structures, advertising signs, or other facilities on the property described in Exhibit "B" not shown on said Official Development Plan adopted by the Board of Supervisors of the County of Santa Clara, nor shall Grantor use said property for off-street loading or parking purposes, or for dumping of trash, weeds, or any unsightly or offensive material on said property.

If, at any time the property described in Exhibit "B" or any portion thereof, shall be hereafter condemned by any public agency, including the Grantee, then and in that event this conveyance, insofar as it affects the portion condemned, shall become null and void and all right, title, interest and estate of the Grantee in the portion condemned shall revert to and be revested in the Grantor, its successors and assigns.

It is understood and agreed that these dedications, grants, conveyances, easements, servitudes, promises, covenants, and agreements shall be binding upon the agents, heirs, administrators, executors, assigns, and successors in interest of Grantors that these dedications, grants, conveyances, easements, servitudes, promises, covenants, and agreements shall run with the land, and that for the purposes of this instrument, the land described in Exhibit "B" shall be the servient tenement and the land built on under the Official Development Plan adopted by the Board of Supervisors of Santa Clara County shall be the dominant tenant.

This dedication shall be forever, but if the property described in Exhibit "B" is no longer in a Residential Planned Development Zoning District or under any similar regulation imposed by the Public body having jurisdiction the Grantor or his successors in interest shall have the right to re-enter and power to terminate this dedication, and to the possession of the land to hold, own, and possess the same in the same manner and to the same extent as if this conveyance had never been made.

Executed this _____ day of _____.

_____
Grantor

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

On this _____ day of _____, 19___, before me, _____ a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared

_____

_____

known to me to be the person__ described in and whose name__ _____ subscribed to the attached instrument, and acknowledged to me that _he_ executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

_____
Notary Public in and for the County
of Santa Clara, State of California

This is to certify that the interest in real property conveyed by the Development Right Easement dated _____ from _____

_____

to the County of Santa Clara, a political subdivision of the State of California, is hereby accepted by order of the Board of Supervisors of the County of Santa Clara on _____, and the Grantee consents to recordation thereof.

DATED: _____

By _____
Chairman of the Board of Supervisors

LJA:DE:ra 5-12-64

APPENDIX H

WISCONSIN FLOWAGE EASEMENT

THIS INDENTURE made this .....day of....., 19...., by and between.....and ....., his wife, of..... County, Wisconsin, Grantor..; and the State of Wisconsin (Conservation Commission), Grantee.

WHEREAS, the Grantor..,.....the owner.. in fee simple of certain real estate which is in, near to, or adjacent to a Wisconsin Conservation Department project area now known as.....and located in.....County, Wisconsin, and

WHEREAS, the Grantee, through its State Conservation Commission, desires to flow said lands with water by means of dams, dikes and other works, for the use and benefit of the general public.

NOW, THEREFORE,

WITNESSETH: For and in consideration of the sum of $.....paid by the Grantee to the Grantor.., receipt whereof is hereby acknowledged, and in consideration of the covenants hereinafter contained, the Grantor..hereby agree..to sell, transfer, grant, and convey to the Grantee, upon acceptance by said Grantee, the perpetual right, power, privilege and easement at any and all times hereafter to cause by the erection of dams, dikes or other works the water of the .....river, creek or watercourse to flow back on, over and under or be withdrawn from the following described lands, together with all the rights, easements, privileges, and appurtenances which will be required or needed for the right of backing and flowage and also all riparian rights of every kind in the fast and unflowed lands described herein, including the right for all of the general public to go upon and across said lands for any lawful purpose, which acceptance must be made by the Grantee within.....months from the date hereof:

the location of said easement being shown on Exhibit "A" attached, hereto, and made a part hereof.

The price to be paid to Grantor..by Grantee for such easement is $.....

To have and to hold the said easement hereby granted, unto the Grantee forever.

A covenant is hereby made with the State of Wisconsin that the Grantor..hold..the above-described premises included in the "restricted area" by good and perfect title; having good right and lawful authority to sell and convey the same; that the premises are free and clear from all liens and encumbrances whatsoever except as hereinafter set forth.

The Grantor.., for themselves, their heirs, executors, administrators, grantees, successors, and assigns, further covenant and agree that they will neither lease nor convey any other easement in any way affecting said "restricted area" without first securing the written permission of the State Conservation Commission of Wisconsin or its successor or successors.

And.....being the owner.. and holder..of.....certain.....lien... .....which is.....
(Insert detail concerning lien)
against said premises, do..hereby join in and consent to said conveyance free of said lien.

APPENDIX I

CALIFORNIA EASEMENT ACT

CHAPTER 1658, STATUTES 1959

An act to add Chapter 12 (commencing at Section 6950) to Division 7 of Title 1 of the Government Code, relating to the purchase of interests in real property by counties and cities and to the preservation of open spaces and areas for public use and enjoyment.

The people of the State of California do enact as follows:

SECTION 1. Chapter 12 (commencing at Section 6950) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 12. PURCHASE OF INTERESTS AND RIGHTS IN REAL PROPERTY

6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

6951. The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.

6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

6953. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, and that any county or city may acquire by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

6954. For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

APPENDIX J

NEW JERSEY GREEN ACRES LAND ACQUISITION ACT OF 1961

INTRODUCED MARCH 27, 1961

Referred to Committee on Agriculture, Conservation and Economic Development

AN ACT concerning the acquisition of lands for recreation and conservation purposes, governing the expenditure of money for such purposes, appropriating $60,000,000.00 from the State Recreation and Conservation Land Acquisition Fund for such expenditure, and supplementing Title 13 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. This act may be cited as the "New Jersey Green Acres Land Acquisition Act of 1961."

2. The Legislature hereby finds that:

(a) The provision of lands for public recreation and the conservation of natural resources promotes the public health, prosperity and general welfare and is a proper responsibility of government;

(b) Lands now provided for such purposes will not be adequate to meet the needs of an expanding population in years to come;

(c) The expansion of population, while increasing the need for such lands, will continually diminish the supply and tend to increase the cost of public acquisition of lands available and appropriate for such purposes;

(d) The State of New Jersey must act now to acquire and to assist local governments to acquire substantial quantities of such lands as are now available and appropriate for such purposes so that they may be used and preserved for use for such purposes; and

(e) The sum of $60,000,000.00 is needed now to make such acquisition possible.

(f) Such sum will be made available by the sale of bonds authorized by the New Jersey Green Acres Bond Act of 1961, if the same be approved by the people;

(g) It is desirable to appropriate said sum for prompt use and to specify the manner in which the Legislature now proposes that such sum, and such other funds as may be appropriated, shall be used for such purposes.

3. Except as the context may otherwise require:

(a) "Commissioner" means the Commissioner of Conservation and Economic Development or his designated representative;

(b) "Local unit" means a municipality, county or other political subdivision of this State, or any agency thereof.

(c) "Recreation and conservation purposes" means use of lands for parks, natural areas, forests, camping, fishing, water reserves, wildlife, reservoirs, hunting, boating, winter sports and similar uses for public outdoor recreation and conservation of natural resources; and

(d) "Land" or "lands" means real property, including improvements thereof or thereon, rights of way, water, riparian and other rights, easements, privileges and all other rights or interests of any kind or description in, relating to or connected with real property.

4. The commissioner shall use the sum appropriated by this act from the proceeds of the sale of bonds under the New Jersey Green Acres Bond Act of 1961, and such other sums as may be appropriated from time to time for like purpose, to acquire lands for recreation and conservation purposes and to make grants to assist local units to acquire lands for such purposes, subject to the conditions and limitations prescribed by this act.

5. In acquiring lands and making grants to assist local units to acquire lands the commissioner shall:

(a) seek to achieve a reasonable balance among all areas of the State in consideration of the relative adequacy of area recreation and conservation facilities at the time and the relative anticipated future needs for additional recreation and conservation facilities;

(b) insofar as practicable, limit acquisition to predominantly open and natural land to minimize the cost of acquisition and the subsequent expense necessary to render land suitable for recreation and conservation purposes;

(c) wherever possible, select land for acquisition which is suitable for multiple recreation and conservation purposes;

(d) give due consideration to co-ordination with the plans of other departments of State Government with respect to land use or acquisition. For this purpose, the commissioner is authorized to use the facilities of any interdepartmental committee or other agency suitable to assist in such co-ordination.

6. Lands acquired by the State shall be acquired by the commissioner in the name of the State. They may be acquired by purchase or otherwise on such terms and conditions as the commissioner shall determine, or by the exercise of the power of eminent domain in the manner provided in chapter 1 of Title 20 of the Revised Statutes. This power of acquisition shall extend to lands held by any local unit.

At least 60 days prior to any acquisition the commissioner shall submit a statement of any such intended acquisition to each of the following bodies in the Department of Conservation and Economic Development: the Water Policy and Supply Council, the Planning and Development Council, the Fish and Game Council and the Shell Fisheries Council.

7. The commissioner shall prescribe rules and regulations governing the administration, operation and use of lands acquired by the State under this act to effect the purpose of this act.

8. Lands approved by the commissioner for acquisition by a local unit with State assistance shall be acquired by and in the name of the local unit and may be acquired in any manner authorized by law for the acquisition of lands for such purposes by the local unit.

9. A grant to assist a local unit to acquire lands for recreation and conservation purposes shall not be made under this act until:

(a) The local unit has applied to the commissioner on forms prescribed by him describing the land acquisition for which a grant is sought, stating the recreation and conservation purpose or purposes to which such lands will be devoted, stating the facts which give rise to the need for such lands for such purpose, enclosing a comprehensive plan for the development of the local unit approved by its governing body, and stating such other matters as the commissioner shall prescribe;

(b) The commissioner shall have prescribed the terms and conditions under which the grant applied for will be made; and

(c) The local unit shall have filed with the commissioner its acceptance of such terms and conditions, and has otherwise complied with the provisions of this act.

10. A grant may not be made under this act until the local unit has adopted regulations governing the administration, use and development of the lands in question, and until the commissioner shall have approved such regulations. No such regulation may be altered thereafter without the approval of the commissioner.

11. Grants under this act shall be made by the State Treasurer upon certification of approval by the commissioner. Each grant shall be in an amount equal to 50% of the actual price to be paid for the lands in question.

12. Without limitation of the definition of "lands" herein, the commissioner may acquire, or approve grants to assist a local unit to acquire:

(a) lands subject to the right of another to occupy the same for a period measured in years or otherwise; or

(b) an interest or right consisting, in whole or in part, of a restriction on the use of land by others including owners of other interests therein; such interest or right sometimes known as a "conservation easement."

13. (a) Lands acquired by a local unit with the aid of a grant under this act shall not be disposed of or diverted to a use for other than recreation and conservation purposes without the approval of the commissioner and the State House Commission. Such approval of the State House Commission shall not be given unless the local unit shall agree to pay an amount equal to 50% of the value of such land, as determined by the commission, into the State Recreation and Conservation Land Acquisition Fund, if the original grant shall have been made from that fund, or, if not, then into the State Treasury. Money so returned to said fund shall be deemed wholly a part of the portion of that fund available for grants to local units under this act.

(b) Lands acquired by the State under this act with money from the State Recreation and Conservation Land Acquisition Fund shall not be disposed of or diverted to use for other than recreation and conservation purposes without the approval of the State House Commission. Such approval shall not be given unless the commissioner shall agree to pay an amount equal to the value of such land, as determined by the commission, into said fund. Money so returned to said fund shall be deemed wholly a part of the portion of that fund available for land acquisition by the State under this act.

(c) If land acquired by the State under this act with money from the State Recreation and Conservation Land Acquisition Fund is subsequently developed for any water supply projects, the commissioner shall pay an amount equal to the value of the land so developed, as said value is determined by the State House Commission, into said fund. Money so returned to the fund shall be deemed wholly a part of the portion of that fund available for land acquisition by the State under this act. The commissioner shall make said payment from any funds available for such purpose in the State Water Development Fund or other water development moneys appropriated and available for such purpose.

14. Use of lands acquired under this act by the State or with State assistance shall not be restricted by any conditions of race, creed, color or nationality, and shall not be restricted by any condition of residence except by direction of or with the approval of the commissioner.

15. Notwithstanding any other provision of law, lands to be acquired by the State under this act from any local unit may be sold to the State by the unit at private sale.

16. The commissioner, in executing this act, may do all things necessary or useful and convenient in connection with the acquisition of lands by the State or with the assistance of the State, including the following:

(a) Make arrangements for and direct (i) engineering, inspection, legal, financial, geological, hydrological and other professional services, estimates and advice; (ii) and organizational, administrative and other work and services;

(b) Enter on any lands for the purpose of making surveys, borings, soundings or other inspections or examinations;

(c) Prescribe rules and regulations to implement any provisions of this act.

17. The money in the State Recreation and Conservation Land Acquisition Fund created by the New Jersey Green Acres Bond Act of 1961 is hereby appropriated to the Department of Conservation and Economic Development for use in executing the provisions of this act, according to the following division:

(a) with respect to acquisition of lands by the State under this act, $40,000,000.00;

(b) with respect to State grants under this act to assist local units to acquire lands, $20,000,000.00.

18. Section 17 of this act shall take effect upon approval by the people at a general election of the New Jersey Green Acres Bond Act of 1961, and the remainder of this act shall take effect immediately.

CHAPTER 427, LAWS OF 1961, WISCONSIN

AN ACT . . . relating to the creation of a state recreation committee, authorizing the improvement of the state-wide recreational facilities of the state and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 15.60 of subchapter VI of chapter 15 of the statutes is created to read:

15.60 STATE RECREATION COMMITTEE. (1) (a) The purpose of this section is to promote, encourage and co-ordinate a long-range plan to acquire, maintain and develop for public use those areas of the state best adapted to the development of a comprehensive system of recreational facilities in all fields, including without limitation: parks; forests; camping grounds; fishing and hunting grounds; scenic areas, waters and highways; boat landings, beaches and other areas of public access to navigable waters; and to facilitate and encourage the fullest public use thereof.

(b) It is the legislative intent in the passage of this act to authorize the expenditure of approximately $50,000,000 over the next 10 years for an outdoor recreation and resource development program to be allotted approximately as follows: $33,000,000, state park and forest recreation areas; $9,000,000, fish and game habitat; $2,500,000, youth conservation camps; $2,000,000 to protect scenic resources along highways; $1,500,000, for creation of new lakes under the federal small watershed program; $1,000,000 in state aids to help metropolitan areas acquire rural recreation lands; $500,000 in state aids to help counties owning lands entered under the forest crop law develop recreational facilities; $392,000 for tourist information centers; $270,000 for careful planning of future projects and priorities; and $50,000 for a survey of the Lake Superior region recreational potential.

(2) There is created a state recreation advisory committee consisting of the governor as chairman ex officio, the director of the conservation department, the chairman of the state highway commission, the director of public welfare, the chairman of the state soil and water conservation committee, and the recreation specialist in the department of resource development. The committee shall meet as often as necessary upon the call of the governor and at least quarterly. Members of the committee shall receive no salary as such members, and any expenses incurred in the performance of their duties shall be charged against their respective departments.

(3) The advisory committee shall:

(a) Recommend to each successive legislature the appropriations necessary to accomplish the priorities established for the following biennium, provided that such recommendations include all projects listed in sub. (6) which have been activated and for which funds have been allotted, and which have not been completed during the preceding biennium;

(b) Co-ordinate the development by its member agencies of a long-range plan for the acquisition and capital improvement of areas necessary for a state-wide system of recreational facilities to be recommended to the legislature;

(c) Develop and disseminate a long-range plan for the fullest utilization of all the recreational assets of the state.

(4) The committee may reimburse other state agencies for necessary services. When it appears to the committee that there is an overlapping of authority or responsibility between member agencies in the completion of any priority the committee shall negotiate a co-operative agreement for completing the priority among the agencies concerned. The committee may retain necessary consulting services. The committee is attached to the executive office for administrative purposes only.

(5) In the fulfillment of its purposes, the committee may receive such gifts and grants of money or property or services as are not otherwise provided for in the statutes. The proceeds of such gifts or grants of money or property may be expended for the purpose of the gift or grant.

(5b) In a county containing 4,500 acres or more of state park lands on January 1, 1961, no lands or interest therein for new state parks shall be acquired by the state unless the county board of such county first approves the proposed state park.

(6) Projects for the biennium July 1, 1961 to June 30, 1963, shall be limited to the following list of high priorities (the order of listing within priority categories is for identification purposes only):

(a) State park system and state forest recreation areas. New land control, existing projects:

1. Kettle Moraine state forest
2. Governor Dodge state park
3. High Cliff state park
4. Terry Andrae state park
5. Wildcat Mountain state park (Lake area to be studied in 1961-63 and activated if feasible)
6. Apostle Islands state forest
7. Black River state forest
8. Brule River state forest
9. American Legion state forest
10. Northern Highland state forest
11. Flambeau River state forest

(b) State park system and state forest recreation areas. New land control, new projects:

1. Europe Lake state park
2. Lake Wissota state recreation area
3. Mirror Lake state recreation area
4. Pike Lake unit of the Kettle Moraine state forest
5. Sugar Creek recreation area
6. "I" highway recreation areas (3)
7. Whitefish Bay state park

(c) State park system and state forest recreation areas. Areas to be studied and activated if feasible:

1. Lac du Flambeau Pines
2. Raspberry Bay
3. Menominee Indian reservation

(d) State parks system and state forest recreation areas. Capital improvements, No. 1 priority:

1. State parks
   a. Blue Mounds
   b. Copper Falls
   c. Devils Lake
   d. Governor Dodge
   e. High Cliff
   f. Interstate
   g. Lost Dauphin
   h. Nelson Dewey
   i. Pattison
   j. Peninsula
   k. Perrot
   L. Potawatomi
   m. Rocky Arbor
   n. Wyalusing
   o. Amnicon Falls
2. State forest recreation areas
   a. American Legion
   b. Black River
   c. Brule River
   d. Kettle Moraine
   e. Northern Highland

(e) State parks system and state forest recreation areas. Capital improvements, No. 2 priority:

1. State parks system
   a. Aztalan state park
   b. Big Foot Beach state park
   c. Brunet Island state park
   d. Copper Culture Mounds state park
   e. Cushing Memorial state park
   f. First Capitol state park
   g. Lizard Mound state park
   h. Lucius Woods state park
   i. Merrick state park
   j. Mill Bluff state park
   k. New Glarus state park
   L. Ojibwa state park
   m. Old Wade House state park
   n. Rib Mountain state park
   o. Roche-a-Cri state park
   p. Terry Andrae state park
   q. Tower Hill state park
   r. Wildcat Mountain state park
   s. Yellowstone Lake recreation area
2. State forest recreation areas
   a. Apostle Islands
   b. Council Grounds
   c. Flambeau River
   d. Point Beach

(f) Game habitat. 1. New land control, existing projects:

   a. Avon Bottoms
   b. Allenton Marsh
   c. Bakkens Pond
   d. Brandon Marsh
   e. Brooklyn Marsh
   f. Blue River
   g. Collins Marsh
   h. Deansville Marsh
   i. Eldorado Marsh
   j. Grand River
   k. Honey Creek
   L. Karsher Marsh
   m. Killsnake Marsh
   n. Lake Mills
   o. Liberty Creek
   p. Lod Marsh
   q. Mazomanie Marsh
   r. McMillan Marsh
   s. Mead Area
   t. Mud Lake (Columbia county)
   u. Mud Lake (Dodge county)
   v. Mullet Creek
   w. New Munster Marsh
   x. Pensaukee Marsh
   y. Peshtigo Harbor
   z. Pine Island
   aa. Poygan Marsh
   ab. Princess Point
   ac. Rome Pond
   ad. Scuppernong Marsh
   ae. Sensiba Marsh
   af. Shaw Marsh
   ag. Theresa Marsh
   ah. Tichigan Marsh
   ai. Vernon Marsh
   aj. Westford Marsh
   ak. Waterloo Marsh
   aL. Waunakee Marsh

2. New land control, new projects:
   a. Bong Air Force Base Acquisition and Development
   b. Brillion Marsh
   c. Evansville Marsh
   d. Goose Lake
   e. Jefferson Marsh
   f. Klemme Marsh
   g. Mud Lake (Dunn county)
   h. Paris Marsh
   i. Richmond Marsh
   j. Scattered wetlands
   k. Silver Creek
   L. Swan Lake
   m. White River
   n. Wildcat Marsh
   o. Wolf River

(g) Fish habitat. 1. New land control, existing projects:

   a. Big Roche-a-Cri
   b. Camp Lake Marsh
   c. Cedar Springs
   d. Chaffee Creek
   e. Dell Creek
   f. Dorn Creek Marsh
   g. Eagle Lake Marsh
   h. Elk Creek
   i. Emmons Creek
   j. Kinnickinnic River
   k. LaBudde Creek
   L. La Crosse River
   m. Little Plover River
   n. Little Wolf River
   o. Mecan River
   p. Milwaukee River
   q. Nace Creek
   r. Peterson Creek
   s. Pine River
   t. Prairie River
   u. Radley Creek
   v. Remnant Fish Habitat Areas
   w. Sawyer Creek
   x. Silver Lake Marsh
   y. Soules Creek
   z. Turtle Creek
   aa. Upper Tomorrow River
   ab. Upper Waubesa Marsh
   ac. Wedde Creek
   ad. White River (Waushara county)
   ae. White River, South Branch (Bayfield county)
   af. Willow Creek
   ag. Wind Lake Marsh

2. New land control, new projects:
   a. Bean Brook
   b. Big Brook
   c. Big Sioux River
   d. Bluff Creek
   e. Bolen Creek
   f. Devils Creek
   g. Evergreen River
   h. Leech Creek
   i. Moose Ear Creek
   j. Mt. Vernon Creek
   k. Oconto River, South Branch
   L. Osceola Creek
   m. Plum Creek
   n. Remnant Fish Habitat Areas
   o. Upper Neenah Creek

(h) Youth conservation camps. 1. Establishment of a camp at Interstate park during the summer of 1961.

2. Establishment of a camp in the Rhinelander area during the summer of 1962.

3. Lease of land and facilities for temporary conservation camps pending completion of the permanent camps.

(i) Scenic easements. 1. First priority will be given to completing scenic easements along the Great River road. Easements will also be acquired on highways along Lake Michigan and Green Bay, Lake Superior; along the Chippewa, Wisconsin, Fox, Milwaukee and Wolf rivers; in the lake and forest country of northern Wisconsin; and through the Menominee Indian reservation and the Kettle Moraine area.

j. Tourist information centers. 1. A permanent tourist center shall be established in 1961 near the Illinois border, adjacent to the interstate highway between Chicago and Milwaukee. Two mobile centers shall be purchased and tried at various experimental locations near Hudson, Beloit and other points adjacent to the interstate highway system.

SECTION 2. 20.280 (71a), (71b), (73a), (74a) and (74b) of the statutes are created to read:

20.280 (71a) FISH MANAGEMENT; LAND AND LAND EASEMENTS. For the biennium beginning July 1, 1961, $1,000,000 for the acquisition of additional fish management land and land use easements, of which at least $250,000 shall be used for the acquisition of land use rights as provided in s. 23.09 (16). At the end of each biennium any unencumbered balance in this appropriation shall revert to the appropriation made by s. 20.703 (41).

(71b) GAME MANAGEMENT; LAND AND LAND EASEMENTS. For the biennium beginning July 1, 1961, $1,703,000 for additional game management lands and land rights under s. 23.09 (16), of which not more than $208,000 may be used for the acquisition and development of Bong air base and of which at least $300,000 shall be used for easements and land rights. At the end of this biennium any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

(73a) LAND FOR PARKS. For the biennium beginning July 1, 1961, $5,000,000 for additional acquisition and capital improvement of parks and recreation areas, of which $1,000,000 is for capital development of state parks and forest recreation areas; of which at least $500,000 shall be for the acquisition of easements and other public rights as provided in s. 23.09 (16); and of which the remainder shall be for park and recreation area land acquisition. At the end of the biennium any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

(74a) TOURIST INFORMATION CENTERS. For the biennium beginning July 1, 1961, $140,000 for the construction, acquisition and operation of tourist information centers as provided in s. 23.092. At the end of the biennium any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

(74b) STATE AIDS FOR RECREATIONAL DEVELOPMENTS IN COUNTY FOREST CROP LANDS. For the biennium beginning July 1, 1961, $100,000 for purposes set forth in s. 23.09 (17). At the end of the biennium any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

SECTION 3. 20.420 (86) of the statutes is created to read:

20.420 (86) EASEMENTS AND SITES. For the biennium beginning July 1, 1961, $293,000 as transferred pursuant to s. 20.703 (41) (b) 3 for the acquisition of scenic easements and development of historic markers, overlooks, waysides, and related purposes pursuant to ss. 84.04 and 84.09 (1). At the end of the biennium, any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

SECTION 4. 20.670 (48) of the statutes is created to read:

20.670 (48) YOUTH CAMPS. For the biennium beginning July 1, 1961, $525,000 for the construction and operation of youth conservation camps pursuant to s. 46.70. At the end of the biennium, any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

SECTION 5. 20.703 of the statutes is created to read:

20.703 RECREATION COMMITTEE, STATE. (41) RECREATION ALLOCATIONS. (a) All moneys collected under ss. 139.50 (2) (b) and 139.51 (2) (b) shall be paid within one week after receipt into the general fund, and are appropriated therefrom to the state recreation committee for purposes specified in s. 15.60 and as provided in ss. 20.280 (71a), (71b), (73a), (74a), (74b), 20.420 (86), 20.670 (48), 20.705 (42) and (43) and 20.750 (41).

(b) The moneys available in the 1961-1963 biennium shall be transferred in accordance with the following allocations:

1. To the conservation commission $8,686,000 for deposit in the conservation fund for the following purposes:

a. General. There shall be allocated $493,000 to be used in place of certain miscellaneous conservation fund revenues heretofore appropriated for park purposes.

b. Parks and forest recreation areas. 1) Land control There shall be allocated $4,000,000 for the acquisition of land and rights in land of which not less than $500,000 shall be used to acquire land use easements and rights in property as provided in s. 23.09 (16). 2) Capital improvement. There shall be allocated $1,000,000 for capital improvements, including campsites. 3) Maintenance and operation. There shall be allocated $250,000 for the normal operation and maintenance of parks and forest recreation areas.

c. Fish and game. 1) Land control-fish management. There shall be allocated $1,000,000 for acquisition of land or land easements, of which not less than $250,000 shall be used to acquire land use easements as provided in s. 23.09 (16). 2) Land control-game management. There shall be allocated $1,703,000 for acquisition of land or land easements, of which not less than $300,000 shall be used to acquire land use easements as provided in s. 23.09 (16) and of which not more than $208,000 may be used for the acquisition and development of Bong air base.

d. Tourist information centers. There shall be allocated $140,000 for the construction, acquisition and operation of tourist information centers as provided in s. 23.092.

e. Additional programs. The state recreation committee may authorize expenditures from funds allocated under b. 1) and c. of this subdivision for such appraisal, surveying, negotiation and legal costs as are directly and specifically related to the additional land acquisition programs herein described.

f. County recreational project aids. As aids to the counties in the development of recreational projects on county-owned forest crop lands under s. 23.09 (17), $100,000.

2. To the state soil and water conservation committee's appropriation made by s. 20.750 (41), $90,000 for the creation of lakes under s. 92.18.

3. To the highway commission for deposit in the highway fund, $293,000 for acquisition of scenic easements and development of historic markers, overlooks, waysides, and related purposes as provided under s. 84.09 (1).

4. To the department of public welfare's appropriation made by s. 20.670 (48), $525,000 for the construction and operation of youth conservation camps as provided under s. 46.70.

5. To the department of resource development's appropriations made by ss. 20.705 (42) and (43), $250,000 for the following purposes:

a. Lake Superior south shore study. There shall be allocated $50,000 for the conduct of a comprehensive study of the economic and recreational potential of the Lake Superior south shore area.

b. Metropolitan park area land acquisition. There shall be allocated $200,000 for assistance to political subdivisions for park land acquisitions as provided in ss. 66.36 and 109.05 (3).

6. To the state recreation committee's appropriation made by sub. (42), $52,000 for the functions of the committee in establishing and coordinating a long-range recreational plan.

(c) With the approval of the board on government operations, the committee may reduce, supplement or transfer between the allocations made in par. (b) when the committee finds that such action will expedite its program.

(d) The moneys allocated by par. (b) may be transferred quarterly and the department of administration may approve allotment requests of the agencies receiving such allocations in anticipation of these transfers.

(42) Biennially beginning July 1, 1961, $52,000 for the execution of its functions under s. 15.60.

SECTION 6. 20.705 (42) and (43) of the statutes are created to read:

20.705 (42) AIDS FOR PARKS. For the biennium beginning July 1, 1961, $200,000 for the state's share of urban aids pursuant to ss. 66.36 and 109.05 (3). At the end of the biennium, any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

(43) SUPERIOR STUDY. For the biennium beginning July 1, 1961, $50,000 for the study of the Lake Superior region pursuant to s. 20.703 (41) (b) 5.

SECTION 7. 20.750 (41) of the statutes is created to read:

20.750 (41) LAKE CREATION. For the biennium beginning July 1, 1961, $90,000 for the state's share of the cost of creating lakes pursuant to s. 92.18. At the end of the biennium, any unencumbered balance of this appropriation shall revert to the appropriation made by s. 20.703 (41) (a).

SECTION 8. 23.09 (16) and (17) of the statutes are created to read:

23.09 (16) CONSERVATION EASEMENTS AND RIGHTS IN PROPERTY. Confirming all the powers hereinabove granted to the commission and in furtherance thereof, the commission is expressly authorized to acquire any and all easements in the furtherance of public rights, including the right of access and use of lands and waters for hunting and fishing and the enjoyment of scenic beauty, together with the right to acquire all negative easements, restrictive covenants, covenants running with the land, and all rights for use of property of any nature whatsoever, however denominated, which may be lawfully acquired for the benefit of the public. The commission also may grant leases and easements to properties and other lands under its management and control under such covenants as will preserve and protect such properties and lands for the purposes for which they were acquired.

(17) AIDS TO COUNTIES FOR THE DEVELOPMENT OF RECREATION FACILITIES. (a) The county board of any county which, by resolution, indicates its desire to develop outdoor recreation facilities on county lands entered under the forest crop law may make application to the conservation commission for the apportionment of funds for state aids to counties for such purposes.

(b) For the purposes of this subsection outdoor recreational facilities shall mean the development of picnic and camping grounds, nature trails, beaches and bath houses, toilets, shelters, wells and pumps, and fireplaces. Costs associated with the operation and maintenance of recreational facilities shall not be eligible for aids under this section.

(c) The state aids granted under this section shall be no greater than but may be less than one-half the cost of such project as determined by the commission.

(d) Applications shall be made in the manner and on forms prescribed by the commission. The commission shall thereupon make such investigations as it deems necessary to satisfy itself that the project will best serve the public interest and need. Upon approval of the project the commission shall encumber a sum not more than one-half of the cost estimate of such project. When the project is completed, the commission shall pay to the county not more than one-half the actual cost of such project. The commission is authorized to inform itself and to require any necessary evidence from the county to substantiate the cost before payment is made.

(e) The commission in making its deliberations shall give careful consideration to whether or not the proposal is an integral part of an official comprehensive land and water use plan for the area as well as the relationship of the project to similar projects on other public lands. If requests for state aids exceed the funds allotted to the commission for this program, those requests which form an integral part of a comprehensive plan shall be given first priority.

(f) Recreation facilities developed under the assistance of this act shall not be converted to uses which are inconsistent with the purposes of this act

without the approval of the commission. The commission shall not issue such approval unless there is evidence that such other uses are essential to and in accordance with an official comprehensive plan for the area. The commission shall require that the proceeds from the disposal of facilities developed under this act shall be used to further the objectives of this act.

SECTION 9. 23.092 of the statutes is created to read:

23.092 INFORMATION CENTERS. The conservation commission is authorized to establish information centers, permanent or mobile, in such manner as it directs.

SECTION 10. 46.70 of the statutes is created to read:

46.70 YOUTH CAMPS. The department may establish and operate youth conservation camps for boys in co-operation with the conservation commission. The camps shall be operated during summers in areas suitable for constructive employment in conservation projects. The department of public welfare is authorized to acquire by fee or by lease all lands and facilities necessary for the establishment of camps for such department.

SECTION 11. 66.36 of the statutes is created to read:

66.36 AIDS TO MUNICIPALITIES FOR THE ACQUISITION OF RECREATIONAL LANDS. (1) Any city of the first and second class as defined by s. 62.05 (1) may apply for and accept state aids for the acquisition of recreational lands and rights in lands for the development of its metropolitan area park system under ss. 20.705 (42) and 109.05 (3).

(2) In those counties having a population of 90,000 or more but less than 500,000 as determined by the last federal census, the county park commissions established under s. 27.02 are eligible for aid under this section if such county park commissions have mutually agreed with all cities of the first and second class located within such counties that the primary responsibility for providing urban citizens with recreation facilities is that of the county park commissions. In such counties, where cities of the first and second class are located, and where mutual agreements between city park commissions and county park commissions do not exist, the county park commissions shall not be eligible for aids under this section. In those counties having a population of 90,000 or more as determined by the last federal census where there are no cities of the first and second class, the county park commission shall be eligible for aid under this section. In counties having a population of 500,000 or more, the only unit of government eligible for aids under this section shall be the county park commission.

(3) State aid under this section shall be limited to no more than 50 per cent of the cost of acquiring, through fee title or through easements, recreation lands which are essentially open in nature and which are located in areas which are not intensively developed for homes or commercial establishments and which are open, or predominantly open, lands, including agricultural land, wetlands, flood plains, forest and wood lots in and around urban areas which because of scenic, historic or aesthetic factors have outdoor recreation values such as sight-seeing, picnicking, hiking, nature study, swimming, boating, hunting, fishing and camping. Costs associated with development and maintenance of parks established under this section shall not be eligible for state aid. Costs of acquiring lands or land rights shall not be included in the "cost of land" eligible for state aid under this section. Title to lands or rights in lands acquired under this section shall vest in the local unit of government, provided that such land shall not be converted to uses inconsistent with this section without prior approval of the state and that proceeds from the sale or other disposal of such lands shall be used to promote the objectives of this section.

SECTION 12. 92.18 of the statutes is created to read:

92.18 ADDITIONAL AIDS. Any soil and water conservation district which is eligible for aid under P.L. 83-566, as amended, is eligible for additional aids from the state as follows: up to 50 per cent of the cost incurred by the district for conservation development specified in s. 92.08 (3), meaning thereby the excess cost of the dam structure and additional land necessitated for fish and wildlife development, or meaning thereby the cost chargeable to the state or its agency when an artificial impoundment is part of an integrated flood control program. Applications for state aids under this section shall contain provision for public access to the bodies of water to be created.

SECTION 13. 109.05 (3) of the statutes is created to read:

109.05 (3) The department shall receive applications for state aid in such manner as the department prescribes for metropolitan area park development submitted under s. 66.36 and allocate funds therefor within the limits of the appropriation established by s. 20.705 (42) in accordance with priorities based on comprehensive plans submitted with the application and on the ratio of population density to available recreational lands in the area to be served.

MARYLAND EASEMENT ACT

CHAPTER 63 1/

(House Bill 75)

AN ACT to add new Section 357A to Article 66C of the Annotated Code of Maryland (1957 Edition), title "Natural Resources", sub-title "Forests and Parks—In General", to follow immediately after Section 357 thereof, relating to the purchase AND ACQUISITION BY CONTRACT OR GIFT of interests in real property by counties and cities, OR THE STATE DEPARTMENT OF FORESTS AND PARKS, and to the preservation of open spaces and areas for public use and enjoyment.

Whereas, It is the intent of the Legislature to provide a means whereby any county or city, OR THE STATE DEPARTMENT OF FORESTS AND PARKS, may acquire, by purchase, gift, grant, bequest, devise, ~~lease or otherwise~~ OR LEASE, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment; and

Whereas, The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan developments; and;

Whereas, The Legislature declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city, OR THE STATE DEPARTMENT OF FORESTS AND PARKS, to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, ~~lease or otherwise~~ OR LEASE, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions; now, therefore,

Section 1. Be it enacted by the General Assembly of Maryland, That new Section 357A be and it is hereby added to Article 66C of the Annotated Code of Maryland (1957 Edition), title "Natural Resources", subtitle "Forests and Parks—In General", to follow immediately after Section 357 thereof, and to read as follows:

357A. (a) The acquisition of interest or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced. Any county or city, AND THE STATE DEPARTMENT OF FORESTS AND PARKS, may acquire, by purchase, gift, grant, bequest, devise, ~~lease or otherwise~~ OR LEASE, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve this end. Any county or city, AND THE STATE DEPARTMENT OF FORESTS AND PARKS, may also ~~acquire~~ PURCHASE OR ACQUIRE BY CONTRACT OR GIFT the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this section. THE COUNTY OR CITY SHALL NOT ACQUIRE ANY SUCH FEE OR ANY SUCH LESSER INTEREST IN REAL PROPERTY FOR THE PURPOSES AFORESAID, BY PURCHASE OR CONTRACT REQUIRING A MONETARY CONSIDERATION IN EXCESS OF $500.00, UNTIL AND UNLESS THE GOVERNING BODY OF SUCH COUNTY OR CITY SHALL ADOPT A RESOLUTION OR FORMAL ORDER DECLARING THE PUBLIC PURPOSE OR USE THEREFOR AND AFTER HOLDING A PUBLIC HEARING RESPECTING THE SAME.

(b) For the purposes of this section, an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

Sec. 2. And be it further enacted, That this Act shall take effect June 1, 1960.

Approved March 23, 1960.

1/ Sec. 357A italicized in original of bill to indicate new matter. CAPITALS indicate amendments to bill. ~~Strike-out~~ indicates matter stricken out of bill.

NEW YORK EASEMENT ACT

GENERAL MUNICIPAL LAW, BOOK 23,
SECTION 247, 1960

ACQUISITION OF OPEN SPACES AND AREAS

1. Definitions. For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

2. The acquisition of interests or rights in real property for the preservation of open spaces and areas shall constitute a public purpose for which public funds may be expended or advanced, and any county, city, town, or village after due notice and a public hearing may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant, or other contractual right necessary to achieve the purposes of this chapter, to land within such municipality.

3. After acquisition of any such interest pursuant to this act the valuation placed on such an open space or area for purposes of real estate taxation shall take into account and be limited by the limitation on future use of the land. Added L. 1960, c. 945, S 2, eff. April 28, 1960.

Legislative intent. Laws 1960, c. 945, S 1, eff. April 28, 1960, provided:

"It is the intent of the legislature in enacting this chapter to provide a means whereby any county, city, town or village may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

"The legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.

"The legislature hereby declares that is is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this state for any county, city, town or village to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions."

APPENDIX K

CALIFORNIA EASEMENT ACT

CHAPTER 1658, STATUTES, 1959

An act to add Chapter 12 (commencing at Section 6950) to Division 7 of Title 1 of the Government Code, relating to the purchase of interests in real property by counties and cities and to the preservation of open spaces and areas for public use and enjoyment.

The people of the State of California do enact as follows:

SECTION 1. Chapter 12 (commencing at Section 6950) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 12. PURCHASE OF INTERESTS AND RIGHTS IN REAL PROPERTY

6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

6951. The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.

6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

6953. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

6954. For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

APPENDIX L

WISCONSIN'S NEW SCENIC EASEMENT DEED

Form R-O-736-67

STATE HIGHWAY COMMISSION OF WISCONSIN

Document Number _____

SCENIC EASEMENT

WHEREAS, the State of Wisconsin desires to preserve, protect and improve where necessary for scenic purposes,

and to prevent any future development which may tend to detract therefrom.

This Indenture, made by

grantor, hereby conveys and warrants to the State of Wisconsin, grantee, for the sum of _____ ($_____) dollars, scenic rights in perpetuity as hereinafter prescribed, in and to the following described parcel of real estate in _____ County, State of Wisconsin, to wit:

(LEGAL DESCRIPTION OF SCENIC EASEMENT AREA)

(POSITIVE OR SPECIFIC RIGHTS CONVEYED - EXHIBIT IV A)

(SPECIFIC RIGHTS RELINGUISHED - EXHIBIT IV B)

Project _____ EXHIBIT IV Parcel Number _____

THE RIGHTS HEREBY ACQUIRED DO NOT GRANT THE PUBLIC THE RIGHT TO ENTER THE ABOVE-DESCRIBE AREA FOR ANY PURPOSE.

THE RIGHTS HEREBY ACQUIRED DO NOT GRANT THE STATE OF WISCONSIN, OR ITS AGENTS, THE RIGHT TO ENTER THE ABOVE-DESCRIBED AREA EXCEPT FOR THE PURPOSE OF INSPECTION AND ENFORCEMENT OF SAID RIGHTS, OR AS SPECIFICALLY SET FORTH HEREIN.

IN WITNESS WHEREOF, the said grantor... ha... hereunto set ..... hand.. and seal.. this ..... day of ....., A. D., 19....

ALSO IN WITNESS WHEREOF, ...
.....
being the owner.. and holder.. of ... certain ..... lien.. against said premises hereby join in and consent to said easement free of said lien.

SIGNED AND SEALED IN PRESENCE OF .....(SEAL)
.....

.....
.....(SEAL)
.....

.....
.....(SEAL)
.....

.....
.....(SEAL)
.....

STATE OF WISCONSIN,)
.....County.) Personally came before me this ..... day of ..... A.D., 19..., the above-named .....
.....
to me known to be the person.. who executed the foregoing instrument and acknowledged the same.

.....
(NOTARY)
(SEAL) .....
NOTARY PUBLIC, ... County, Wis.
My commission (expires) (is) .....

Negotiated by .....

This instrument was drafted by the
State Highway Commission of Wisconsin.

Received for record this ..... day of .....
A.D., 19..., at ..... o'clock
..M and recorded in Vol. ..... of ....., page .....
.....
Register of Deeds
.....County

APPENDIX M

WISCONSIN SCENIC EASEMENT RESTRICTION GUIDE

POSITIVE OR SPECIFIC RIGHTS CONVEYED

The specific rights and interests hereby acquired are as follows:

1. The right for the State of Wisconsin, its agents and contractors, to enter upon the easement area;

   (a) To inspect for violations of the provisions of this easement and to remove or eliminate advertising displays, signs and billboards, stored or accumulated junk automobiles, farm implements or parts thereof, and other salvage materials or debris, and to perform such scenic restoration as may be deemed necessary or desirable.

   (b) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures.

   (c) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures. The area excluded from this provision is described as follows: (Then describe excluded area such as residence, etc.)

NOTE: ONLY THOSE PROVISIONS THAT APPLY TO THE SUBJECT PROPERTY ARE TO BE USED.

SPECIFIC RIGHTS RELINQUISHED

The owner's rights to engage in specified activities are acquired as follows:

1. The right to erect, display, place or maintain upon or within the scenic area any signs, billboards, outdoor advertising structures or advertisement of any kind, except that one (1) on-premise sign of not more than _____ square feet in size may be erected and maintained to advertise the sale, hire or lease of the property, or the sale and/or manufacture of any goods, products or services upon the land. Any existing signs, other than the one on-premise sign, and/or advertisements as described above shall be terminated and removed on or before_____.

2. The right to dump or maintain a dump of ashes, trash, rubbish, sawdust, garbage, offal, storage of vehicle bodies or parts, storage of farm implements or parts, and any other unsightly or offensive material.

3. The right to cut or remove any trees or brush.

4. The right to cut or remove any trees, except marketable timber and then only in compliance with local forest cropping practices, however, at no time will the scenic area be denuded of trees.

5. The right to park trailer houses, mobile homes, or any portable living quarters.

6. The right to quarry, or remove, or store any surface or subsurface minerals or materials.

7. All rights except general crop and/or livestock farming (agricultural) within the first _____ feet of the scenic area as measured normal to the (centerline) (reference line) (nearest edge of pavement) (right of way line) of the highway.

8. All rights except general crop and/or livestock farming (agricultural).

9. The right to develop the easement area except for limited residential development consistent with applicable state and local regulations. Such limited rights retained by the owner are as follows:

   (a) Each single family residential lot fronting on and abutting (identify highway) shall be limited to a minimum width of_____feet as measured parallel to the highway;

   (b) A total of _____ single family residential lots is the maximum number authorized for the easement area.

10. The right to change the use of the easement area from residential to any other use.

11. The right to change the use of the easement area from commercial to any other use.

NOTE: ONLY THOSE PROVISIONS THAT APPLY TO THE SUBJECT PROPERTY ARE TO BE USED.

APPENDIX N

INJUNCTIONS ISSUED ALONG THE BLUE RIDGE NATIONAL PARKWAY

There have been two scenic easement cases from North Carolina, heard by the federal court. The orders issued in these cases follow.

United States of America v. *Ardle Darnell*

This cause coming on for hearing and being heard by the court on Monday, May 23, 1949, the plaintiff and defendant being represented by legal counsel, the court finds that the easement under which the United States of America claims, and which easement is a good and valid lien against the lands of the defendant, to mean that the defendant can only remove seedling shrubbery or seedling trees such as may be grubbed up or cut down in accordance with good farm practice and residential maintenance, and that this clause means undergrowth and excludes by its very terms trees that may be eight inches or more in diameter and which, according to the custom in the Wilkes County, North Carolina section, become merchantable timber, and the court finds that the defendant has stated that he will cut twenty-four trees, all of which are eight inches or more in diameter.

It is, therefore, ordered, adjudged, and decreed that the defendant be and he is hereby permanently enjoined from cutting any trees upon his land which are subject to the easement of the plaintiff as set out in the petition in this cause without the consent of the Secretary of the Interior, except seedling shrubbery or seedling trees may be cut down or grubbed up if the same is in accordance with good farm practice and residential maintenance.

It is further ordered, adjudged, and decreed that the defendant pay the costs of this suit, to be taxed by the clerk.

This, the 30th day of May, 1949.

(Signed) Johnson J. Hayes
United States District Judge

United States of America v. *Reece Bedsaul and wife, Gladys Bedsaul*

The cause coming on for hearing and being heard by the court on Saturday, December 8, 1951, the plaintiff and defendants being represented by legal counsel, the court finds that the easement under which the United States of America claims, and which easement is a good and valid lien against the lands of the defendants, to mean that the defendants can only remove seedlings, shrubbery, or seedling trees such as may be grubbed up or cut down in accordance with good farming practice and residential maintenance.

The court finds, after viewing the site of the scenic easement described in the complaint and designated as Section s-A, that certain white pines located on the lands burdened by said easement may be trimmed from the ground to heights of three or four feet and that certain other white pines should be removed from the said tract; and the court further finds that the fence row along the line of the scenic easement farthest removed from the Parkway should be cleared of small trees and shrubs in order that a new fence may be properly built; and the court further finds that the thicket along the creek running through said scenic easement should be cleared and put in grass according to good farming practice, and that the briers and bramble bushes should be removed from said tract in accordance with good farming practice. However, none of said cutting, trimming, and removal should detract from the scenic beauty of view of said tract as viewed from any point along the Parkway.

The court further finds that the landscape architect for the Blue Ridge Parkway, Department of Interior, has consented to go up on said tract with the defendants and mark such mature and stable trees which he desires to have left intact, and to assist in any other way to carry out the findings and orders of this court in such a manner which will not interfere with the scenic value of the easement as viewed from the Blue Ridge Parkway.

It is now, therefore, ordered that the defendants, with the permission and approval of the landscape architect of the Blue Ridge Parkway, Department of Interior, may cut, remove, or trim the trees, shrubs, fence line, and land as set out in the above findings of the court, and the defendants are hereby permanently enjoined from cutting, topping, mutilating, and heading stable or mature trees and shrubs on their lands described in the complaint, without having obtained permission so to do from the Department of the Interior, except seedling shrubbery or seedling trees may be cut down or grubbed up, if the same is in accordance with good farming practices and residential maintenance. This cause is to remain open to abide the further orders of the court.

This, the 19th day of December, 1951.

(Signed) Johnson J. Hayes
United States District Judge

APPENDIX O

REPORT OF THE SKYLINE STUDY COMMITTEE
SAN MATEO COUNTY, CALIFORNIA

February 16, 1966

The Skyline Study Committee recommends the County proceed promptly to acquire those areas for scenic easements that will enhance the beauty and utility of a Scenic Skyline Highway, acquisition could be any of the following:

a. Purchase
b. Voluntary gifts
c. In connection with development

In order to prevent any hardships to property owners, the Committee urges that immediate steps be taken as follows:

a. To provide the necessary funds for purchase and

b. That a priority of acquisition be established and

c. That a high priority be given to acquisition of any easements included in any development plans and

d. That scenic easements not be designated until there is reasonable prospect of having the necessary funds and

e. That until acquisition, the property owner has full use of his property for any lawful purpose.

f. The landowner retains mineral and water rights within the easement.

g. When lots become unbuildable because of easements, the State must purchase the entire property unless the owner wishes to retain the land.

h. Existing buildings must be allowed to remain unless they become unsafe for occupancy.

FAVOR 22

OPPOSED 1

ABSTAIN 1

ABSENT 3

CHAIRMAN did not vote

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