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Securing Open Space for Urban America: Conservation Easements

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URBAN LAND INSTITUTE—TECHNICAL BULLETIN NO. 36

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SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS

by

WILLIAM H. WHYTE, JR.
Author and Lecturer
New York City

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Courtesy of LIFE

From "A Plan to Save Vanishing U. S. Countryside"
by William H. Whyte, Jr., LIFE, issue of August 17, 1959

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URBAN LAND INSTITUTE—TECHNICAL BULLETIN NO. 36

SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS

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Preface

By the year 2000, we may expect to find the United States a nation of some three hundred and twenty million persons. About four fifths of these people will be living in tremendous urban concentrations roughly divided between ten huge super-metropolitan regions and 285 smaller metropolitan areas with populations ranging from 100,000 to 5,000,000.* Thus growth could mean the absorption for urban use of additional land area equivalent to the State of Illinois or over seven times that of New Jersey!

As land is absorbed for urban purposes, open land areas disappear with finality. Thus when the need for permanent open space is greatest the raw land is no longer there. Is this important to the physical, social and economic well-being of the United States? We think it is becoming increasingly more so and should be of increasing concern to every person who has the welfare of his country and city at heart.

William H. Whyte, Jr., the author of this study thinks so too. He set out on a year's survey to determine whether under our economic and social system, realistic ways and means could be found to insure the preservation of open space both in urban and rural areas. He took leave of absence as Assistant Managing Editor of *Fortune* magazine to get the job done. The complete results of his investigations are contained between these covers. Some general results of his findings appeared in an article in the August 17, 1959 issue of *Life* magazine.

There may be those who differ with the urgency of the matter or the conclusions reached by Mr. Whyte. No one, however, can question the fact that in perusing this study he did so as a highly trained observer, as an accurate reporter with a mission and as one whose journalistic skill has permitted him to state the case for accomplishing open space conservation both forcefully and convincingly.

Born in West Chester, Pennsylvania, he graduated cum laude from Princeton in 1939. He joined the Marine Corps in 1941 as Intelligence Officer in the 1st Marine Division serving through the Guadalcanal Campaign and later as head of G-2, Marine Command and Staff School. He joined *Fortune* in 1946 becoming Assistant Managing Editor in 1951. His interest in urban and suburban growth problems began in 1953 and led to a number of books and Fortune articles including "The Organization Man," and "The Exploding Metropolis." During this period he became deeply involved in the problems of open space conservation leading to the present study which included extensive field work in both the United States and Europe. Mr. Whyte has left *Fortune* to devote full time to his own studies and writings.

ULI is pleased to make this contribution to the field of land use available in its Technical Bulletin Series.

MAX S. WEHRLY
Executive Director
URBAN LAND INSTITUTE

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* Pickard, Jerome P., Metropolitanization of the United States. (Urban Land Institute, Research Monograph No. 2) Washington, Urban Land Institute. 1959. 96 pp. ($4.00)

Foreword

The purpose of this report is to be of some help to those who want action to save open space. There is in it no exposition on urban sprawl, why it is bad and why we should do something about it. Nor is there full treatment of the best known tools for achieving open space, such as the out-right purchase of land, for example. These tools may not be used as well as they should be, but their availability hardly needs belaboring.

There is one tool, however, which may be of considerable usefulness, but which is not well known, and it is on this tool that the report concentrates. It is the purchase by a public agency of rights in land from private owners to insure the continued integrity of key open areas. Essentially, it is nothing more than the adaptation of the ancient common law device of easements, and in several areas legislation is already in existence authorizing the purchase of easements for open space purposes. So far, the tool has yet to be applied on any scale for the control of urban sprawl. Few officials realize that such a tool exists, and partly because of this there are many questions which cannot be answered — the reaction of the tax assessor, for example, is one that can be answered satisfactorily only when there is an actual program for him to react to.

Study of what we've learned so far, however, can at least take us part of the way. Thus this report. In it we have attempted an inventory of the most relevant precedents and have also attempted an inventory of the knottiest questions for the future, for there must be no blinking the fact that there are some knotty questions indeed.

The first version of this report was completed in August 1958. Since then many planners, officials, and legal experts have helped greatly with criticisms and suggestions. I have also profited by the further chance to talk with more landowners', civic groups, developers, and special interest groups of one kind or another, and to follow the trials and errors of a number of promising open space programs.

What I have learned convinces me that there is one overriding consideration for any open space program. It is, simply, that open space must be sought as a positive *benefit*. Open space is not the absence of something harmful; it is a public benefit in its own right, now, and should be primarily justified on this basis. Some may argue that I am merely concentrating on one side of the coin, and that the other would do as well. I do not believe so; the concept of a benefit has important legal and tax aspects, and it is critical to the problem of rousing real public support.

It is for this reason that we must look carefully to the law of eminent domain, and it should be stressed at the outset that the tool under discussion is an extension of eminent domain rather than the police power. This is not to deprecate the latter, which is tremendously important in any open space plan. But while the two powers complement each other, there is a fundamental distinction between them; the failure to see the limits of the police power, I submit, is the greatest ideological obstacle to successful action.

In many cases the community can properly use its police power to conserve open spaces—through the zoning of flood plains against development, for example. If the police power were the main tool, however, this would be to a large degree a negative way of securing open space; that is, the community would have to maintain that it is harmful to the public interest for development to take place in particular areas—so clearly harmful that the community has no obligation to compensate the owner for the rights taken away from him.

This is placing an intolerable burden on common sense, let alone the law—and the feelings of landowners. For if it is a benefit we are getting—if we want to keep a stream valley open because we *like* it—the law is very clear. We've got to pay for it.

We may buy the whole property. We may buy only one or more rights in it, as with an easement. In either event, and whether or not condemnation is used, the law of eminent domain applies. We must do it for a public purpose, and we must offer the owner fair compensation for what he is giving up.

Those who have been working for open space don't need to be told it's a valid public purpose. But will the courts? Will the public? We must go on faith a bit, but it will help if we also hammer at the positive with as much force as we can. It is for this reason, I am now persuaded, that "Development Rights," the

working title of the original report, is not the best one. Several planners had argued that it would tend to confuse people and I now think they were right. Among other confusions, the term has suggested the procedure which the English have now abandoned as unworkable—that is, the purchase of development rights to whole areas rather than specific open spaces, and the use of the sale-back of rights to specify where development could take place.

More important, however, the term stresses what is to be avoided, rather than what is to be gained. What we're really after is conservation of things we value, and thus I have been trying the term "conservation easement." Another term may well prove better, but "conservation easement" has a certain unifying value: It does not rest the case on one single benefit—as does "scenic easement," but on the whole constellation of benefits—drainage, air pollution, soil conservation, historic significance, control of sprawl, and the like.

Let me sketch briefly how the kind of open space program envisioned can achieve several important benefits at one and the same time. To conserve key portions of the countryside of an area—such as the heart of a stream valley—the public agency purchases away from landowners their right to develop it into a subdivision or splatter it with billboards. Except for the open space restrictions, the owner keeps full title to the land. The amount of land involved will probably be only a small fraction of the total; the idea is not to prevent development of an area, but to channel it; there will be plenty of room left for subdivisions—and the people in them will enjoy a better environment than otherwise would be the case.

The purchase of easements in fringe areas should be considerably less expensive than acquisition in fee. The land, furthermore, will be kept alive—in securing the land against subdivision, more than a negative thing is scenic asset; by keeping the land in cultivation, secured: Not only can land be kept in productive farming, for example, but maintained as a scenic asset; by keeping the land in cultivation, furthermore, the easement tool can be of material help in any program of watershed control. Indeed, upon this latter need one could rest the major justification.

The purchase of "conservation easements" also can have a great preemptive value. There is, of course, no substitute for outright acquisition of land in fee simple for parks and other kinds of property the public is going to need. At the same time, however, easements can provide future options. Even though the community might not know now what its precise land use needs will be in twenty years or so, by the conserving of key open spaces it insures that it will have choices to make, and that the developer's bulldozer will not have gotten there first. As I will note later, however, this is a minor reason for securing easements: The main justification must be *present* benefits.

Easements may also break certain ideological blocks. They are ancient, they respect property rights, and are far less "socialistic" than many programs which conservatives now sanction.

Why not go a step further, buy the land outright and then lease it back to the owner, or a new owner, subject to open space restrictions? In many cases, this procedure might be in order and it is notable that the California Easement Act (Appendix A) has a provision for sale and leaseback. The writer's opinion is that the easement is a more promising device for large scale conservation. Those who decry it as too limited a tool have many arguments on their side but when they demand public ownership of open space as the only real solution, I feel they are flying from current reality. If easements prove faulty, the effort will have taught us something but at least it is an effort that can be made: Now let's not ask for Utopia or bust.

Some people believe emphasis on any specific tool is premature; they argue that first priority must be given to the study and development of a regional plan and regional planning instrumentalities—only then, they contend, does discussion of specific ways and means become pertinent. It is true that we must have regional planning if any long range program is going to succeed. It is also true that the easement tool is only one of many—and possibly it will be of less importance twenty or thirty years hence than sale and leaseback, the use of subdivision controls, control of sewage and water lines, etc., to achieve the most economic and amenable pattern of development.

Yet the easement tool may prove an important catalyst. As an abstraction, regional planning simply doesn't connect with most citizens. They know what is happening to the countryside, but so long as they see no practical way of coping with it—and most of them don't—they will turn their eyes to the host of other problems pressing for their attention. But

show them that there is a way—a practical one, in the here and now—and their attitude changes. They ask questions, sharp ones. They do care about what's happening, and once they see a real chance to do something effective, a support that otherwise would lie dormant can become aroused.

This report does not go into the technical details of land selection. It does not go into them because no research is needed to establish the ways and means that can be used. Indeed, there have already been a plethora of studies on open space needs, and with monotonous regularity these studies time and again identify certain key areas. (In the Southeastern Pennsylvania area, William Wilcox of the Greater Philadelphia Movement has pointed out, there have been since 1932 nine studies on land needs, seven of them on recreation and open space needs). To be sure, not all of the plans have been well conceived for today's situation, but they do at least illustrate that there shouldn't be any great difficulty in figuring out which areas deserve top priority. For the long haul, there should be the kind of comprehensive planning which will make of open space selections, not isolated bits and pieces, but a framework which supports such other elements as industrial development, highways, and the like. This, certainly, will require a lot of work, and constant work too, for years to come. But let us not await the millennium. It will be extremely difficult to commit the sin of choosing too much open space in getting started (or at almost any other time, for that matter), and any planner who can't think now of some land worth saving ought to get into another line of work.

We need long range planning, but we need a little retroactive planning, too: Let's save the best land as soon as we can, and then, at our leisure, rationalize with further studies how right we were to have done it.

One caveat is in order. I have tried to indicate those points which are based on my own personal opinion so that the reader may draw his own, and have tried everywhere to distinguish between fact and surmise. Yet no one can claim complete "objectivity" about this problem, nor should he. Facts are vital, but they will not stand still; time is a critical dimension and the question of values that underlies the whole problem is changing. What we hope and work for will shape the reality we are studying.

WILLIAM H. WHYTE, JR.
October, 1959

SECTION ONE: THE PRECEDENTS

Basically, the principle of eminent domain is simple. The public can acquire property if it will serve a public purpose and if the owner is given just compensation.[1] In acquiring property, the public does not have to buy all of it, but that element of it that will serve the public purpose. We are talking, then, about property *rights*. They are plural; economists and lawyers are now agreed that we should think of "property" not as the tangible thing owned, but as a composite bundle of rights—the right of the man to sell his property, to encumber it, to have his wife and children inherit it, to build upon it and to develop it.

The public can acquire these rights in land by gift, purchase by voluntary agreement, or by condemnation. It may buy the whole bundle of rights—that is, acquire the land in fee simple—or it may acquire less than the full bundle.

It is this latter aspect that we are concerned with, and in the form of easements it has been common practice for generations;[2] though the particular purpose for which the public acquires the easements has shifted, the basic principle involved has remained the same. Today, we have channel-change easements, slope and drainage easements, scenic easements for highway and parkway purposes, highway development rights, air rights, sight-distance easements, easements of view, building protective easements, and many others; whatever the variation, they are essentially a purchase from a landowner of one or more of his rights in land so that the public interest may be served without having to purchase the entire bundle. Such easements have had a statutory basis for many years and have been upheld by the courts as a valid exercise of governmental power in the public interest.

While in many states there already exists a statutory basis for purchasing easements for the purpose of securing open space, the urban sprawl problem is so new—or at least, seems to be so new—that there are few cases directly bearing on this kind of use. The Massachusetts legislature authorized the Boston Metropolitan Park Commission to acquire rights in land in the basic act of 1893, and in 1898 additional powers were granted "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.)

Back in the nineteen-twenties, a study for the park needs of the Washington, D. C., area recommended six methods for "withdrawing land from urban occupation"; one of them was the acquisition of rights in land, or easements, as well as outright purchase. In the Federal Rights in Land Act of 1928 (40 USC, Section 72A), Congress gave the National Capital Park and Planning Commission authority for such acquisition, and in the Capper-Crampton Act of 1930 authorized the spending of $32,500,000 for three kinds of park and open space projects. In 1956, in the act establishing the Bay Circuit surrounding metropolitan Boston, the Massachusetts legislature authorized acquisition of a variety of rights in land in order to preserve open spaces.

But though the authority has existed, up until now park officials have not sought recourse to it, and have concentrated on the acquisition of land for parks. Since 1894, the tool of rights in land has been exercised only once in Massachusetts; this was by the Metropolitan District Commission to protect land lying along the Charles River Basin in Waltham (no shrubs may be removed or planted, nor may any physical changes be made in this area without the approval and consent of the Metropolitan District Commission). The Metropolitan Parks Commission has received a great many gifts in fee and in private lands from

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[1] The standard work is *The Law of Eminent Domain* by Philip Nichols; originally published in 1909 by Mathew Bender & Co., N.Y. It has since been extensively annotated (by J. L. Sackman and R. D. van Brunt; see 3*d* edition, Bender, N. Y. 1950) and the footnotes bringing it up to date have swelled it to many heavy volumes. Nichol's original running text, however, stands up admirably; even a layman can understand it, for Nichols had an inclination to plain English.

[2] The law of easements in the United States is virtually identical with English law (and was borrowed by us, it might be added, several centuries before the English Town and Country Planning legislation). Here, as in England, the essential features of an easement are (1) that it is an incorporeal right, a right to the use and enjoyment of land—not to the land itself; (2) that it is imposed on corporeal property; (3) that it is a right without profit; (4) that it requires two distinct tenements: the dominant, which enjoys the right; the servient, which submits to it. (e.g., a park commission which purchases a scenic easement would be the "dominant tenement." The owner of the property to which it applies would be the "servient tenement"—not just the owner who agreed to the purchase, but also subsequent ones, since the easement "Runs with the land.")

landowners, but to date has not used its power of eminent domain for this purpose. The National Capital Planning Commission has been studying several proposals that envision development rights purchase but have been concerned primarily with the task of park and parkway acquisition.

There is, accordingly, no case law bearing directly on development rights. There do not appear to be any judicial decisions construing the Federal Rights in Land Act of 1928; and nothing directly in point in the cases construing the various Massachusetts park laws (Chapter 463, Acts of 1898, found in Chapter 92, Section 79 of the annotated laws of Massachusetts).

At this point in time, then, it is to analogy we must look for the most relevant precedents. Here are some of the principal kinds of easements for which a successful body of experience exists:

(a) "SCENIC EASEMENTS" FOR PARK PURPOSES. Since 1933 the State of California, through its Department of Natural Resources (Division of Beaches and Parks) has from time to time acquired scenic easements from landowners immediately adjacent to state park units. The easement is a fairly standard one; the landowner grants to the state the scenic easement deed (see Appendix for the form of agreement), by which he gives up the right to put up any buildings on the land without state approval, erect billboards, and the like.

While the state has not extended this easement principle to the acquisition of future park sites, the powers given are fairly broad. Under Section 5006 of the state's public resources statute, "The State Park Commission, through the consent of the Department of Finance, may acquire by purchase or by condemnation proceedings, brought in the name of the people of the State of California, title to or any interest in real and personal property which the Commission deems necessary or proper for the extension, improvement, or development of the State park system."

Somewhat similarly, the New York State Division of Parks has in a few cases acquired easements by appropriation (Section 676-A of the Conservation Law), to prevent the construction of commercial facilities opposite the entrance to state parks. (Since Section 675 of the Conservation Law prohibits use of signs and advertising structures within 500 feet of the border of any state park or parkway, scenic easements have not been necessary).

(b) "SCENIC EASEMENTS" FOR PARKWAYS. In the building of our National parkways, notably the Blue Ridge Parkway and the Natchez Trace Parkway, scenic easements have been used to conserve sections of natural landscape along the rights of way. These 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."[3] The National Park Service does not itself purchase the easements; this is done by the highway departments of the various states involved, but the Park Service, which eventually receives the deeds, does lay down the general standards to be followed. Currently, it asks a minimum right of way averaging 125 acres per mile in fee simple, supplemented by scenic easements where appropriate.

The device not only insures a natural landscape, it saves money on maintenance costs. Along the Blue Ridge Parkway there are some 177 scenic easements totalling 1,468 acres, most in grassland. Maintaining the grassland within the regular right of way costs the Park Service about $4.50 a year per acre; on the land covered by easements the farmers do it by continuing to farm, thus saving the Park Service some $6,100 a year. (To save more money yet, the Park Service is now applying a sort of reverse gambit also; for right of way it owns, it often gives a "special use permit" so neighboring farmers can use it for grazing or crops or such —they pay a small fee for the privilege, as well as relieve the Park Service of the $4.50 per acre maintenance cost.)[4]

The Great River Road proposed by the states bordering the Mississippi is to make considerable use of easements. Instead of a continuous, and somewhat antiseptic, strip park, it will be a "living landscape of our life and industry—the vast wheat and cotton fields; the waving sugar cane and the pumpkins among the corn shucks; the cattle grazing in pastures; the hay

[3] *Requirements and Procedure to Govern the Acquisition of Land for National Parkways:* National Park Service, Washington.

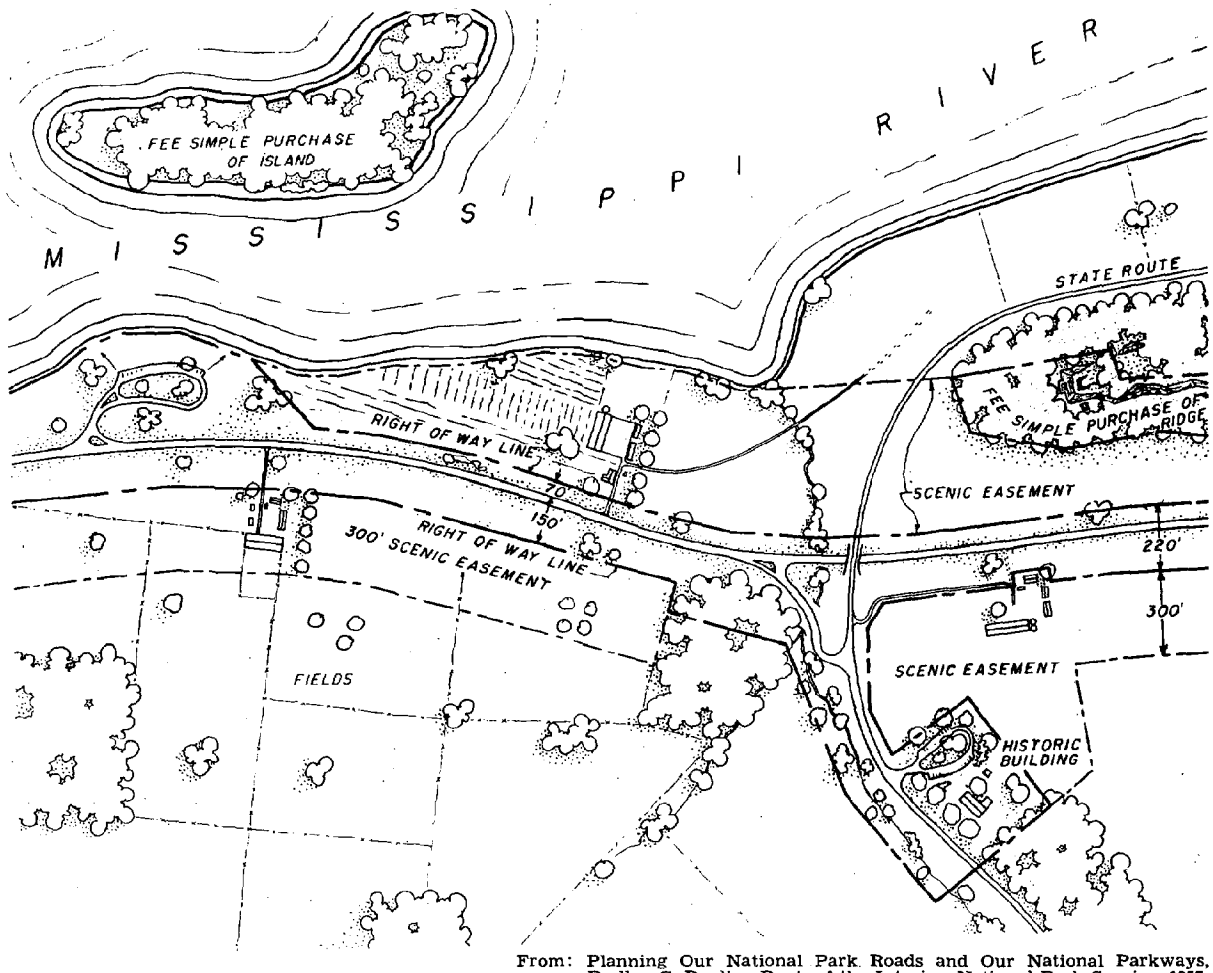
[4] Earl A. Disque, "Land Use Treatment as Related to Maintenance," Highway Research Board, Washington 1959.

stalks and corn cribs readied for winter, and always the ever-changing panorama of the mighty river."[5] [See cut attached to this section. Diagram by National Park Service of a typical stretch of the Great River Road, showing complementary uses of fee simple and easements.]

(c) "SCENIC EASEMENTS" FOR HIGHWAYS. In New York State, to cite one example, it is the present policy of the State Department of Public Works to acquire easements restricting the erection of billboards on all controlled-access state highways. (In the past such easements have had a width of 750 feet from the edge of the actual roadway. This policy is now going to be altered to take advantage of the new federal aid highway bill which the President signed April 16, 1958; this provides a financial incentive for states to acquire rights in strips 660 feet from the edge of the highway right of way.)

The New York State Thruway Authority, whose enabling legislation has a provision

[5] Dudley C. Bayliss: "Planning Our National Park Roads and Our National Parkways." National Park Service, 1957.



From: Planning Our National Park Roads and Our National Parkways, Dudley C. Bayliss, Dept. of the Interior, National Park Service, 1957.

PARKWAY LAND CONTROLS IN RURAL AREAS

Hypothetical drawing to illustrate variability of Parkway land takings so as to provide:

1. A development width of 220 feet with space for widening of pavement if necessary in the future.
2. Control over the sightlines of rural scenery by means of easements, so that lands could continue in present ownership and remain in use as farms.
3. Outright purchase of occasional historic sites, wooded islands, swamps, bluff faces, and marginal lands.

similar to Section 676-A of the N. Y. Conservation Law, has protected its right of way through a combination of police power and easements. Up to 500 feet from the edge of the roadway, signs are prohibited by the state's police power. Beyond this point the Thruway Authority has purchased in scattered areas 1000-feet easements from property owners to prohibit billboards. These were acquired at the same time as the rights of way.

(d) "RIGHT-OF-WAY EASEMENTS." In addition to securing easements for billboard control, several states have also used them to conserve future rights of way at relatively low cost. In Wisconsin, such authority is to be found specifically in Section 84.105, Wisconsin statutes. Ohio, which has made considerable use of "reservation agreements" to protect rights of way, has no specific enabling legislation but has presumed the authority to exist in the general authority of the Department of Highways; since in specific statutes the department already has the power to acquire the entire bundle of property rights, it is presumed any lesser interest may also be acquired. Texas, which has used the easement device under the name of "highway development rights," has a specific statute to this effect. California makes heavy use of easements both to prevent destruction of view and for the actual highway right of way; several thousands of California highways have been built on easements, and legally and economically it has worked out very satisfactorily.

(e) "AIRPORT EASEMENTS." Another type of easement, for which a considerable body of experience exists, is the acquisition of rights in land from nearby landowners to assure an unobstructed path for landings on airfields. Under the federal airport program, all participating airports must provide for control over the "clear zone area" up to 2,700 feet by 1,000 feet (Federal Airport Act, Public Law 377, 79th Congress, 1946).

(f) "EASEMENTS FOR WATER CONTROL." Many kinds of easements are used for this purpose. To conserve the sponge-like qualities of flood plains, for example, easements can be acquired to prevent building on them and, thus, a higher rate of run-off. By easements the public can also purchase the right to flood an area, or to discharge sewage effluent on it. Rates of compensation vary widely, depending to a great extent on the enjoyment of the land left to the owner.

SECTION TWO: THE PUBLIC PURPOSE

The precedents, then, are many. More than that, in different variants, the easement tool has been on the books for some time. We don't have to start from scratch; even without further legislation, much more use of the easement device could be made than now is the case; and while it is right to talk about new tools, it wouldn't hurt us to spend more time rediscovering what has already been given us.

That said and done, let us note that there are some definite advantages in tackling the problem the hard way. For if there is to be any really major program, it must be established for the public that open space is a benefit in its own right and not merely as an adjunct of some other established public program, as is the case with most present easements. Upon this proposition all else rests; it is not just a question of "selling"—for legal and tax reasons the case must be firmly documented, and the more homework done now, the less chance of critical setbacks later.

The best way to clear the easy hurdles may be to address ourselves to the toughest: justifying the use of condemnation. Some might wonder why so much stress is put on this contingency; gifts and negotiated purchases may well gain the bulk of the open space we want saved, and condemnation should be used very sparingly indeed, certainly so at the beginning of the program.

But eminent domain is an excellent discipline. We must prove that we have justification for using it; otherwise our lesser measures will be in jeopardy. This is so because the law of eminent domain applies to public purchases whether the owner wants to sell or not; whether it is by gift, or voluntary purchase, or by condemnation, when an agency of the public acquires a property, the purpose must be public. To put it another way, if we cannot establish that open space conservation is a public enough purpose to justify condemning an easement, we're going to have trouble justifying the public's paying money for it in any event. Even a gift of an easement does not allow us to sidetrack the issue; if a public agency is involved, it's got to be able to prove that a public purpose is being served. Sooner or later there will be a taxpayers' suit, and it is not difficult to imagine someone complaining that the public agency has no business accepting easements, let alone paying good money for them, since the whole idea is merely to help landowners dodge taxes.

How, then, do we define the public purpose? The law of eminent domain holds that the purpose of securing a property or a right in it must be public, and not primarily for a private interest only incidental to the public.[6] This does not mean that there is anything wrong if the landowner happens to benefit also; there is nothing in U.S. law that says someone has to suffer if the public is to gain.[7] Nor does it mean that the public has to have physical access to the property. In the past, some courts have taken a narrow view of what constitutes "use," but it is now generally held that the public can enjoy a benefit from the property without physically going on it.[8] To be on the safe side, however, it is important that we do not beg the question by failing to stress the positive benefits the public enjoys without access; the establishment of these—as is so admirably done in the opening sections of the California bill—is the best way to avoid unnecessary troubles over "use." (Later I will take up the possibility of combining easements with provisions for limited physical use by the public, the right to fish in a stream, for example, that runs through a man's property. Suffice it to say now that the two benefits must be considered as separate, and not contingent. One thing at a time—the public gets a fair bargain when it gets a man to agree to keep his land open; if it wants to fish in his stream as well, that is another matter and it can't demand both benefits at the price of one.)

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[6] Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 25 S. Ct. 251 (1905).

[7] Nichols, Ch. IV. Sec. 48: "If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will inure to individuals."

[8] "That the public gets no physical use of the premises is clear. It cannot travel upon or occupy them. The use acquired, so far as the general public is concerned, is rather negative in character, except, perhaps, that its sense of the appropriate and harmonious will not be offended by the erection in the condemned district of proscribed buildings. The condemnation does not take any part of the ground away from the owner; the taking consists in restricting its use. He is compensated for the restrictions imposed. . . ." State ex rel. Twin City Building & Investment Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920).

Who's to say what is a public use? The law is what common sense would indicate; in essence, it holds that something serves a public purpose if the public thinks so. This, in practice, means what the legislature says the public wants, and though the two are not always synonymous, the courts tend to go along; if the public through its elected representatives designates a public purpose to be served, the courts reason, this justifies exercise of the public's powers, so long as other constitutional requirements are met.

The courts' adjustment to new public needs may not be instantaneous, but they have shown much more flexibility that most laymen realize, and this is particularly true in connection with problems of urban growth. Compared to other extensions of eminent domain courts have approved, open space easements are relatively mild, if not antique. Consider, by contrast, what public agencies have been doing under Title I of the Housing Act. They can take a man's property—all of it—and then re-sell it to somebody else, and at a cheaper price, too. Not so many years ago the very idea would have been thought outrageous, unconstitutional, communistic; and so, indeed, it was. Now it's part of the status quo, for the public has realized the overriding need for such action if the larger community purpose is to be served.

It has been a far more drastic exercise of eminent domain than anything envisioned in open space conservation, but most courts have upheld it.[9] The most notable decision of all has been *Berman* v. *Parker,* 348 U.S. 26, 75 S. Ct. 98 (1954), in which the owner of a store, Samuel Berman, contended that the District of Columbia Redevelopment Land Agency was depriving him of his rights under the Fifth Amendment; his store wasn't hurting anybody, and here they were forcing him to sell it so they could tear it down and sell the land to somebody else. On November 22, 1954, the Supreme Court upheld the Redevelopment Agency and the enabling act of 1945.

[9] Even the Pennsylvania courts. They have had rather a bad reputation with planners, but though some of their decisions on zoning have been highly conservative, they have kept up with the trend to a liberal construction of the eminent domain power. In *Oliver* v. *City of Clairton,* 374 Pa. 333, 98 Atl. 2nd 47 (1953), land 90% vacant and unimproved was declared to be blighted land and condemned so that it could be redeveloped for industry. The courts supported the city on this.

In delivering the majority opinion, Justice Douglas hauled off and took a resounding crack at the constricted view of the public welfare. He wrote:

> "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. In the present case the congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

Let us now turn to the public benefits from open space. In a sense, they are indivisible, for an open space that serves one public purpose well will usually serve a number of others too. The aesthetic will probably be the basic motivating force, and thanks to the trend in court decisions, we need not be the slightest bit shy in affirming them. But solid economic and social benefits must be established also, and the more we go into them the more we realize how intertwined they are with the aesthetic. Let us run down the list briefly.

Water. Quite aside from any of the other benefits produced by an open space plan, it could be justified on the basis of watershed protection alone. In practice, a great proportion of the key areas that most people would agree should be conserved are likely to be stream valleys. Many people would not be thinking of the drainage and flood control aspect—but of the fishing and the swimming in the streams, or the beauty of the meadows, or the excellence of the farming, the contoured slopes that seem to go so well with the stream valleys.

Yet for the reasons these valleys are beautiful, they are tremendously useful. Like a great sponge, their flood plains temper the flow of the water downstream; the good soil practices of the farmers help keep down the silt that can be such a problem for communities and industries further downstream; because they have not been covered with asphalt, their runoff is much less; and when there is

heavy rainfall, the streams and the creeks that flow into a natural storm sewer system are far better than anything constructed by man.

Agricultural land conservation. Closely related to watershed control is the problem of our declining supply of prime agricultural land. A heavy proportion of Class 1 land is located in the metropolitan areas. It is not the marginal farms that are sought after; it is the best kind of land that is most attractive to developers. Some farm people feel the argument for agricultural land conservation so compelling that they believe an open space program could be justified solely on this basis.

They have an impressive case, but in the writer's opinion farm groups are not going to get too far with the general public if they continue to go it alone. If my talks with nonfarm people are any indication, the farmers' argument is not a persuasive one to lead off with; rightly or wrongly, many people think the farmers are getting away with murder as it is, and they have a vague idea that increasing mechanization, chemical farming, and such can easily compensate for the loss of acreage. They wouldn' be so sanguine if they studied the statistics thoroughly, but this is a chore they are not likely to undertake.

In making this qualification, I am not deprecating the cropland argument: I am merely suggesting that it does not become truly effective until the citizen sees his own equity in open space. Once he does, however, he can become quite receptive to the cropland argument. He now *wants* to believe it. For one thing, it helps neutralize his pessimistic assumption that maybe subdivision and commercial development is the "highest and best use" and that to think of saving farms in suburbia's path is being retrogressive and sentimental. He still may not really care about the farmers' problem, but their case now helps him prove to himself, and others, the economic soundness which his instincts impel him to. It's not necessary for him to agree completely with the cropland argument; what makes it important to him is its assurance that it won't be uneconomic to save farmland.

I have been speaking primarily of the citizens of the metropolitan areas, where the bulk of our population lives. When we turn to the citizens of our rural areas, however, the agricultural argument can be immediately compelling; and more to the point, in their hands it has a tremendous leverage. Urban planners have long lamented the lopsided way our legislatures over-represent the rural interests, but as far as open space is concerned, this is not without some advantages.[10] If rural legislators perceive how an easement program can help their constituents, they won't have to be thoroughly sold on its benefits to the city; as a matter of fact, they're likely to see it as a defense *against* the city. If this sharpens their enthusiasm, so much the better.

Recreation. There can be no substitute for outright purchase of park lands, but easements can greatly complement—and protect—parkland, and they provide some definite recreation benefits of their own. Even if the public doesn't go onto the land itself, it can enjoy the fact of it; the drive through the countryside is enjoyable because there *is* countryside.

The existence of countryside—*some* countryside, at least—has considerable effect on any regional park system. Big parks are not so dependent on their surroundings, but smaller ones are; there is, for one thing, their water supply, and if their lakes and dams remain good to swim in, conservation of farmland upstream may have a lot to do with it.

It should also be pointed out that, while public use does not necessarily go with an easement, there are many opportunities for limited use. We tend to underestimate how much public recreation takes place on private land. In the course of making a movie record of the Brandywine area, I have been struck with how many people use the Brandywine and the land along it; at first sight you don't notice many people, but if you stay put in one spot

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[10] By the same token, farmers can lament that planners don't pay much attention to farming. "Today we planners," writes one, "have done almost nothing *for* agriculture, because, I fear, we know so little about its needs. Even when we believe that it should be preserved, we don't know enough about the specific criteria of crop growth and land use relationships to do anything positive about it. In fact, by and large we tend to consider agriculture as a single entity without distinguishing between its vastly differing varieties and their respective characteristics and needs. How many land use maps and master plans lump all agriculture into one classification? Practically all do. From our study we believe that we must have at our fingertips such a sufficient command of basic agricultural information that we may distinguish floriculture from dairy or from poultry, as we would distinguish commercial, industrial, and residential land uses." From a letter from Leonard C. Moffit, Alameda County Planning Commission, 20 May 1959.

only a few hours you'll be amazed at how many canoers will pass by, how many people you'll see fishing whom you didn't spot at first. (I have also been amazed at how traveled are the back roads, particularly on weekends; and the number of picnics is awesome.) The landowners are very good about letting people go across their property, and the local sporting club, which has built "step-overs" to protect the farmers' fences, has posted the area with signs telling people to come and fish but to be sure to clean up any trash. As population mounts, landowners can't be expected to keep on providing free parks without a quid pro quo, but certainly there are ways to work out sensible agreements that will protect the landowner and compensate him for any increase in the burdens involved.

Control of sprawl. One of the great benefits of an easement program is that it provides a way of channeling metropolitan growth; it should be valuable, not just for the land it saves but also for the way it helps concentrate development in the land around. The economic benefits of this can be clearly demonstrated; the case against sprawl has been documented to a fare-thee-well, and though easements are only one of several tools that must be used, any brief for establishing the public purpose of easements should bear down heavily on sprawl.[11]

There are other points that should be made the relationship of open space to our air pollution,[12] for example, or how it can lead to a more economic spacing of highway interchanges. But in whatever order the arguments are advanced, they must be brought to focus on one simple clearly stated proposition: that open space is a public benefit in its own right. This is the critical part of any legislation, for it is the rock on which favorable court "construction" and tax decisions can be based.

The California Act does this superbly. The full text is contained in Appendix A. But one passage deserves quotation now:

> "The legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas 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."

As if this isn't touching all bases, later, in defining open spaces, the Act goes on to say that these areas "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."

Before concluding this section on the public purpose, let us consider one other potential benefit: *the reservation of future options.* In conserving open space by easements, we may have a relatively inexpensive way of reserving land, even though we may not be sure at the time exactly what future use the community might need to make of it. In the case of a possible park, for example, the community could lose nothing by securing an easement on suitable land; if subsequently, the community decided that a park was desirable, then it would still have to pay for the land, but the easement would have insured that the land remained open and that there would be the choice to make.

This is an attractive argument, but the writer has come to believe that it can be a dangerous one too. There must, of course, be an opportunity for the public to adjust to changed conditions, and in a later section we will take up the advisability of reversionary clauses, the question of subsequent condemnation by another public body, and such. But valuable as easements might be in giving us future choices, to stress this is to stress the hypothetical and thereby to undercut the force of the major argument. To repeat, open space must be established as a benefit in its own right and a benefit *now*. For another thing, landowners might reasonably become suspicious that the authorities were using the device as

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[11] For up-to-date documentation, aerial photos can be very compelling. For people on the Eastern Seaboard, it should be noted that Aero Service Corp. at 210 E. Courtland St., Philadelphia 20, Pa., in the summer of 1959 made a photographic flight with a new type camera which yields picture enlargements of extraordinary detail. The photos diagram vividly the interstices of the urban area.

[12] For supporting data see: Proceedings, National Conference on Air Pollution, Nov. 18-20, 1958. U.S. Department of Health, Education and Welfare.

a back door to make sure they'd get the land later for a park. Do they want me to keep my land open for the reason they say they do, he may well ask, or are they buying time at my expense? We should take care that the issue is not clouded by the hypothetical. Present use is the best yardstick, legally, politically, and otherwise. In selecting land, and advocating a program for doing it, the key question is not what open space might provide but what it does provide.

It should not follow from this that the land must be frozen, or that easements cannot be used to prepare for future conditions. Take, for example, the advisability of reserving land for reservoirs that may be needed in 1990 or 2000. Planners in the Delaware River basin area have just such a problem, and they are studying the applicability of the easement device. One question has been that of futurity: would the courts approve the acquisition when the needs are so far off in the future? Whatever the answer to this question, it might well be possible to justify the acquisition to the courts on the basis of present benefits. Even if the reservoirs were never built, the existence of these open areas might serve a readily perceivable public purpose in water retention, silt control, recreation, or whatnot. The wording of the California Act again comes to mind. If there's a good piece of open space which we can't find some reason for saving for the here and now, we have lost our capacity for invention.

While the matter of futurity is tangential to our main case, it should be noted that courts and legislatures have been looking with increasing favor on advance land acquisition. In seventeen states there are now statutes specifically authorizing land acquisition for possible future highway use. In most cases, the authority is granted to the state highway departments, in several instances to a specific state authority, and in one instance, to counties. In five additional states there is legislation which seems to imply that there is authority to acquire land for future highway use (North Carolina, Oregon, Tennessee, Texas, Washington). Most of the statutes run for only a relatively short time.

Even though there had not been specific legislation authorization, in at least six states the courts have sustained the acquirement of lands for future highway use (Arkansas, prior to its law, Illinois, Iowa, Kansas, Mississippi, Missouri), and the Delaware high court has approved the concept in principle. Aside from highways, acquisition for future use has been authorized or sanctioned by the courts for a series of other public needs. These have involved schools, waterworks, railroads. Some of these date back to the 1800's, so that precedent of long standing is involved.

To sum up: the cardinal requirement of an open space easement is that it provide a public benefit. It may provide future benefits not yet clear, but though the courts are becoming more liberal on this score, it is not necessary to justify open space on what it might do; we have abundant reasons to show that it is a benefit now, and it is this proposition that we must put before the public.

How do you convince the public that open land is a benefit—particularly when it remains in private hands? Many landowners and citizens ask this question, and though they say they recognize the benefit; they're still not sure the public at large will. May not the public look on the whole thing as a tax dodge?

It is true, unhappily, that people most readily recognize a benefit only when it is being taken away from them. About the time an open space is threatened—whether by a highway, a subdivision, or one of the many crews of tree cutters that seem to be everywhere these days—the public begins to get aroused. At this very moment, undoubtedly, there are scores of protest meetings over outrages to be committed—and if events run true to form, the outrages will be committed just the same.

Outrages do have their usefulness: one of the reasons why Monterey County citizens girded for action on open space was the sight of a hilltop being chopped up for a highway cloverleaf, and the smoke of burning stumps ("funeral pyres," as one citizen put it) roused many tempers to a high pitch. Question: But is there not some way to dramatize a benefit *before* it is too late? Some vigorous showmanship might accomplish a great deal.

Let me illustrate with an outrageous scheme I heard put forward. A large landowner was complaining that though the hills of his land made the view for miles around, people would

begrudge him any tax concession if he gave up an easement; they took his land for granted. Someone came up with this idea: rent a large neon sign, transport it up the highest hill, then, at dusk—just as householders were contemplating their blessings over cocktails on their terraces—turn the thing on. In short order, hundreds of angry people would be on the phone. The landowner would agree with them: yes, it was a shame and he hated to do it. But, after all, he had children to educate, and he just couldn't turn down the money. "Perhaps," he might go on, "they could work out a compromise." If all the landowners who enjoyed the view would chip in enough to make up for the money the sign people would pay him, then he could afford to keep the hills open. The cost, spread among so many people, would only come to a dollar or so a year for each household. Was the view for which they built their picture windows and their terraces worth a dollar?

The suggestion was facetious, but the basic principle is there. The public has an equity in the open spaces it has long taken for granted; if it is to be persuaded to preserve this equity, the fact of it must be graphically and forcibly demonstrated.

SECTION THREE: THE LIMITS OF ZONING

The question of costs brings us to a fundamental question. Why do we have to go to so much trouble and expense when there is a much simpler tool at hand? Why not zoning instead? It has been tested in the courts, it does not involve negotiations with a series of individual landowners, it requires no expenditure of money, and the basic idea has had wide public acceptance.

If easements are to be justified, this question must be met head on. For their part, laymen instinctively think of zoning as the answer to sprawl, and while the mention of eminent domain strikes them as drastic, they look on the use of the police power as the traditional, conservative way. Planners, who have reason to be amused by the fact that zoning now seems so respectable, see many flaws in large-lot zoning. At the same time they feel that other applications have great promise for the conservation of open space—much more promise, many feel, than an approach which calls for new legislation and an arduous campaign for public acceptance.

In answering this objection, I do not wish to suggest that there must be an antithesis between the use of the police power and the use of eminent domain. My point is that there is a distinction, a profound one, and however close the end goal, we overlook it at our peril. The police power, obviously, must be used if we are to control sprawl, and I will note some of the ways new applications of it are helping very much. My argument is directed solely against *over-reliance* on the police power.

Let's start with large-lot zoning. This is the exercise of police power that the citizens of outer Suburbia see as their best shield against sprawl, and they can argue that it has yet to be fully exploited. The trend to one-acre minimum lot sizes, they acknowledge, doesn't provide greenbelts, but these have tended to keep the mass developers at bay. As minimums are increased, furthermore, the by-product may be many a large tract left as open space; for if minimums can be increased to three-four acres, or more, the main stream of subdivision will be deflected elsewhere.

Increasingly, the courts have been ruling in favor of large-lot zoning. In the twelve states where minimum lot control has been ruled on by appellate courts, all but one—Michigan—have upheld it. In twenty-five other states, court decisions on related issues indicate that a similarly liberal viewpoint can be expected. In only six states do the courts seem inclined to rule against minimum lot zoning.[13]

Pennsylvania furnishes a particularly good example of the shift. Only a few years ago, in the Easttown township case, the state's supreme court had seemed dead set against the whole idea of minimum lot zoning. The Bilbar Construction Company had gone to court to protest the township's one-acre zoning; the company had a fifty-acre property and wanted to subdivide into half-acre plots. The lower court supported the township, but when the supreme court ruled on it, in July 1957, the ordinance was struck down. Less than a year later, by which time the composition of the court had changed, it reversed itself. It did not rule on the desirability of minimum lot zoning; it said this was really up to the Legislature. It did hold, however, that the zoning restriction was not illegal for it primarily served the *public*, rather than the *private* interest. Justice Bell, a member of the former majority, restated, energetically, the old view; in his minority opinion, he said the court was condemning "the doctrine of unlimited police power—a doctrine which is repugnant to our birthright of liberty, our tradition, our constitution, and our American way of life."

But the dominant trend is clear. Not only is there increasing approval of the idea of minimum lot zoning; there would also appear to be a growing disposition to approve higher minimums. At present, the firing line seems to be located in Fairfield County, Connecticut. Controversy is fierce there, but despite the counterfire, the minimums are gaining. Most recent is the case of New Canaan. In 1956 the zoning board raised the minimum from two to four acres in the northern part of the town. A

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[13] The eleven states, significantly, include most of the heavily populated ones: California, Connecticut, Florida, Maryland, Massachusetts, Illinois, Missouri, Nebraska, New Jersey, New York, and Texas. *Zoning for the Minimum Lot Area*, Communities Research Institute Project, School of Law, Villanova University, Villanova, Pa., 1959. 76 pp. ($3.50).

developer, who planned to cut his property into two-acre lots, went to court. On June 30, 1959, the Supreme Court of Errors, the state's highest court, ruled in favor of the zoning board. In its opinion, the court said, there were plenty of smaller parcels in other parts of the town, and the upgrading of the zone, therefore, wouldn't keep all but the wealthy away from New Canaan, as the developer had charged. In line with the general trend elsewhere, the court did not attempt to pass on the wisdom of the ordinance; its prime concern was whether or not, in the specific instance, it was arbitrary or unreasonable.

As far as open space is concerned, however, minimum lot zoning is not the wave of the future. We must grant that it will be very helpful in maintaining the integrity of different kinds of residential areas, we may also grant its usefulness in buying time and forestalling premature development while other safeguards are being established.

As a defense against sprawl, however, minimum lot zoning has several basic defects. In the first place, it tends to accentuate, not diminish, scatteration. By demanding larger lot sizes, the community forces the developer to chew up even more open space to house a given number of people; instead of several tightly knit subdivisions, there will be a smattering of them all over the landscape. In their eagerness to keep away mass builders citizens of outer Suburbia fail to recognize that it is often a multitude of small developments that is their main problem, and the fact that the lots must be large by no means inhibits many subdividers. The developments that are doing the most to ruin the countryside I know best are relatively small ones put up by local builders. Acre minimums haven't meant much to them; they've picked cheap land far out; their 1200 sq. ft. ranch houses may look incongruous on an acre of ground, but the cost of the extra land is only a small part of the developer's cost. Eventually, it will be a very large part of the owner's, and the community's, cost, but that is a matter not considered very much at the time. And too late will the community realize how much just a few badly placed subdivisions will have robbed it of choices it would very much like to have five or ten years from now—for parks, or industrial sites, or just plain open space.[14]

In the meantime the country is producing more and more people, and they are bound to limit the potential of large lot zoning. The growing middle class can't be housed in one-acre homesteads, and it will become progressively more difficult for communities to bid new people go somewhere else. Even if the community does keep the immigrants away, the victory will be Pyrrhic; they will fill the interstices—and the surrounding environment the communities have taken for granted will now be all the worse. The community won't be penetrated; it will be enveloped.

A good case could now be made for *maximum* lot zoning. At the very best, communities should temper their ordinances so that subdivisions could make better use of the space they develop; the same ratio of houses to total acreage could be maintained, but instead of filling the whole parcel with minimum plots, the subdivider could group the houses somewhat more tightly and thereby have some really usable space left over. Some planners feel subdividers should be made to do this. The pattern is not only economic for the developer, who would then have to install less asphalt road, pavement, gutters, and such per family, it is also economic for the community, which will have to service the development.

And it will be a better place to live in. Lot sizes will be smaller, but the residents gain far more amenity in exchange. If a stream gully runs through the area, for example, it won't be chopped up into a mess of back lots that will be a headache for the owners to keep up (if they do keep them up, which experience indicates is most unlikely). Instead, it can be conserved as a whole, or by enough to be made into a worthwhile community asset.

A pioneering example of how the community can induce subdividers to follow this pattern

[14] In showing slides to groups, I have noticed that aerial shots of mass housing developments invariably bring gasps of horror. Here, they feel, is the enemy. It is an easy, but unfortunate, assumption, and it is important that people realize it. Without attempting any praise of a "Levittown's" aesthetics, I point out that if there weren't large developments like these, there might not be much open space left in adjoining areas to talk about. For example, were the population of Levittown, Pa., spread across lower Bucks County in an aggregation of typical subdivisions, the place would be an unsalvageable mess; add to this a blanket of large-lot zoning, and a good part of the rest of the county would have had it too.

is provided by Philadelphia. Unlike most cities, it still has some farmland within its limits; it has also an imaginative planning commission. Planner Edmund Bacon and his staff saw a great opportunity; in the undeveloped far northwest section they would lay down the basic pattern *before* the developers got there. The conventional device of asking developers to dedicate a portion of the land to public use wouldn't be enough; all too frequently, the 3, 4, or 5 per cent turns out to be the useless patches the developer couldn't do anything with. The planners assumed the initiative: they laid out the whole street pattern and in doing so they provided for a series of cohesive neighborhood units, with a series of "greenways" and parks in between. The power of the city government was put behind the plan, and though private builders were not wildly enthusiastic when the idea was briefed, they began to see that within this overall pattern they could manage very well. Twenty builders are now at work on the neighborhoods. When completed, these will comprise a community of 68,000 people, on a tract of 2,500 acres. Being in Philadelphia, the houses are row houses and the density is higher than would be necessary farther out. But the basic principle is just as applicable to detached houses in Suburbia.

Agricultural zoning. Perhaps the most successful zoning device for open space at this time is exclusive agricultural zoning. Santa Clara County, California, has done the pioneering, and it is there that the pros and cons have been most sharply revealed. Few counties have been so hard hit by sprawl so quickly. Until the War, its flat, rich valley floor, which contained 70 per cent of the Class I soil in the Bay Area, was primarily farmland—and San Jose, the county seat, was the center of a thriving agricultural industry. By 1946 the developers had begun to leapfrog south from San Mateo County; the flat land was easy for builders and the farmers were dazzled by the land prices offered. Here and there a parcel was sold, and then another, and another.

By 1954 the place was a mess. The developments were not grouped in any pattern; they were scattered all over the place. Farming suffered. It was not merely that there was less land for cultivation; what was left was jeopardized by the scattered developments. The people in them complained about the farmer's sprays, his early hours with the tractor; more important, they needed new schools for the children they were breeding so prolifically, they needed new sewer lines and services of one kind or another. Before long, the assessor was raising taxes on the farms, which didn't need the new schools and services.

With Karl Belser, the county's able planner, the farmers worked out a program. They would petition to have the few large green spaces left zoned exclusively for agriculture. The county supervisors approved the idea, and in 1954, at the request of a group of peach growers, the first zone was set aside. To keep the cities from annexing farmland, Belser and the farmers went to Sacramento and got the legislature to pass an act forbidding annexation against the farmers' wishes. In time, other areas were "greenbelted," including the local golf courses and an airport ("Their uses are compatible with agriculture," says Belser, who is a thoroughgoing pragmatist). The result is quite visible; much of the valley floor is a mess of neon, subdivisions and hot-dog stands, but flying over it you can see several large tracts of green still intact—in all, some fifty square miles of "greenbelt."

But the total area the Santa Clara zoning experiment has helped save is much greater. Other California counties have followed suit, particularly those with highly specialized croplands, like the Salinas valley in Monterey County, the artichoke fields of San Mateo County. In the East, such highly fertile areas as Pennsylvania's Lancaster County are also taking up exclusive agricultural zoning; after studying the Santa Clara experience, one of the key townships, Manheim, set up a large zone (fortuitously, the Lancaster city-county airport was located in the area, and thus the zone could be justified as a safety, as well as a conservation, measure).

But Santa Clara County also furnishes some sobering lessons. Nowhere is exclusive agricultural zoning now under such fire. The cities, or most of their officials, at any rate, never liked the idea in the first place—just a political grab, they charged—and their hostility is getting intense.[15] Meanwhile, as some 5,000 new

[15] Officials of San Jose were so outraged by favorable comment I made on the county's experiment in a *Life* piece they drafted an official protest to Time Inc. ("The greenbelt, in our booming society," wrote city manager A. P. Hamann, "is an anachronism.")

people move in every month, land prices are going up still more; the temptation to sell has been growing, and if a farmer wants to get his land de-zoned, he can apply to the nearest city to be annexed. There are signs that some farmers' fealty to husbandry may weaken under the strain.

In Santa Clara County, at least, it does take some work to get out of a zone. In many other areas the agricultural zoning is only cumulative—that is, available for farming *and* subdivision; in many that are exclusively agricultural a farmer who wants to sell part of his land for a subdivision need only appeal for a zoning change. The boards are usually compliant, and as with other kind of zoning, the exceptions often seem to be the rule. In Macon County, Illinois, one of the first counties to adopt an agricultural zoning ordinance, there has not been a single case in fifteen years where a farmer who wanted such a change was turned down. City officials can be excused some of their skepticism; in quite a few cases agricultural zoning has been presented to the farmers as a fine tool for preventing signboards, automobile graveyards, etc.—and for giving them low taxes until the day they want to cash in and sell to a subdivider. ("Zoning is one of the best ways to assure that you'll have something worth re-selling," *The Farm Journal* quotes one farmer as saying.)[16]

The low tax idyl, however, can only be temporary. So far, agricultural zoning has helped in keeping assessments low, but legally there is no direct cause and effect relationship. As I will take up in detail in a subsequent section, the pressures on assessors to raise valuations begin to compound as soon as developers move into an area; too late, many farmers will then find that the zoning can be ignored when valuation time comes around. The zoning may have been coincident with low valuations; it did not insure them. But the zoning can have achieved much—if its weaknesses have been recognized. Psychologically, it will have had the great effect of making a number of people recognize their common stake, and in going through the arduous task of getting action on the zoning program, they will have produced a considerable momentum. They will have bought time.

It is significant that the people who pioneered exclusive agricultural zoning are conspicuous among those pressing for a much more far-reaching program. The farmers of Santa Clara County are glad they got the zoning—there wouldn't be much land left to save if they hadn't—but they are well aware of the flaws in it, more so than most of the communities which are just getting excited about the possibilities. This year (1959) the County Planning Department officially recommended an easement program to make the greenbelts really binding. The county supervisors were rather shocked at the idea, but a member of influential farm people believe such a move necessary. In nearby Alameda County, where the pressures on zoning have been similarly intense, the farmers are now talking of "agricultural parks." They suggested to the county planning commission that they ought to borrow a leaf from the industrial park developers; set up fully planned, concentrated farm areas surrounded by compatible buffer zones to protect against antagonistic and jeopardizing uses (e.g., subdivisions). This would take money; at present the only hope of attracting the necessary capital would lie in the formation of a new variant of the farmer-owned cooperative, and this in turn would require state help. But California farmers are resourceful people.

The Official Map. Another important application of the police power is the official map. So far, it has been used largely to chart future streets and possible widening of existing ones, but many feel it can be used effectively for reserving open space; if a community can prohibit owners from building on land that may be needed for streets, it should also be able to prohibit them from building on land that may be needed for parks, and in several states (cf., New York, Pennsylvania, Wisconsin) there is specific enabling legislation for such preemption. If a landowner finds the community has zoned his property against development because it may want to buy it for a park, he cannot build on it unless he can prove he is unable to earn a fair return on the value of his land.

[16] For an excellent discussion of cumulative vs. exclusive agricultural zoning, and the advantages of rural zoning in general, see "The Why and How of Rural Zoning," E. D. Solberg: Agricultural Information Bulletin 196. Dept. of Agriculture. For sale by Supt. of Documents, U. S. Government Printing Office, Washington 25, D. C. Dec. 1958, 58 pp. (40¢).

The fact that the community could secure the land against development by purchase of the land—or rights in the land—does not necessarily invalidate the use of the police power to achieve the same end. In *Pennsylvania Coal Company* v. *Mahon,* 260 U.S. 393, the Supreme Court struck down a Pennsylvania regulatory statute. Inveighing for the majority Justice Holmes argued that regulation under the police power can go too far and become a taking. In one of his famous dissents, Justice Brandeis said, "Nor is a restriction imposed through exercise of the police power inappropriate as a means merely because the same end might be effected or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limited height; but it is settled that the state might not resort to that power."

Since that time the use of the official map has been upheld in a number of cases. Recently, for example, in *Miller* v. *Manders,* 86 N.W. 2nd 469 (1957), the Supreme Court of Wisconsin upheld the state's official map law. In this case one Miller applied for a building permit to erect a drive-in lunchstand within the bed of a street that was planned on the official map. When the permit was refused, he started proceedings. At that time thirty-three Wisconsin cities and villages had adopted official map ordinances under the state's official map law. The court accepted the ruling of the New York Court of Appeals in *Headly* v. *City of Rochester,* and said that a broad reading of the recent decision of the U.S. Supreme Court in *Berman* v. *Parker* "is that the Constitution will accommodate a wide range of community planning devices to meet the pressing problems of community growth, deterioration and change. . . ." The court spoke of the financial interest of the taxpayers of the city. (This court has previously held that the protection of economic interests of the general public falls within the scope of promotion of the general welfare, and thereby affords a basis for the exercise of the police power."

In Pennsylvania the official map has had rougher sledding. In *Miller* v. *Beaver Falls,* 368 Pa. 189, 82 Atl 2nd 34 (1951), the Pennsylvania Supreme Court declared against a use of the official map on the grounds that it constituted the taking of a property right. The land in question, which the plaintiff wanted to develop, has been put on the community's map as a future park, and the community had three years of grace before it had to buy it. During this time, the plaintiff argued, his land would be virtually unsalable, and he was being deprived of just compensation. The court agreed.

Again, however, the basic trend is towards liberalization of this use of the police power. The main point in question is how honorable are the intentions of the community; once it has said, via the official map, that it will want to use a particular property, it cannot stall around interminably; if the owner's equity is to be protected, the community must consummate the intended purchase within a reasonable time—three years is frequently the limit. If it doesn't, the owner can properly claim that his title has been clouded, and for no valid purpose. Given these safeguards, however, the community can do much more than it has to secure open space for public needs.

Why, then, easements? The thrust of court opinions on different uses of the police power would seem to be all in the direction of further extensions of it. If the community can establish that open space is necessary for the public welfare, why cannot it use the police power to zone key areas against development? For the saving of open space, many planners feel, this is the main road to pursue, and they see *Berman* v. *Parker* as one of the great landmarks on it.[17]

Let me return again to the basic premise. Open space is a *benefit;* it is not the absence of something harmful, it is a positive good. If this is so—and my whole case, let it be clear, rests on this assumption—then it follows that we must be prepared to pay for the benefit.

The question is: *who* should pay for it? The landowner—or the public?

[17] It is surprising how many people who cite Justice Douglas' famous opinion think the case was about the police power. It wasn't; it was about eminent domain. Justice Douglas wanted to convey the majority's desire to enlarge the narrow concept of what serves the public purpose. This did have implications for subsequent cases on the police power, but was not a license to zone something because it served a public purpose. Berman, let us remember, did get paid for his property; the issue was whether the taking of the property served a valid public purpose. Forget about the matter of compensation and you misunderstand the whole case.

Here we come to the vital distinction between the police power and the power of eminent domain.[18] Under the police power we prevent somebody from doing something harmful to the public, and we have no reason to pay him anything. Under eminent domain we purchase a benefit. The distinction is not to be fudged. It is easy to say that preventing blight and gaining open space add up to the same thing, so why the fuss, but the matter of compensation forces the issue. The community, let us say, decides to do it the easy way; it tells the landowner in a key stream valley that it is vital to public health, general welfare, etc. that the valley be kept free from subdivision and that his land is now zoned against subdivision. To put it more bluntly, they are saying to him that his land is so beautiful they've decided he's to keep it that way, and that they've got enough power so that they don't have to give him a damn cent, either.

This is simply not fair. The community wants the benefit of the open space, but it's too cheap to pay for it. The landowner is to pay for it. By giving up his normal chances for realizing a profit on his land through subdivision, he is now bearing the whole cost of the benefit while the public pays nothing. The fact that the public welfare is served by the land being kept open does not absolve the community from paying. It cannot compel a benefit. In those cases where building would be clearly injurious, the community can properly pay nothing, but the case must be clear on this point.

In a piece in the *Columbia Law Review,* May, 1958, Professor Allison Dunham of the University of Chicago Law School has pointed out how very important are the implications of this distinction for future metropolitan planning. It is worth quoting at some length:

> "From time immemorial the common law and statute law have evidenced a community judgment that it is proper to make an activity assume the burdens or costs which the activity might cause . . .But to compel a particular owner to undertake an activity to benefit the public, even if in the form of a restriction, is to compel one person to assume the cost of a benefit conferred on others without hope for recoupment of the cost. An owner is compelled to furnish a public benefit just as much when his land is taken for the runway of an airport as when he is prevented from building upon his land so that airplanes may approach the runway. In the former the landowner is paid without question; in the latter there is an attempt from time to time to compel the landowner to furnish the easement of flight without compensation by restricting building. The evil of the latter system is that there is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare. A further consequence of an attempt to obtain a benefit by means of a restriction is that the full cost of the public benefit is thereby concealed from those in our democratic society who are given the power of deciding whether or not they want to obtain a benefit . . .
>
> "The moral and political question is: When should an owner be compelled to do something for the general welfare without compensation? The planning statutes in England and other Commonwealth countries in general draw a distinction between a restriction imposed on the principle of 'good neighborliness' (that is, preventing one neighbor from hurting others) and one imposed to secure a public benefit. The public need not compensate an owner when it takes (restricts) his privileges of ownership in order to prevent him from imposing a cost upon others; but when the state takes (uses or restricts) his property rights in order to obtain a public benefit it must compensate him.
>
> "There is much in American constitutional law to support this distinction although precise accuracy in application is not required under the rule of deference to the legislative judgment. Thus it has been held unconstitutional to compel an owner, without compensation, to leave his land vacant in order to obtain the advantages of open land for the public or in order to save the land for future public purpose,[19] but it is within constitutional power to compel an owner to leave a portion of his

[18] "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." Freund, *The Police Power,* pp. 511, 546, 547 (1904).

[19] *Galt* v. *County of Cook,* 405 Ill. 396, 91 N.E. 2nd 395 (1950); *59 Front St. Realty Corp.* v. *Klaess,* 160 N.Y.S. 2d 265 (Sup. Ct. 1957). But cf. *Miami* v. *Romer,* 58 So. 2d 849 (Fla. 1952).

land vacant where building would be harmful to the use and enjoyment of other land (e.g., set-back lines)."[20]

A good way to illustrate the critical difference is to think of a property along a stream. In the photograph we see an 80-acre farm bordering a stream. The 200 yards between the stream and the road running parallel to it is flood plain. The land in back slopes upward, culminating in some low hills.

The flood plain is good flat land, and most of the time you will see cows grazing on it. But once in a while the stream does flood over the plain, and after a spell of rain it is apt to be very spongy. This will not prevent developers from building on it (not so far away from this farm a builder has done just that), but this is clearly harmful to the public interest, let alone that of the poor devils who buy such houses. Quite properly, this strip of flood plain is zoned against development. The owner is not compensated, and shouldn't be. There is no reason to pay a man for not fouling the water supply of the countless people downstream.

Now let us go to the ground higher up. It would be nice if it were kept open too, and there are clear public benefits involved. But can we rightfully use the police power on this part of his property? Here we must pay, or be prepared to; if the owner cedes the chance to develop it, he is giving up a *right*. We can-

[20] *Gorieb* v. *Fox*, 274 U.S. 603 (1927).

Photo: WILLIAM GARNETT

An illustration of a plan to use conservation easements and flood plain zoning for saving open land along stream valleys. By this means the value of surrounding land for development purposes is raised. The photo shows at the top land that can be developed. Through the center, the photo shows land to which flood plain zoning is applied. On either side of the flood plain is land that could be preserved by easements.

not take it away from him by administrative fiat and claim we're doing it to prevent injury. This strains credulity. It is one thing to prove such open space is a benefit. It is quite another thing to prove that a well constructed development on it would wreak harm.

As long as the essential differences are recognized, the two tools can complement each other very well, and though it is not necessary, they can both apply to the same piece of property. If the owner has been given fair compensation for giving up the right to subdivision on his upper property, it could be zoned against it as well, though this would be somewhat redundant. Conversely, though the flood plain is property zoned against development, it wouldn't hurt a bit if easements were taken on it also, just to make sure (and for which the compensation should be nominal, since the owner isn't giving up much). This will relieve the owner of the temptation to ask for a variance some day—a temptation, alas, that has affected many owners of flood plain property these past few years.[21]

Conceivably, the community could stall off the necessity of paying for an easement by marking the whole property on the official map as a future open space reservation. Almost immediately, however, the land can cease to rise in value; developers may be bidding up comparable land around but this has been taken out of the market. Unless the community makes up its mind in a reasonable time and buys an easement or the fee simple, the owner will have suffered condemnation without compensation.

I have used stream valleys, not only because they clarify the issues at stake but because the first, critical tests are likely to take place in them. In most general plans for open space, stream valleys are given first priority, as they should have been, one should add, for some decades. This report is most certainly not a counsel for more procrastination, but a warning is in order. If officials think, as many seem prone to do, that the courts are so liberalizing the police power that the knotty question of compensation can be by-passed, they are making a serious mistake. There is nothing in recent court opinions that abrogates the constitutional provision that a man's property cannot be taken, in effect as well as by purchase, without due process, and just compensation.[22]

The practical question, then, boils down to this: What part of a stream valley is it necessary to keep open; what part would it be good to keep open? For the first, we zone; for the second, we negotiate.[23]

To recapitulate. We properly use the police power to compel owners not to build on open space when building on it would harm the public. With certain kinds of land we want saved for all sorts of other reasons too, such as flood plains, this is clearly the case. With other kinds of land—gently rolling hills, for example—we could stretch a point and say that we're doing it to prevent public harm, and thus apply the police power here too. But the point will not stretch this far; a good lawyer could tear it into shreds and ask, vehemently, if providing decent homes for people on land fit for building is harmful.

No, if we, the public, want this kind of land saved—and it is the greater proportion of our open areas—it is as a benefit. The law is clear on the matter. If we want it, we pay for it. What we pay depends on how much the owner is giving up in keeping it open; sometimes it will be considerable, sometimes little, and often he will give it free. But the offer we cannot evade.

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[21] See *Changes in Urban Occupance of Flood Plains in the United States:* G. F. White et al., Univ. of Chicago Press, 1958.

[22] Recently, Los Angeles authorities re-zoned a part of the San Fernando Valley from a multiple-dwelling to a single-family-house district; builders had started to put up multiple dwellings on land that might soon be condemned for airport purposes. The court struck down the re-zoning: "The true purpose of the ordinance," it said, "was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes." *Kissinger v. City of Los Angeles,* 161 CA 454, 327 Pacific 2d 10 (1958).

[23] An interesting test may be furnished by Rockford and Winnebago counties, Ill. In the joint land use plan for the two counties, the Rockford City-County Planning Commission has recommended "floodway preservation strips" along every water course that drains more than 500 acres of land. These run roughly 300 feet wide at the maximum; on this land, by zoning ordinance, no structures are to be built. While the criteria are based on careful study by the Corps of Engineers and others, and despite the clear relationship to public health and safety the idea is under attack by some on the grounds it is a value taking (???) The Planning Commission itself is not without apprehension in the matter; in its recommendation to the Board of Supervisors in January 1959 for floodway protection, it carefully asked that the action taken would assure "that the constitutional principle against public taking of private land without compensation is not violated."

I recognize that some planners feel this argument is an unfortunate one to expound at this time. One can understand the feeling; by reflex, planners are suspicious of arguments which invoke the sanctity of private property; most of the attacks on any kind of planning have tiresomely pled this principle. But two wrongs don't make a right. If those who want open space don't recognize the limits of zoning, the enemies will—and the lesson will come hard.

SECTION FOUR: JUST COMPENSATION

How much will easements cost? Whether we get them by negotiation, or condemnation, the law of eminent domain furnishes our ground rules. It holds that we base payment, not on the benefits we may derive from the easement—which in the case of open space would be highly difficult to put a figure on—but, simply, on what the owner gives up in deeding the easement. As Nichols put it, "Just compensation is what the owner has lost, not what the condemning party has gained." (Ch. XIII, Sec. 208.)

The general rule of thumb for gauging this is to estimate what the property is worth with the easement and what it is worth without it. The difference is the damage the owner suffers. As I will touch on later, it is for this reason vital that the easement deed explicitly state just what it is the owner cannot now do; if the wording is too loose, he can claim that he's letting himself in for more restrictions—and hence damage to property value.[24]

There are many ways of estimating damage, but "fair market value" is the basis for all. The U. S. Supreme Court said in reference to fair market value that it is "the price in cash at which the property would at that time [i.e. the time of taking] change hands in a transaction between a willing buyer and a willing seller, neither acting under any compulsion to buy or to sell."[25]

An owner might say his land would fetch $1,000 an acre with the easement but $3,000 without it; the community might claim this was outrageous exaggeration and that at best it would fetch only $1,500. The court must be the arbiter. There are all sorts of objective evidence that can help it—record of sales in the area, professional appraisals, and so on, but the final weighing will vary from court to court.

Would a jury award as much for the easement as for the land itself? We come now to one of the objections most frequently raised to pursuing the easement device. Many people not merely raise the possibility of such awards, but assume they would be the rule, and this assumption has cropped up often in literature on the open space problem. Indeed, it has gained such force as established fact that the absence of documentation is not questioned.

I have tried to track it down and have found that there are few cases to buttress the contention; a great many, as I will show, tend strongly to refute it. The question remains as to why the assumption has gained such currency. I think I have found an answer. It lies in the fact that for many years the kind of easement most commonly used was for highway, streetcar and railroad rights of way. Naturally enough, in such cases the owner is usually given as much for the easement as he would be for the land itself; for all practical purposes, he suffers as much loss one way as the other.

Since the most important easement cases have been for rights of way, many people thought—and many still do—of the two as synonymous, and lawyers, in writing about them, often left off the qualifying phrase, "right-of-way". Unless one reads carefully, in consequence, the generalization,

right-of-way easements cost as much as the fee simple,

becomes:

easements cost as much as the fee simple.

An obscure indexer in a publishing firm may have caused some of the trouble. If you didn't know anything about easement costs and decided to look them up in the index of Nichols' *The Law of Eminent Domain*, you might easily close the book and go no further. This is the way the index reads:

EASEMENT
- abandonment of 320
- abutters, in highway 491
- additional consistent, authority to impose inferred 1003
- constitutes property 346
- exercise, of outside land taken 465
- full value of land commonly paid for .. 689

If you do turn to page 689, you'll find the all important qualification: "for such purposes as

[24] In an Ohio case, a park commission secured an easement by which it was allowed to change the restrictions from time to time. The courts struck down the easement; the uncertainty, it held, made it much too difficult to assess damages. *Pontiac Improvement Co.* v. *Board of Commissioners of Cleveland Metropolitan Park District*, 104 Ohio St. 447, 135 N.E. 635 (1922).

[25] *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945).

a highway or a railroad which requires a permanent and substantially exclusive occupation of the surface, the distinction between the taking of the fee and of the easement has no practical application in the determination of the compensation. . . ." As Nichols elsewhere makes clear, common sense, let alone the law, indicates that when an easement allows the owner beneficial use of the land he shouldn't be paid as though it didn't.

Because a man retains beneficial uses does not mean he cannot be paid the full value. There may be a serious question as to how long or how much he can enjoy these uses, and in such cases many courts tend to give the landowner the benefit of the doubt.[26] If a man has given a public body, via an easement, the right to occasionally flood part of his property, he'll likely get full price for it, for though he may be able to use the property himself at times he certainly can't count on it.

With an open space easement, however, the owner retains all present uses and any possible future ones that don't conflict with the stipulated restrictions against building. How much is he giving up? It depends on time and place. If he's in the midst of suburban developments and developers are besieging him with offers of $4,000 an acre, he's giving up a lot. If he yields an easement, the fair market value of his land is reduced to what people will pay for it as a farm or an estate—say, $1,000 an acre. Out in the open country, however, the present going market may be primarily for farm and estate land; here he would be giving up very little.

In some cases sale and leaseback might be preferable to an easement. The property, for example, might have such a high current market value for development that it would cost a great deal to buy an open space easement, yet be of such benefit to the community that it is willing to pay a good bit. In such cases it might well figure that since it's going to have to pay a lot, it might as well get the land while it's about it, then lease it back, subject to the open space restrictions. This might be especially advisable with land the community foresees it will need for a park or other purposes later, or for property of great historic significance.

As a large-scale measure for conserving open space, however, it could conjure up the spectre of government ownership, "socialization" of the land, and in outlying areas would cost far more than easements. It may be that in time the public will incline to such a program; there are few signs that it is a realistic possibility for the near future.

Let us now look at data on easement costs. There are no court cases directly bearing on the purchase of easements for an open space program, but some clues are afforded as to cost by recent experience in other applications of the easement principle. First, let us take *highway easements.* The most extensive body of experience comes from the acquisition and condemnation of scenic and right-of-way easements in connection with the improvement in 1951 and 1952 of the first section of Wisconsin's Mississippi River Parkway and State Trunk Highway 23, Trempealeau and LaCross Counties, Wisconsin. The easements vary in width, but are generally confined to a width of 350 feet on both sides of the highway centerline. Easements were acquired only through rural areas.

The actual costs of acquisition for the nine projects comprising the 33½ miles involved are summarized as follows:

DEVELOPMENT RESTRICTION (SCENIC) EASEMENTS DATA ON MISSISSIPPI RIVER PARKWAY PROJECTS, WISCONSIN

Project	No. of Acres	Easement Cost	Easement Taken on Number of Parcels	No. of Parcels Condemned	Miles of Road
A	565.68	$ 5,570.00	57	20	11.16
B	56.86	315.00	7	1	2.74
C	15.32	75.00	2	0	0.78
D	141.96	----	1	0	2.30
E	48.50	395.00	8	1	1.12
F	125.06	1,853.88	12	6	2.74
G	149.06	4,672.59	15	6	3.13
H	163.40	5,990.00	30	2	7.00
I	5.98	100.00	1	1	2.42
Totals	1,271.82	$19,151.47	133	37	33.39

[26] In North Carolina the highway commission obtained a 150-foot-wide easement but used only 50 feet of it for a highway. The court awarded full value for the whole width, even though the farmer could use much of it: ". . . compensation is to be assessed on the basis of rights acquired by the condemner at the time of taking, and not on the condemner's subsequent exercise of such rights." *North Carolina Highway Commission* v. *Black,* 239 N.C. 198, (1954). By contrast, a Kentucky court denied full value to a farmer for a pipeline easement; it held that he still could use the land for farming. *Tennessee Gas and Transmission Co.* v. *Jackman et al.,* 311 Ky 507, (1949). In a previous Kentucky case the court denied full value for a transmission line; save for the fraction actually occupied by the towers, the land was still available for farming. *Kentucky Hydroelectric Co.* v. *Wood,* 216 Ky 618, (1926).

Some averages derived from the data for these projects are the following:

		Range
Average easement cost per parcel	$144.00	($2.63
Average easement cost per acre	15.06	to
Average easement cost per mile	573.57	$5.73)
Per cent of parcels condemned	28%	(7 to 50%)
Lands donated	142 acres	

The cost of acquiring fee title versus easement title to these rights on two projects, are the following:

	Project A	Project B
Fee title cost per acre	$35.00	$44.85
Easement cost per acre	$ 8.22	$23.75

The magnitude of the parcels condemned may be significant. Condemnation had to be resorted to in approximately 28 per cent of the cases. This is at least twice the amount condemned in ordinary highway projects. This high percentage might indicate that too little is being offered by the state for these rights or it may be that the character of the restrictions involved and their impact on remainder values are not fully understood and appreciated.

Another significant illustration of the application of the protection easement is the Ohio "highway reservation agreement." (See Appendix D for the form of the agreement.) Under the Ohio agreement, the Department of Highways acquires specific "rights" in designated "reserved" areas, for a normal consideration; the owner is permitted to use the reserved areas for all normal purposes that will not later interfere with the future use of the marginal strips as highway right of way. The reserved areas may vary from 100-foot strips along the tangent sections of road to 200 and 300-foot areas at the crossroads, where future interchanges may be contemplated.

Ohio has been paying for the reservation of these areas at the uniform rate of $5 per acre or portion thereof. Thus, on one project, $421 was paid for 21 reservation agreements involving 3.85 miles of road. This is at the rate of $109 per running mile. State authorities have estimated that the average state investment will range from $60 to $120 per mile, depending upon the width of right of way and the area protected. One of the earliest projects where this reservation easement concept was applied was on a section of the Columbus-Wooster Road in Delaware County, Ohio.

It should be pointed out that in both the Wisconsin and Ohio illustrations indicated above strictly rural areas were involved. If the device were applied in urbanized areas, the costs, quite naturally, would be expected to be much higher, consistent with the character of the uses involved.

National parkway scenic easements. While scenic easements have worked well to conserve a natural landscape along sections of the parkways, there is a widespread belief that they cost as much to acquire as the land in fee simple would have. Since most were acquired 10-20 years ago, this assumption has achieved the stature of a well known fact and has dissuaded many officials from trying the device.

The National Park Service has no record of the costs, and the writer therefore queried the highway departments of Virginia, Alabama, and Mississippi (the easements were acquired by the states at the request of the Park Service). The answers show a considerable variation in experience, a variation that seems to have been influenced very strongly by the practices of the highway engineers. By tradition, highway departments are used to getting land outright, and many did not look with especial favor on the use of easements (which would require enforcement); particularly so in cases where the cost of outright acquisition was moderate to begin with. In Virginia, for example, land in the rural sections cost only $60 an acre outright; the easements cost $50. For the last thirty miles of the Blue Ridge Parkway, therefore, the highway department acquired all the land in fee simple.

The Mississippi Highway Department feels easements burden the taxable land of the property owner, restrict his rights, and impose an enforcement burden on the administrative agency that holds the easements. In obtaining easements for the Natchez Trace Parkway, the department paid between 50 per cent and 100 per cent of the cost of comparable land in fee simple.

The Alabama Highway Department, by contrast, was able to get easements for its portion of the Natchez Trace Parkway at a nominal price. For a ten-mile stretch acquired in 1941 and 1942, it paid an average of $75 per acre

for land in fee simple; the price for easements on comparable land was $10 an acre.

The absolute figures, of course, are not pertinent to today's prices nor for land in built-up areas. Two tentative conclusions, however, are suggested: (1) easements *can* be acquired at a fraction of the fee simple cost; (2) the comparative price depends a great deal on the full understanding of easements by landowners. The task of proper enforcement is not to be underestimated. (But the lowering of maintenance costs required with fee simple land may more than offset this. See Section Two.)

Flight safety easements. On agricultural lands adjacent to the Lemoore Naval Air Station in Kings and Fresno Counties, California, the Navy is purchasing 19,236 acres outright and is buying easements on 12,312 acres. The easements limit the use of the land to agriculture and impose limitations on the heights of structures. Average cost: about $15 per acre.

Flood easements. California has had a great deal of experience with flood easements; in conjunction with flood control projects of the U. S. Corps of Engineers and other water conservation projects, the state generally acquires flooding easements. Much of the land in the by-pass channels protecting the city of Sacramento, for example, is preserved by easements from such conflicting uses as development. In negotiating price, the state has found that no rule of thumb can be used; in flood control easements the historical hydrology of the streams causing the floods and the frequency of flood and its length of time would naturally affect the use remaining to the landowner, and therefore the easement price. In levee easements, for example, the Department of Water Resources and the Reclamation Board pay almost the full market price of the land, since the owner is being deprived of the actual use of his land and only a nominal value remains to him. In many flood control easements, however, the owner still enjoys almost full use of his land, and in such cases, naturally, he is paid much less for his easement. (Lands on the bypass channels around Sacramento, for example, are still farmed. Similarly, in the reservoir areas where the state has purchased easements the land is still used for grazing purposes.)

In assessing damages, the courts looks to present market value, and not to some hypothetical sum the owner thinks he could make. In this respect, the Pennsylvania courts furnished a good case; in *Laureldale Cemetery Company* v. *Reading Co.*, 303 Pa. 315, 154 Atl. 372 (1931), the court wrote a fine opinion in rejecting the contention that the owner was entitled to reap the full potential value of his land; an unimproved portion of his property had been condemned, and he was asking for the value that the land would have had if he had developed it for cemetery purposes like the balance of the plot. The court held there was no reason why he should be paid for the hypothetical future value of his land. This is promising, for it indicates that in assessing the value of development rights, such a court would probably be conservatively low.

To recapitulate, the question of price is one on which precedent can be of only limited help since an open space program has not been tried before. Yet there is some encouragement for the belief that the price need not be excessive—if purchase is started soon and in outlying areas where developers are not waving thousand dollar bills around. Experience with other kinds of easements, notably scenic easements for highways and airport easements, suggests that in many areas the price would be quite moderate indeed, and in many cases, as we will note later, the rights would be given free.

Let us now consider the arguments that can be presented to landowners. We do know enough now to see that there are some compelling ones—and in terms of their own self-interest.

(1) Immediate compensation vs. hypothetical gain. Let us say, for example, that we are trying to negotiate the price of $100 an acre for the development rights to a 140-acre farm on the present urban-rural fringe.[27] The farmer might argue something like this: "Why should I settle for $100 an acre? Right now I'll admit the land is worth only about $1,000 an acre as farmland. But five to ten years from now a lot of developers are going to be coming out here, and they might give me, say, $2-3,000, maybe $4,000 an acre. I've got my kids to think of."

First, it can be pointed out that he gets the money now—$14,000 in cash on the line (and

[27] Lest the reader be misled by false concreteness, let me point out that this $100 figure is solely for illustration and is not based on any computations.

taxed as capital gains, not income). And what he must contrast is not $14,000 vs. a possible great sum later, but what that $14,000 could do for him during all those years while he's waiting for a killing—and paying rising taxes.

(2) **Uncertainty of high price.** And what assurance does he have that he is going to make a killing by selling to a developer? Many people have the erroneous idea that development advances in consecutive steps, digesting everything as it goes along, and for this reason they have exaggerated notions as to potential land values. It would be sobering to them to be shown an aerial map of the great number of scattered tracts that have been left open in the areas close to the city. Are the developers bidding high for all that land? In a few cases here and there, yes, but for the most part they bypass it to seek cheaper land.[28]

(3) **Replacement costs.** Santa Clara County, California, furnishes some pointed examples; there, where farmland is immensely productive and worth a great deal as farmland alone, many farmers were dazzled at the thought that land they thought worth $2,000 an acre would fetch $5,000 if they sold to a developer. But for many farmers this was only a paper profit. If they wanted to keep on in farming, they could find no comparable land at the old price.

(4) **Low cost protection.** Next, let us consider another kind of landowner, the gentleman farmer. You can demonstrate to him that it might even pay him to give up his development rights, so long as he has assurance that land of neighboring owners will be similarly protected. It is important that we do not obscure the fact that eminent domain will eventually be needed, and any attempt to sugarcoat the fact in selling an open space program is bound to backfire. Without eminent domain a landowner in the middle of an open space area could reap a very big—and very unearned—increment in value by selling out to a developer—who, promptly, would advertise the "parklike" surroundings his customers would enjoy.

(5) **Possible increase in value as estate land.** It is not correct to assume that if one gives up his development rights, he necessarily will be permanently lowering the value of his land. In terms of today's market, it does appear that land that cannot be cut into a subdivision would fetch less when it is put on the market than land that is not restricted in this way. This fact should be taken into account by the tax assessor. At the same time, however, we should not assume that today's "highest and best use" will hold true in perpetuity, and that the land has been irretrievably damaged as far as market values are concerned.

Let me cite a point I heard brought up in a discussion with a group of landowners in what is known as the Kennett Pike section, northwest of Wilmington. We had just returned from a meeting of the local watershed group, the Red Clay Valley Association, and there was a very hard-headed discussion of the development rights idea. One of the landowners questioned the premise—which most of us were more or less accepting—that yielding of development rights would permanently impair the market value of the land. He said something like this: "Right now there are a fair number of good-looking farms for people like us to buy. But the prices are getting pretty steep. If I were to sell my eighty acres to a developer, I might get $2,000 an acre. And if I gave up my development rights, I certainly couldn't get that much now. But the supply and demand is changing. If things keep on going the way they are, in ten or fifteen years how many farms will there be available—at any price—like mine? But there will probably be at least as many du Pont people as today who would like to have one. In other words, if I do give up my development rights I may lower the market value of my land for the short term, but it's quite possible that over the long run that might make it all the more valuable."

The validity of such arguments we cannot satisfactorily test today, but they have another

[28] Let me refer to Chester County, Pa., again. Most people would agree that the very eastern part of the county, 20-25 miles from Philadelphia, has been heavily settled while the rest remains quite open. In going over the ground, however, one quickly sees that the *total* amount of land in the eastern part that has been developed since the War is not great at all; put together, all the new subdivisions can be contained in several square miles. They are not, of course, put together, and there is the rub. They are along the main roads, and even here they are scattered. Yet they have sterilized much of the open space that remains behind them, or between them, and you see more acreage going to weeds and second growth in this part of the county than you do in the central and western parts. Much of this remaining land in the eastern part will indeed be developed and fetch high prices, but much of it won't be, and some landowners who have been anticipating a killing are going to be disappointed. The developers are looking westward.

significance. The well-to-do landowner is only one of many people served by an open space program, and it would be a great mistake, certainly, for the program to be tagged as a way to help rich people at the expense of everybody else.

But let us count our blessings. The fact is that there is a fortuitous linkage of self-interest; landowners can recognize this rather quickly, and when they turn the cap around the other way, they are usually situated in considerable positions of power. Furthermore, not having to protest their conservatism, and by training, highly able to see their long-range self-interest, they find, more than do most people, that it is relatively easy to make whatever ideological adjustments may be necessary.

(6) **The "non-injured" remainder.** Much attention has been given the injury a man may suffer to the rest of his property when a highway easement is taken. Somewhat the reverse may apply to the case of many open space easements. Quite often, only part of a man's property will be covered by the easement—in the farm in the photograph (p. 27) for example, the flood plain is zoned; the middle section is covered by an easement, the rear part is left unrestricted. The very restrictions raise the value of the unrestricted part and make it a far better buy for a developer than it would otherwise be. Land owners should read the National Association of Homebuilders manual on land planning: it is quite explicit on the value of such buffers ("Be sure to check the zoning of adjacent tracts, whether vacant or built up, and the presence of protective covenants on these properties which will protect you against future adverse uses." Homebuilders Manual for Land Development, page 7, second revised edition, 1958.)

SECTION FIVE: GIFTS

A surprising amount of land can be obtained by gifts. Many landowners have bequeathed land to park commissions in their wills and in many cases have been prepared to give the land before their death provided they may enjoy a life estate in it. There is a large body of experience on the legal and tax aspects of such deeds; Massachusetts, through the pioneer work of the Trustees of Reservations, has received many such gifts; similarly, in California, state park authorities have acquired tracts, particularly those of historical significance, by letting the grantors keep a life estate in them.

The easement device may greatly enlarge the gift potential. Only a relatively few landowners are wealthy enough, or public spirited enough, to give their land outright, but there is a rather sizable group who could afford to give easement, and would be willing to; indeed, it can be demonstrated that it would actually pay them to do so.

Before listing the arguments, let it be emphasized that they can apply only to the owner who really does have a feeling for the land; if he secretly hankers to make a killing, the arguments can only have a certain neutralizing effect. But if the owner does want to see his land remain open, the easement nicely couples his self-interest and that of the community.

First, it provides him with the flank protection that he probably has worried about more than once. An open space program can't be planned in bits and pieces; it must have some topographical unity, and thus, in talking to any one landowner, we can point out how the easement program will conserve surrounding areas. If he has been concerned, say, about the prominent hill across from him ("I know Dave won't sell out, but I'm not sure about his kids, and Dave's getting on"), he can now be assured as much protection as if he put in a preemptive bid for it himself.

This points up the eventual necessity of having the power of eminent domain. The first legislative efforts, as I will note later, have tended to omit this on the grounds of first things first, and one can appreciate the political advisability of taking the easier steps first. As the public becomes more involved in an open space program, however, it is going to become apparent that eminent domain will be necessary if one man is not to exploit the contributions of others. For this reason, the writer believes that the long-range necessity of eminent domain, like that of perpetuity in the deed, must be constantly stressed, and not soft-pedaled.

A second quid pro quo for the landowner is tax treatment. In the following section I will go into the matter in detail; suffice it to say here that by giving an easement, the landowner protects himself from rising assessments based on the subdivision potential of his land. In many areas it is precisely this problem that is uppermost in landowners' minds. It may also be pointed out that if he gives the easement as a gift, the value of it is deductible in computing his income tax. In outlying countryside the value might be little, there being little difference between the market price of his land without the easement and with it. In areas where the market price is being pushed upward by developers, there might be a considerable difference, and thus more of a sacrifice of potential profit on the part of the donor. If this is the case, he has a compensating advantage in that this difference is fully deductible as a gift.

These considerations should not be overstressed; they are not themselves sufficient motivation. They are important because they enable a landowner to do what he *wants* to do and feel that he is being sensible and prudent in the bargain. I have talked with many landowners, and I have been struck time and again by the fact that, in any general discussion, it is the landowners who take the lead in hypothesizing the different advantages that would accompany an easement program. They don't talk about the tax angles because they are looking for favors. There are much easier ways open to them if it's more money they want. They explore these angles because they are eager to justify economically what their instincts impel them to.

This kind of landowner, characteristically, is the gentry. They may be the third or fourth-generation to hold the property, gentlemen farmers or ranchers, older executives who have bought a country estate, retired generals, or, simply, people who are rich. The gentry make up only one category of owners, to be sure, but

they are critically important to the success of open space conservation, and the potential they represent, I maintain, is being badly neglected.

This brings us to the last quid pro quo offered the landowner. Characteristically, the gentry have a strong bias for the "natural" countryside, and it is the preservation of this that the easement device promises. When they think of open space, they usually don't think of parks, or lakes for recreation, or the landscaping along super-highways; they think of farmland, streams and meadows, white fences, and barns. Many such people feel they should be for park programs, but more from an abstract sense of obligation than from any personal impulse. If they're for parks, it's likely to be for parks somewhere else, and if they get to talking candidly, it's not long before they'll reveal a definite distaste for the idea of picnic benches and formal landscaping. The word "manicured" comes up often; so do invidious references to the monotonous green perfection of parkways.

Much could be written about the muted class and economic conflicts in this situation, but it would not be to the point; the simple fact is that these people do have this bias and that they happen to own the best land just beyond today's suburbia. The job is to understand their inclination and to exploit rather than deplore it.

Not enough park officials do, and thereby they are missing a great opportunity. Frequently a large landowner will offer to leave his property to a park commission if he is given assurance that it won't be developed with benches and such into a park. Many park people feel they cannot properly guarantee such a provision would be fulfilled, and there the matter has rested. Somewhat ironically, in one eastern county a local park commission was recently created largely because the citizens had heard that a wealthy woman wished to leave her land for the public. She did, but when the park commission came to her, she said a park was the last thing she was thinking of; she wanted it left as a natural preserve. There was no machinery for this, and the park commission, which had no parks, has lapsed into inaction.

Antithesis between parks and countryside is unnecessary. To think of open space acquisition only in terms of full title and formal park development is to leave unexplored the great chances for saving a complementary, and no less important, kind of open space. It is a kind of open space, furthermore, that will not strain operating budgets. As has long been known, gifts of land can often be troublesome unless there is going to be money to develop the property and to maintain it.[29] Land that is conserved with easements, however, is maintained by the owner, and economics aside, aesthetically this provides something a park cannot. The owner, certainly, is doing it for his own self-interest; he's not contour plowing his slopes or having cows graze in his meadows to provide a spectacle, but this has a lot to do with the public's self-interest. The land is being used and it is productive. It is kept *alive*.

Some years ago the State of Pennsylvania made moves to acquire land for a park in the lovely valley where the battle of the Brandywine was fought. The landowners went up in arms; some of their reasons were not altruistic, but on one point many others were in impassioned agreement with them. This was no way to save the Brandywine; for the tourist as well as the native, it was far better if its rolling hills were left in farming, little changed from the way it looked 200 years ago. This view prevailed, and the valley is still almost as lovely as ever. The resolution of the issue was negative. Because there has seemed no middle way between park purchase and laissez-faire, the blight has begun. The Philadelphia Electric Company has strung high tension lines along the very edge of the Brandywine; here and there, a developer is nosing about.

In contrast, there is Monterey County, California. Armed with the easement tool, a group of its citizens have been soliciting gifts of easements from landowners, and gifts of money to buy easements as well. The campaign started in June (1959); by August 10th gifts of 4,000 acres had been pledged. One gift will save part of the most magnificent stretch of coastline in the world, the Big Sur.

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[29] This is true of land given as wild land also. John H. Baker, president of the Audubon Society, points out that "there is a disposition, in some quarters, to not only receive it as a gift, but buy it, without any knowledge or assurance of how it is going to be maintained properly, and by whom. Our society has had quite a little experience with the management of relatively wild land, and firmly believes that it is essential, if an area is to be truly 'saved', that there be from the outset sufficient funds available to properly manage and maintain it." Letter to writer 6/26/58.

SECTION SIX: THE TAX QUESTION

We have been saying that in asking landowners to keep their property open, the public is looking for a benefit and that it must be prepared to give something in return. It may be money; or it may not be. If the landowner is willing to forswear the just compensation the law entitled him to, the community will get the easement free.

But this is only part of the bargain. In every case there is one thing the public must give, and for the landowner it is probably the most important quid pro quo of all. He must be given a guarantee of fair tax treatment. If he has given up the right to make an extra profit by selling his land for subdivision, the community must recognize this in the assessment of his property. It should be taxed on the basis of fair market value, no more, no less.

This is hardly a new principle. It has long been public policy that land should be taxed at fair market value. But how do you gauge it? Practice varies widely. In one county, the assessor won't raise the valuation of farmland, even if it's next to a Levittown, until the owner sells it. In another, the assessor will raise it to the value of adjacent developed land whether the owner plans to sell it or not. But the drift is unmistakable; as the money pressures on local governments mount, the assessor is increasingly raising valuations on open land to that of comparable land that is being developed. This, he says, is its fair market value; and whether the owner wishes to realize it or not is beside the point; he *could* get this price right now, and the assessor must take this into consideration.

The effect is to tax land into development, and there is a pronounced spiraling effect. As more land is developed, the more the community needs money to meet the new burden of services, and thus the more it needs to raise taxes. Result; more scatteration. The assessor has become de facto a master planner, and the fact that it is by inadvertency only makes the problem worse.

It can be pointed out to him that the "highest and best use" of land is often not residential subdivision; that open land frequently returns benefits to the community out of all proportion to the services it requires; conversely, the developed land which yields higher taxes may require services so costly that the community pays out far more than it gains. It can also be pointed out that his assessment policies may be negating many of the long-range plans the community is set on. To all of which the assessor can reply that his job is to collect taxes; it's not to do the master planning; and until the public, through its state government, changes the rules for him, he has to keep on doing just as he's been doing.

Legally, the uniform taxation clause gives him considerable leeway. Some assessors have been almost vengeful in their interpretation of it, but they can always invoke the idea of fair play; they don't *want* to tax any land into development, they can say, but they take their orders from the state constitution, and whatever the exact wording from state to state, it tells them to assess a property at its fair market value. It may be that a particular farm will fetch only $1,000 an acre if it is sold for farming, but if comparable property nearby is fetching $2,000 an acre from developers, that is its fair market value.[30] The assessor may sympathize with the landowner who wants to keep his acreage in farming but he can plead that the law directs him to raise the valuation; the taxation is obviously not uniform if he assesses one property at one figure, a comparable property at a much lower one.

Thus we come to the critical importance of a binding easement. If a property isn't legally available for subdivision, it isn't comparable to properties that are. (See Appendix A) The very constitutional provision that assessors have followed to raise valuations now becomes the landowner's shield. No new legislation is needed on this point; 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 market value. This is why the easement must be binding. Many landowners I have talked to would love to have it both ways; that is, have the easement apply

[30] In estimating the pros and cons of using a portion of its property for development, Stanford University found that at current tax rates the property would cost the community more in services than it gained in taxes unless the land were developed with 1-acre lots and $50,000 houses.

and save them from higher taxes—but always with an easy loophole in case they change their minds. There must, of course, be a reversionary clause in the easement; it must have flexibility so that it can be adapted to future conditions we may not be able to foresee now. But basically it must be a deed in perpetuity, and rather than soft-pedal this fact, it should not only be made plain to landowners but used as a selling point. The perpetuity feature is to their advantage; without it, they have no real tax protection.

In many semi-rural areas, landowners don't realize that they will eventually need this protection; there may not yet have been sufficient development to set the spiral off, or, as I have sometimes been told, "we have a very *understanding* assessor here and, for heaven's sake, don't upset the applecart." In such communities the citizens have been rather apprehensive lest too much discussion of the open space tax question give the assessor ideas. (I must confess that in talking to some civic groups on the matter I feel uncomfortable when the assessor is present. "Ah, so they're raising valuations on farm properties up in X County!" he will comment, obviously stimulated.)

Let me now illustrate the foregoing points by telling a story. It is the tale of the fight between the assessor and the golf clubs of San Mateo County, the great bedroom community just south of San Francisco. For communities yet to feel the full impact of development, it provides a clear warning of the tax dilemmas in store for them.

Several years ago one of the eight private golf clubs sold off a small bit of its property when it was re-locating a hole. The fact that it got a very nice price for the piece drew the assessor's attention. He proceeded to raise the valuation on the club's remaining acreage up to the value of the residential land around it. The club protested. It didn't want to sell its land for subdivision; it was going to keep it open. The assessor replied, in effect, that this is what they said but there was nothing to prevent them from selling it, and he had to recognize this in his valuation. He proceeded to raise the assessments on the other eight clubs. (Currently, they range between $1,254 to $2,500 an acre, which, being on a 25 percent valuation basis, means estimated market values of $5,000 to $10,000 an acre.)

The golf clubs organized in self-defense and in 1958 went to the county supervisors, who serve as the Board of Equalization. Among other things, the golf clubs pointed out that for the public at large these green spaces were a benefit and were they subdivided overall land values would be hurt, rather than increased. (One industrial development man attributes the closing of two important site purchases to the amenity provided by the nearby Menlo Golf and Country Club.) The supervisors backed up the assessor's valuations.

The golf clubs, in the meanwhile, had had another idea. Taking a cue from Santa Clara County's agricultural zoning, they figured that if they could have the golf clubs incorporated as exclusive recreational zones, they might have the makings of a fence against the assessor. To lay the groundwork they went to the state capital in Sacramento and, with some other groups, got through an amendment to Section 402.5 of the California Revenue and Taxation Code. It read:

> "In assessing property which is zoned and used exclusively for agricultural or recreational purposes and as to which there is no reasonable probability of the removal or modification of the zoning restrictions within the near future, the assessor shall consider no factors other than those relative to such use."

But when they sat down with the assessor to talk over the zoning plan, he told them, sorry, but even if they did zone he still wouldn't lower their valuations. Both the county's counsel and the state's attorney general (now Governor Brown) had advised him that the amendment made no change in preexisting law. Under zoning there would he a reasonable probability that the zoning could be changed, and so long as this was true, the uniform taxation requirement forced him to take this into consideration.

There is a new assessor now, Mr. Ralph Woodman, but he takes the same position. In sum, he holds that the golf clubs want it both ways: to escape full valuation while they're using the land for golf, but not to bind themselves so they can't sell out for a killing if they ever are of a mind to. The golf clubs are now thinking of restrictive covenants, for a given

period of time, that would guarantee to the assessor that the land wouldn't be subdivided. Mr. Woodman is not impressed; the covenants, he believes, wouldn't give the assurance that his office needs, and he would continue to tax the clubs' land on the basis of their highest and best use—i.e., subdivision.

I asked him what he would do if they severed the development rights by giving an easement to a public agency. Yes, he said, then he would have to lower the valuations to their worth as open land. He was, I should point out, by no means enthusiastic about the idea and emphasized that the easement would have to be for perpetuity, and with no reversionary clause. (On the latter point, of course, the courts and not the assessor would be the judge.) Anyway, he said, the clubs probably wouldn't take such a step; that way, they couldn't have the loopholes he plainly believes they want.

He raised two objections that are likely to occur to assessors elsewhere. One was the knotty question he would face in determining the market value of such properties, surrounded as they are in most cases by developed land. (He's paid to worry about such problems, the golf clubs can point out.) A second was the possibility that the easement device would open the door to every Tom, Dick, and Harry who wanted to get his taxes reduced. He cited the Elks Club, whose assessment he's going to have to raise: what would prevent them from giving up an easement and demanding a lower valuation? The answer is that there are two parties to the easement; the "dominant tenement" would be a public agency, and it could not accept the easement unless there was a clear public benefit involved.

On the basic issue, however, people everywhere who are concerned about open space would do well to heed the lesson of San Mateo County. At a time when some communities are just begining to hear about exclusive agricultural or recreational zoning, the study of assessment practice in an area like San Mateo County may prevent many a fool's paradise. Such zoning can be very helpful, but if it leads to complacency, it is likely to be short-lived. I end this tale with my last question to Mr. Woodman: in the coast area of the county, zoned exclusively for agriculture, wasn't he still assessing the properties only as farmland? Yes, he replied, but not because of the zoning; there wasn't any development next to the zoned land yet, but just as soon as there was, he would be raising assessments on adjacent properties, zoning or no zoning. And, incidentally, he will soon have to raise the assessments on the golf clubs another notch.

The easement device, of course, is only one of several possible approaches to the tax problems of open space conservation. Another possibility is the use of a "severance tax," by which an owner pays a low rate so long as he keeps his land open, but must pay up the accumulated differential between the low tax rate and the full one if he exploits the land commercially. In Wisconsin and New Hampshire the severance tax device has been very helpful in taking pressure off landowners to cut their trees prematurely. Some planners feel that the same basic device could be adapted to provide a positive inducement to landowners in metropolitan areas to keep their land open.

In Indiana, for example, a legislative proposal now being considered for rural area conservation would use the severance tax procedure to forestall premature development. Following the pattern of forestry classification laws, it would allow planning commissions to designate uses for particular areas—farming, recreational, flood plain, industrial and residential. If a landowner agreed to keep his property undeveloped, the local taxing unit could grant him an annual tax deferral of from 10 to 30 per cent of the property taxes due. He would pay the accumulated tax deferred only if he developed the land. The proposed bill also provides for an assessment to be levied against developers—the assessment to cover a share of the cost of new public facilities and to be paid to the local government. This, it is hoped, would allow the local governments to build their new sewage systems and such with cash instead of having to float bonds.

While it is not in the compass of this report to explore the many possible variations of tax policy, two points should be made: (1) most tax experts do not feel the tax power should be the principal instrument of open space conservation; (2) the tax power should complement the positive measures.

The easement principle may furnish the best entering wedge into the tax problem. It certainly can't do very much to overhaul our

bewildering assessment procedures, but it can be used now; it requires no amendments to state constitutions, it is simple, and it is equitable. To be sure, legislation is needed if there is to be any major open space program, but it is well to remember that on tax policy a state bill can only be advisory. The pertinent legislation as far as the tax aspect of easements is concerned exists in our state constitutions: the uniform taxation clause that has been, by default, allowed to work against open space.

To sum up: If a man severs his development rights through an easement accepted for the public benefit, he is guaranteed by his state constitution that his land cannot be taxed as though it were available for development. This is fair to him and it is fair to the public. He gets no special favor; his taxes may not be as high as those on similar property open to development, but by the same token neither are his demands for municipal services; indeed, most current studies of real estate taxation indicate that the community will probably net much less—if it doesn't suffer an actual loss—from the subdivided property than the open one.

And the landowner's taxes are by no means frozen at a low figure. Simply because his land won't be subdivided doesn't mean it won't increase in market value; if it does, his assessment quite properly should go up.

No selling program is easy, but on this point we have the great advantage of simplicity. However many the details, the basic point is one the public can well grasp: Fair market value, no more, no less.

SECTION SEVEN: THE COSTS TO THE PUBLIC

The matter of total costs is closely related to the public purpose; quite naturally, in the public reaction to such a program, two questions will frequently be asked: (1) What will be the direct costs to the public of development rights purchase? (2) How much will it cost the community in reduced taxes? (A third question, how the costs can be apportioned between the various governmental levels, will be discussed later.)

The question of direct costs, of course, will depend upon the size of condemnation awards, number of gifts and such considerations, spoken of previously. We must assume that, on the average, the per acreage costs will not be excessive, for otherwise there would be no further point in discussing the program. Even if we err on the conservative side, however, and assume that the acreage costs will be considerable, it need not follow that the *total* cost will be uneconomic.

In an open space plan, only a relatively small portion of the total area will be subject to development rights purchase; the idea is to secure the rights for the key areas which, though only a fraction of the total, tend to set the character of the whole. Chester County, Pa., for example, covers 760 square miles, yet the core of the Brandywine Valley could be encompassed by securing easements to acreage totaling roughly twelve square miles. In almost every county on the edge of the metropolitan area there are similar points of leverage; the physical features which make up the framework of the area's beauty often take as little as 5 per cent of the total.

Let us assume, for the moment, that the price per acre would range from nothing, thanks to gifts, to $300 an acre and average out to $50 an acre. The cost would come to $32,000 a square mile or a total of about $400,000. This figure, to repeat, is entirely hypothetical. Time is critical; if the waiting period is long, costs can mount geometrically. But the order of magnitude we are talking about depends on what other things cost too; even if the cost of securing our twelve miles were $800,000, and it could turn out to be considerably lower or higher, it would compare very favorably with the present cost of only one super highway interchange.

It should also be noted that such a program does not, like a highway project, require a certain minimum expenditure to be effective; initially, the program will cost what we want to spend on it, and it may be that a fairly modest sum can get the thing rolling. First things first: If there's only so much money available, it can be concentrated in particular areas that the people feel should get priority, and in a cumulative process other areas can be picked up subsequently. By the same token, there is nothing in the world to prevent the public from enlarging its concept of the areas that should be saved.

Some people object that so much land might be conserved that not only would the community have to pay too much but that no room would be left for housing. The argument is rather unrealistic. By every rule of thumb for open space needs we are so far behind that the problem of getting too big a proportion can be tabled for quite some time. For the Baltimore area, to cite an example, the Baltimore Regional Planning Council proposed these standards: Per 1,000 of population, 4 acres for neighborhood parks and playgrounds; 10 acres for urban parks; 10 acres for regional and state parks. For open space it proposed 33 acres and noted that this standard might have to be raised; much of the open space people assumed would remain is held by institutions, many of which might soon sell and move away.

The question of what it will *cost* the community in loss of taxes is not, strictly speaking, a fair question, but it is one that certainly is going to be asked. For this reason it is vital that there be commenced a continuing evaluation of the economic importance of open space reservation in the area. Such an evaluation would be helpful not only from the standpoint of establishing such a program in the first instance, but also in the valuation process involving the acquisition of the development rights. If, for example, it could be demonstrated that proximity to an extensive open space reservation would make residence or

recreation facilities more desirable there,[31] it might be possible to acquire easements at a lower figure than might be possible without such a demonstration.

The kind of economic approach here contemplated is similar to the one being used in connection with expressway development, identified in technical circles as highway economic impact research.

A similar study was made some time back in connection with parks.[32] The Union County Park Commission (New Jersey) reported a 631.7 per cent increase in assessed valuations on properties adjacent to Warinanco Park, for the 17-year period from 1922 to 1939. This was nearly fourteen times the average increase of 46.4 per cent for the entire city during the same period. A similarly spectacular increase is reported for Elizabeth, New Jersey, adjacent to the park, where property assessed in 1922 at $703,155 rose to $5,144,980 in 1939. The study also cites Washington, D. C., as an illustration:

> "In 1937 the increase in real estate values which could be attributed to the parks of Washington, D. C., was $339,300,000. The tax rate was $1.50 per hundred dollars, and the taxes collected on these values were $5,090,000. During the previous ten years the maximum annual expense for park maintenance and operation was a little over $2,000,000 and the average annual expenditure for these purposes was a little over $1,500,000. Therefore, if the tax returns produced by the parks were to be expended in the park system, there would be a fund of $2,500,000 to $3,000,000 which could be expended each year for the expansion and development of parks, and, as the system grows, the values produced will be even larger."

One has reason to hope that study will demonstrate that an intelligently planned open space program will not hurt the community's tax base. It is true that the landowners who have given up their rights should not be taxed at the going market value for surrounding land available for development, but let it be noted that, if they don't pay the higher rate, it is because they will not saddle the community with the demand for new services. Balancing costs and receipts, the community will have just as good a deal with the open space landowners as it will from the owners of land given over to development—and to new roads and new schools. This is a point that should not be too difficult to demonstrate; as many a resident is very much aware, the kind of hit-or-miss development that is now taking place requires more in services than it pays in taxes. Nor is the land "frozen" at its current value simply because it cannot be developed; as noted earlier, it seems highly likely that much of the land in such areas will greatly increase in value because of the supply and demand situation for the remaining "estate" land.

This is not to slight the many financial questions that such a program will pose. If it can be demonstrated that an open space program improves the value of the surrounding land, for example, we will have the rather interesting question to resolve of whether or not the community should not require some quid pro quo from developers for the unearned increment of the value of their land because of its proximity to an open space reservation. Current thinking about land values in highway programs suggests that the community could assert a right to recapture some of its investment in the open space program.

[31] Stuart Walsh, of Industrial Planning Associates, points out that private industry well knows the advantage of adjacent open areas. "The owners of a number of extensive properties we know about are reserving large areas for parks and open spaces in their development plans—not because they are nature lovers but because they are profit seekers."

[32] *The Planners' Journal*, October-December, 1939, "The Effect of Parks Upon Land and Real Estate Values," by Charles Herrick, page 89 et seq.

SECTION EIGHT: THE DEED

The document which is the fulcrum for all the questions we have been discussing is the easement deed itself. In brief, it provides that the owner of the land, the grantor, conveys to the public agency an easement on the property, the easement to be for perpetuity and to "run with the land", whoever may subsequently own it.[33]

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 notation of all the benefits that may be involved—the preamble of the California bill is an excellent model in this respect. The writer's feeling is that, in both the legislation and the deed, the purpose should be broadly construed; "scenic easements," which rest the case briefly on aesthetics, have been successful, but they have been used largely in areas not subject to the pressures of suburbanization. It would be much better if the whole constellation of benefits were stated, and this is why I suggest that "conservation easements" may be both the most accurate tag, and the most persuasive.

Next come the specific provisions of the easement. They may include one or more of the following:

(1) Prohibitions against erecting buildings or other structures;

(2) Restrictions against constructing or altering any private drives or roads;

(3) Prohibitions against the removal or destruction of trees, shrubs, or other greenery;

(4) Restrictions against uses other than residential or agricultural, for public utilities, and existing uses;

(5) Restrictions against the display of outdoor signs, billboards or any other form of outdoor advertising;

(6) Prohibitions against dumping of trash, wastes, or unsightly or offensive materials of any kind;

(7) Other kinds of restrictions consistent with open space preservation and reservation.

After the restrictions are set forth, it is vital to note that, aside from these, the owner continues to enjoy all the present uses of the property and any future ones that don't conflict with the restrictions. It is important that this be made abundantly clear; where there has been trouble negotiating scenic easements, one reason has been ignorance on the part of owners as to just what they might be giving up. Ambiguity can be far more of a deterrent than the restrictions themselves.

Yet the deed must be flexible; we cannot now foresee the conditions of, say, 1975, and there must be some way of allowing owners to adjust to them. How to do it? This is the key problem in writing the easement, and it is no easy one. On one hand, there is the necessity to stipulate precisely what the owner cannot do. If this is not done; if, for example, there is a clause which says the restrictions can be altered from time to time, or new ones issued, by the public agency, the courts might hold that the owner is giving up too much. It may be that the public agency has the best of intentions, but the owner has now let himself in for continuous, and unspecified control. Equally important, because of the ambiguity involved, in condemnation proceedings there would be no way to assess accurately the damages to the owner. Just what is he giving up? If the threat of further restrictions hangs over the property, the courts might well agree, the easement is not a true easement.

How, then, can the necessary flexibility be incorporated into the easement? In one respect, a clause customary in all easements gives the owner assurance that he won't be had. If the purpose for which the easement was secured is abandoned, the easement becomes null and void and all the rights specified in it revert to the owner. If, say, the public secured the easement to protect the flanks of a park and

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[33] "Perpetuity" tends to scare some landowners a bit. They might with equanimity consider giving some acres outright—which is quite a perpetual gesture—but the initial thought of deeding an easement for perpetuity upsets some of them. Talks with such people convince me that the perpetuity aspect should be brought up right away, and forcefully. It is to the benefit of the landowner; as noted in the tax section, an easement which isn't binding could be disregarded by the assessor on the grounds that the owner was getting a temporary tax haven while waiting to make a killing later. The owner should not be allowed to think he's going to have it both ways; the law gives him fair reversionary privileges, but it is a real commitment he is being asked to make and any muffling of the fact will boomerang.

then sold the park, the easement would be automatically void; the public went back on one part of its bargain, and the law is that the landowner should therefore no longer be bound by it.[34]

But the owner will want more flexibility than this. Suppose he wants to build a small guest house for his children? Suppose that twenty years from now dairy farming is no longer profitable and he wants to tear down the barn and put up a greenhouse? There are all sorts of possibilities; common sense tells us that there may be many changes in use which the owner might want to make in the future and which would not offend the basic purpose of the easement.

The public agency, as noted before, should not be able to lay down new restrictions, but it would seem reasonable to have a clause in the easement by which it could allow changes requested by the owner if it deemed them in conformity with the purpose of the easement. 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. Professor Paul Mishkin of the University of Pennsylvania Law School puts the problem clearly: "It would be undesirable," he notes, "to attempt to freeze the development rights completely against any future adjustment. At the same time, I think it imperative that controls be worked out to minimize unjustified reverses. Much money and other power may be involved and the temptations will be great . . . at the very least, procedures should be specifically provided —to require notice, for example, and public hearings before any such action may be taken."

Even with these safeguards, of course, the public agency might get away with murder and not only grant outrageous variances, but sometimes give up the easement and let the owner build away. To say all this, however, is to say that we live in a democracy; if in the years ahead the public becomes so supine it doesn't care what its officials do with an open space program, there's very little we can do now about that. We must go on faith and provide an instrument that will allow for adjustment to changing conditions; at the same time — the present time — we must be specific about the bargain we are making with the landowners. It is not an easy balance to strike, and one could debate around the nice points involved for some years to come; the necessity for writing an actual document for an actual landowner is the discipline we need.

Let us assume that a good easement has been drawn, that the local public agency is conscientious and that the public and the owners are all for the program. One big danger will still remain: Eminent domain by another public agency. Many landowners I have talked to raise the point forcefully; "If I deed such an easement," the question is generally put, "won't I make myself a sitting duck for the highway department?" They have good cause to raise it; many highway departments have been showing a great propensity for running rights of way through park land, and quite conceivably they might be attracted to land kept green by easements, not only because it's easy to build over but because it shouldn't cost as much as nearby land that is developed. Even if the easement had been acquired through eminent domain by the local government this would not necessarily stop the highway department; it would have the dominant right of eminent domain. Nor would it prevent another state agency from taking the land if either program gave it authority to take such land.[35]

One safeguard can be written into the easement: It can be stipulated that if there is later condemnation of the property for another purpose, the easement becomes null and void; in other words, the agency must pay the going market price for the land without restrictions; it can't seize the land with the idea that it's going to get it cut rate.[36]

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[34] "It is well settled that when an easement has been taken by eminent domain for the public use, or has been acquired by purchase, prescription, or dedication . . . if the public use is subsequently discontinued or abandoned, the public easement is extinguished and the possession of the land reverts to the owner of the fee free from any rights to the public." *Nichols: Ch. XXIX Sec. 512.*

[35] "A corporation which has taken land by eminent domain under legislative authority and devoted it to public use has thereby acquired no immunity from the condemnation of such property for some other public use which a subsequent legislature may deem of greater importance." *Nichols, Ch. XIX, Sec. 251.*

[36] "If the public easement is discontinued or abandoned, the land reverts to the owner of the fee free of the easement and a new public use cannot be subsequently imposed upon it without paying the owner full compensation." *Miller* v. *C. C. C. & St. L. RR. Co.*, 43 Ind. App. 540, 88 N.E. 102.

This would only be a negative safeguard, it must be pointed out; there seems no question but that any open space program, whatever the tools used, will always be in danger from conflicting programs. There is no satisfactory solution to this danger; as with parks, securing the land will be only the first part of the fight, and the fact should not be under-played.[37]

[37] The case of Glen Helen is instructive. This is a 1,000-acre nature preserve next to Antioch College in Yellow Springs, Ohio, given by a man who felt deeply about the land and administered by people who feel the same way. Several years ago the state highway department decided to run a highway through it; the friends of Glen Helen raised a terrific fuss, and by dint of hard work, finally got the Governor to announce that Glen Helen would be spared. Now a greater threat looms. The Yellow Springs council plans to build a sewage disposal plant and run a mile-long trunk main through the heart of the area. Again, the friends of Glen Helen have gone to battle. They should win—but even if they do, they know there will be other threats in the future. People who think open space is a do-good, non-controversial cause should know about these fights.

SECTION NINE: THE FINANCING

Where is the money going to come from? Since the basic premise of this report is that open space is a public benefit, the following section will deal primarily with public money. It should be noted, however, that in many ways private money can be of importance out of all proportion to the sums involved, particularly in the early stages of getting a program going. The Trustees of Reservations in Massachusetts is a good example. This group of citizens stimulated many gifts of land, money to maintain the land, and money to buy land. The acres they have saved as a consequence are considerable; more important than the actual land acquired, however, has been the public programs, such as the Bay Circuit, that have been established through the leadership of this group. The money involved in the public programs is far greater than the total of all the private funds given to Trustees for a half century, but the latter was seed money—and with a good climate this can be very potent.

Eventually, however, the public must help pay for the benefits it wants and the provisions of open spaces could follow some of the more orthodox methods, and, conceivably, some rather unique techniques. Here are the principal alternatives.

Appropriations from general funds. The most direct method of providing the money is to get a legislative appropriation from the general funds of the state or community involved. With so many demands upon a limited resource, this method may not be easiest to tackle.

Special or benefit assessments. This involves the determination of special benefits to abutting owners, and the levy of assessments commensurate therewith. Under the laws of many states, a stipulated percentage of the landowners must consent to the levy, and without further promotion it may be impossible to convince the requisite number of owners that they will benefit to any appreciable degree from the provision of open space. Moreover, if eminent domain is to be used, the money will be taken out of the pockets of some owners and put right back in when development rights are purchased or condemned. In any event, the incidence of the benefits are likely to be so broadly diffused that the equity of this financial device may be seriously questioned.

Adjunct to other public programs. Given specific authorization, the provisions of open spaces may be financed out of the appropriations made available to other public improvement programs, such as parks, recreation, highways, housing, slum clearance, urban renewal, airport development, and others. The justification for so doing, of course, may be found in the interrelationship between the provision of open spaces and the public improvement program involved. Almost without exception, such programs would benefit over a long period of time by the provision of open spaces. (A little study will indicate in more detail why this is true—with housing, for example, the open space would provide more air and light and view; with airports, added protection in the landing and take-off of aircraft; with highways, less possibility of early functional obsolescence, better sight-distance, more pleasant travel, etc.)

Many of these public improvement programs already permit, at least partially, the use of their funds for open space development of a sort. The expanding concept of "highway use" right now permits the use of highway funds for roadside rest areas in such States as California, Ohio, and others. So that a cleverly contrived open space program of reasonable magnitude could possibly make use, on its financing side, of a portion at least of the authorizations for the programs involved, if authorized. "Oil and Gas Lease Funds", as in California, are available for park and open space programs.

In Pennsylvania, for example, the Department of Forests and Waters got the legislature to set up an "Oil and Gas Lease Fund", and stipulate that all the royalties from state-owned gas and oil lands (now about $4 million annually) were to be used by the Department of Forests and Waters. In this little gem of a bill, the purposes were defined simply—and very broadly: ". . . for conservation, recreation, dams, or flood control, or to match any Federal grants which may be made for the aforementioned purposes." It should be noted that though the determination of the projects is up to the head of the department, continued legislative support is vital; a disgruntled legis-

lature can easily reduce the department's regular appropriation.

Land acquisition funds already established—state, county, or township—could easily be adopted to purchase of conservation easements. In San Mateo County, California, for example, the county charter adopted in 1932 set up a land acquisition fund; by this the county officials were able to acquire over the years many tracts, and without having to go to the voters for special appropriations. When the charter was established, it specifically provided that easements and rights in land could be purchased as well as land in fee simple.

Installment plan financing. Another device which may offer promise, especially now that the demands on the tax and public dollar are so great, is a plan to finance open space acquisition or reservation on the installment plan. If a modest appropriation is made available annually, the sum could be spread over a much larger area than otherwise, if the installment basis is used. Not only is the idea practicable from the public point of view, but the landowners involved might find the tax implications entirely to their advantage, if they were enabled to report gains—as they most frequently would be—on the installment basis, over a period of years; their taxes—capital gain, income, or what have you—would be at a minimum. Moreover, the provision of the investment, from a public point of view, would be more consistent if done in installments, with the rate of benefit the public derived from open spaces. This scheme has a lot of interesting possibilities. (Note: The lease-lend concept which the Federal government has used in the provision of public buildings is somewhat akin to this.)

Revolving fund and excess condemnation concept. The acquisition of open spaces is bound to result in investments that grow in their capital elements. This means that if, in a particular instance, it is possible to acquire, let us say, 500 acres at a given price, five years later it may be possible to sell off, say, 100 acres at a handsome profit; the resources so provided could be used to buy open spaces elsewhere, etc. A given annual appropriation for open spaces, accordingly, could assume the character of a revolving fund, which is depleted and restored over a succession of years. Or the excess or marginal land idea could be used, under which more land than is needed or provided for could be acquired for open spaces, with the idea that some of the total could be resold later on, with appropriate restrictions protecting the remainders, and with some recoupment objectives in mind. While this concept has not enjoyed a very enthusiastic reception by either state legislatures or the courts, it has some possibilities, if cleverly put together, for open space acquisition. Incidentally, eleven state constitutions already authorize excess condemnation for limited purposes.

General obligation bonds. These instruments may be authorized for open space uses and the general faith and credit of the state are pledged to pay the interest charges and eventually repay the principal investment. Some states have constitutional restrictions on the total amount of debt that can be so created. Accordingly, it may be unavailable for this purpose in every state, even if the legislature were willing to authorize it.

Miscellaneous. There are other methods of financing, of course. These might include revenue bond financing; but this, by definition, would be almost impossible, because there would be little or no revenue that investors could hope to look for from the open spaces, unless recreation objectives were implemented at the same time, or concessions were involved from which some current income could be derived.

Federal participation. An interesting precedent for a Federal grant and loan program for local jurisdictions is provided by the workings of the 1929 Capper-Crampton Act for parkways and parks in the National Capital area. Among other things, for the purchase of stream valley parks in Maryland and Virginia it set up $3 million for loans, and $1.5 million for grants (to be matched $2 for $1 by local jurisdictions).

Despite the fact that the acquisitions have saved many hundreds of acres and have increased overall values enormously, Congress seems restive over the idea of the Federal government spending money for park land in local jurisdictions. As a possible new tack, the National Capital Planning Commission has been considering the merits of a Federal loan program to local governments. Writes the Commission's director, W. E. Finley: "A park authority, city or county, could buy open space

now and repay the cost over a 15 or 20-year period . . . It occurs to me that this experimental approach might be tried where we have some precedent and might in a few years be broadened into a nationwide one. Cities and counties and single purpose authorities now are able to borrow (Federal) money for such facilities as sewage disposal plants, water systems, etc. There are even outright grants in some fields and the Community Facilities Administration of the HHFA lends money for all kinds of public works . . . So the pattern of such a program is already well established."

SECTION TEN: THE AGENCIES

Who's to be in charge? There are many kinds of agencies, existing or potential, which could handle the program, and since so much depends on the political realities from state to state, it would be foolhardy to suggest there is any one "right" approach. In dealing with enabling legislation, we will speak of several specific administrative set-ups, but this is meant only for example. The goal of this section, simply, is to suggest the range of possibilities and certain legislative proposals that would buttress them, whichever approach were used.

Local agencies: The most obvious starting point is local government, boroughs and cities, townships and counties. It is surprising how much authority many of these governments have already been given—and how little some of them recognize the fact. In some areas, local governments have full authority for purchase of rights in land as well as the fee simple for such purposes as open space conservation; some have funds available for this, and, in a very few cases, some have had the will and energy to actually use them for this purpose.

As far back as 1932, San Mateo County, California, incorporated in its charter a provision for a land acquisition fund "which shall be used solely for the purchase of land, rights of way, easements and rights in land, as recommended by the Master Plan." Under this provision much park land was bought in the thirties; the easement device was never applied, for there seemed no need for it. Today, however, there is: the county's new master plan proposal includes a series of "finger parks" along streams and canyons, and recommends the use of easements as a complementary way of conserving buffer areas and scenic lands. The authority, in short, exists, and so does the plan; political support is the crux.

Characteristically, the local governments which have done the most in land acquisition are found in the earlier settled, relatively well-to-do suburban areas; Westchester County, New York, is a conspicuous example. Their open spaces, it should be noted, are largely the heritage of a boldness exhibited quite some years ago, for common to most of these areas has been a comparative public complacency until very recently. Now the cycle seems to be coming round again and there is a notable rise of citizen interest in the planning commissions' open space programs.

Which brings us to the knotty governmental problem of City vs. Suburbia. The suburbs which are rousing themselves to action are doing it, in most cases, with no idea in mind of helping solve the metropolitan area's open space problem. Quite the contrary; the citizenry's impulses are frankly protectionist. They want to save their areas *from* the city, or, more accurately, from city people. They wish to the devil they'd go somewhere else to live. More immediately, they wish they'd go somewhere else to play.

This protectionism does have the good effect of driving people to support plans they should long ago have supported, and perhaps for better reasons. But it also can have a very inhibiting effect. One of the deepest fears of Suburbia about park and open space plans is rarely voiced out loud, but it is quite powerful: Fear of attracting the city's poor. Talk to many a county politician, and after giving you all sorts of reasons for delay on land acquisition, he may blurt out what's really on his mind. If they get these open spaces, his constituents contend, he says, that it'll just bring out all the "wrong" people. This fear, or rationalization, is found in semi-rural areas almost as much as in suburbs next to the city, and it is a problem that is going to be a tough one to deal with for a long time to come.[38]

There are many other suburban-city conflicts of interests that do not make for easy action on open space, and despite the city's great equity in the surrounding area, few have the machinery for a regional attack on the problem. Indianapolis, through its Metropolitan Planning Commission, which has jurisdiction over a considerable area around the city, has

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[38] It would be much better if the matter were openly stated, for then rational argument could be used, but communities are offended if it is brought up. In one meeting with officials and citizens of a large urban county, I cited the fear of a negro "invasion" as one of the main problems that ought to be discussed; individually, all I had spoken to had brought it up (not that they shared the fear, understand, but you know how people are). As a group, they were very annoyed that it was cited. It was in very bad taste, I was told.

had some success in securing open land; such examples, however, are few. Many planners feel this is the root difficulty, and they argue that without a regional body, or, preferably, a metropolitan government, it is futile to tackle open space conservation through local governments. Open space, it is further argued, is only one of many interrelated problems, and to tackle it except as part of a broad scale approach on all the other ones would be hopelessly piecemeal. The effort, furthermore, would divert energies that more properly should be focussed on getting a metropolitan approach.

This big picture view has much to commend it, but it can also be enervating. There should be no antithesis in working for the long-range regional approach and at the same time getting something done on the spot, now. As far as selection of land goes, the danger that communities will secure too much land too soon does not seem a pressing one. Nor is the selection likely to be in conflict with metropolitan needs; whatever the motives of the communities involved, the chances are rather strong that the land secured would be land marked on any plan, regional or otherwise, as top priority.[39]

This point made, it must be said that though communities can take first steps, there can be no large-scale open space program unless there is a cooperative regional effort, whatever the mechanics. And this means that the role of state government is critical. The communities are its creatures; it has the power of eminent domain; its tax powers, direct or bestowed, provide one of the best ways of fairly apportioning the costs. The state may pass on its powers to local agencies; it may create new ones; it may execute and administer an open space program directly—in any event, for the long pull good state legislation is a *must*.

An excellent example of special districts are the Ohio Conservancy Districts. These were set up originally as the result of common protective efforts by flood-prone communities. Today, the districts are full-scale enterprises that have more than paid for themselves. In tackling the flood problem, they set aside great tracts of land for recreation, and the result is a measurably better standard of living for the people of the area. The famous Forest Preserve District, Cook County, Illinois, is another fine example. In this case the landowners of the District coincide with a political boundary. But both Districts have in common a firm base of local support.

Before going on to the problem of basic enabling legislation, let us note a few of the ways the state itself can take the initiative. In many states there are long established means for getting an open space program going. Officials tend to suffer from the historic rural bias of state governments. State park commissions, for example, have an understandable tendency to by-pass the thorny job of acquiring land in high-priced metropolitan areas and tend to concentrate on the more easily assembled tracts of rural areas. It might also be noted that in many cases the governments within metropolitan areas have not shown much disposition to work effectively for a common effort with the state agency. Nevertheless, these agencies have the machinery, and with intelligent political pressure from within the metropolis, a good bit of advance land acquisition could be achieved fairly soon.

In Pennsylvania, for example, the Department of Forests and Waters could be an excellent vehicle, and its work could greatly complement a regional planning effort. The Department has very broad powers, and it also has a sizable annual fund with which it can secure land for purposes related to conservation. In 1955, in a splendid bill, it got from the legislature an ever-replenished fund consisting of all the oil and gas royalties from state-owned land; currently, this provides about $4.5 million a year, and thanks to the felicitous wording of the act, the money can be used for just about anything the Secretary of Forests and Waters thinks it should be used for.[40]

State legislature, of course, have a habit of taking away with one hand what they give with the other, and can offset the fund with a cut in the regular appropriation. Com-

[39] Over the past three decades there have been a succession of studies of the Philadelphia metropolitan area's open space needs. Put all the maps on top of each other and you'll see pretty much the same areas marked on each. Stream valleys, in particular, are earmarked as reservations.

[40] ". . . which funds shall be exclusively used for conservation, recreation, dams or flood control or to match any Federal grants which may be made for any of the aforementioned purposes." Section 1: Act 256. Commonwealth of Pennsylvania: Dec. 15, 1955. See Appendix F.

munities which would like some of the oil and gas fund money would have to go to bat in support of the department's regular appropriation, but this seems a fair quid pro quo. As in California, which has a similar fund, the money may not be anywhere near the amount desirable, but it has the considerable advantage of being available now.

A state program would have to be jointly planned with the communities involved. Dr. Maurice Goddard, the Secretary of Forests and Waters, Commonwealth of Pennsylvania, would insist that no easements would be acquired for open space conservation unless the community wanted such a program in its area. The necessary joint planning should be done with regional agencies or districts, rather than with the separate governments within it. In most areas, unfortunately, effective regional agencies remain on paper, and there would be no action at all if the program had to await their birth and maturation. Somebody has to negotiate the easements, to hold them, and to enforce them. The state government can go ahead on this, and while it may eventually be better to vest the easements in special districts or regional authorities, it would help if somebody took the first steps.

The great value of a state program, it seems to this writer, is the pressure of immediacy it could apply to communities; until somebody with the authority makes a specific move, open space plans will tend to remain abstractions. But there is nothing like the imminence of action (and/or funds), as the highway program has often proved, to stir communities to long-deferred thinking, and sometimes, cooperation with other communities. They have to make up their minds; do they want to take advantage of the chance offered them to save open spaces? Which ones? Why? What about the invasion of subdividers? What about the valley that runs through the next county? These are tough questions, and the citizenry won't face them unless there is an issue. For the citizen, I suggest, the issue will not be an abstract one of regional planning; it will have to be immediate and tangible.

So far, we have been talking of governments, but there are many special purpose bodies which could act also. Park commissions are the most obvious vehicle, but there are many other special purpose authorities and commissions which could purchase easements in connection with their regular programs. Water authorities, for example, could use easements to keep important ground water recharge areas in farming, forest cover, or marshland; watershed districts could use them so that lowlands could be conserved for their natural function of flood water storage; state game and fish departments could use them to insure an area's remaining in good condition for game and available for public hunting (for this purpose they should be able to use the arms and ammunition tax money given the states by the Federal government under the Pittman-Robinson Act).

Private agencies can also play an important role. They are no substitute for a public agency, but in the initial stages they can perform an essential function; if their charters are broad enough and they rate tax exemption, they can, on their own, purchase land and easements, receive gifts, and until such time as there is an effective public agency, hold title to the deeds. From such an effort, indeed, may come the public program.

For a precedent, consider the chain of consequences started by the Trustees of Reservation in Massachusetts. This was set up in 1891 by a group of citizens (themselves members of yet another group, the Appalachian Mountain Club). Supported by private subscription, the Trustees secured full title to many historic or scenic areas, some by purchase, most by gift. By 1957 they had accumulated some 4,355 acres; they had also been active in securing some prime park land and holding it until the state would accept it (notably, the 2,000 acres of dune land on the tip of Cape Cod, which was sewed up in 1893). But most important was the legislation they inspired. Soon after they were formed, they helped push through the legislature the act setting up the Metropolitan District Commission which put together Boston's fine park system. More lately, they lobbied successfully for the "Bay Circuit" act; the actual greenbelt envisaged is more a promise than a reality at present, but the enabling legislation provides a magnificent tool. See Appendix H. (The Trustees also provided the model for Britain's

National Trust, and this, in turn, inspired the creation of our own National Trust.)[41]

There are organizations set up for the express purpose of showing local communities how they can set up their own programs. Nature Centers for Young America, Inc., is an excellent example. Based in New York, it does not use its endowment money for land purchase, but rather to support the work of Director John Ripley Forbes and his staff in stimulating local groups and leading them through the legal maze of getting nature preserves set up. The work of Richard Pough of the Natural Area Council is another example; again, the emphasis is on showing citizen groups what kind of machinery can work best—and how many more gifts of land can be stimulated than most people realize.

What about the Federal government? It is difficult to see, let alone anticipate the possibilities of the Federal government being the prime mover in an open space program for our metropolitan areas. In a negative, as well as a positive sense, however, the many Federal programs affecting land will have a great impact on local open spaces, and some kind of coordination is desperately needed. Merely to name some of the Federal programs—the Department of Agriculture, the Bureau of Public Roads, the Sewage Treatment Plant Program under Public Law 660, the National Park Service, the armed services' various land-buying activities—is to suggest the scope of the problem, and many pages could be filled with examples of how one activity can cancel out another. How to resolve the conflicts? The writer detests studies which conclude by asking for more studies, but on this particular problem he throws in the towel; we certainly need a lot of study on this one.

Question: how can the Federal government's agencies, existing and new, support an open space program for metropolitan areas?[42] Should there be a coordinating agency? Special legislation? Such questions will be difficult to answer; they will be impossible unless there is an open space program to be coordinated with. This is the vital part of the equation. The burden of getting Federal support, in short, rests to a very large degree on the states and the communities within them.

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[41] A smaller, but spirited, effort is that of the Sudbury Valley Trustees Inc. In 1953, a group of citizens in Wayland, a Boston suburb, got a charter from the state enabling them to secure land for conservation purposes. Two years later the U. S. Internal Revenue Service, which does not move with blinding speed on such matters, certified that gifts to the Trustees would be deductible. The group still had rough going: It wanted to save swamp land as well as hills and ponds, and local people had to be sold hard on the idea that wetlands are worth saving. In the first fund-raising campaign they pled for money to buy a piece of ground a developer had plans for. In several months they raised $7,500. Since then they've successfully persuaded a number of owners to give land free. All in all, they now have 400 acres, which is pretty good for a small suburb.

[42] One suggestion: The National Park Service has used easements to complement its parkways. Could not Congress extend the principle to protect scenic and historic areas that should be kept "alive" rather than made into a conventional park? Cape Cod is an urgent case in point: the Great Beach, as several bills propose, should certainly be secured as a park for it will be desecrated if it is not. But what about the nearby towns? There is an understandable furor among residents of Wellfleet and Truro over the prospect that many properties will be declared within the proposed park. Would not use of easements temper the conflict? Fee simple should be used for the beaches and the dune areas, but many adjacent areas could be conserved by securing easements. The charm of the lower Cape lies in lived-in-houses as well as in the dunes. Quite aside from the feeling of local property owners, the public-at-large would be well served by a park plan which, with suitable restrictions, allowed people to go on living in the area around. As one who spent his boyhood summers making bad maps of the paths around Gull and Great Ponds and Cahoon's Hollow, the writer can assert that, save for the dunes, most of the area would be pretty nondescript without the houses.

SECTION ELEVEN: LEGISLATION

Is legislation necessary? In many states authority already exists for the purchase of easements for open space conservation. It would also seem obvious that local governments empowered to buy the fee simple for public land uses should be able to buy less than the fee simple as well, and in theory, at any rate, further legislation would be somewhat redundant.

Nevertheless, most people who are working for an open space program feel strongly that legislation should be sought. The particular machinery provided by the legislation is not the crux; from state to state the possible variations are many. What is important is a clear statement by the legislature that open space is a public benefit. This may seem only a nice preamble to the guts of a bill, but it is the vital part. Many subsequent court decisions may hinge on it.

Even without it, many courts would undoubtedly approve open space conservation as a valid purpose for the expenditure of funds and for eminent domain, but to leave the matter there to rest is an unnecessarily large burden on the courts. With a clear legislative statement, however, the courts are more likely to accept open space conservation as a valid public purpose. The statement, furthermore, would remove much of the hesitancy many public officials feel about using their authority to buy easements. They know well that purchase of land for parks is a public purpose, but they argue that buying rights in land which the public will not necessarily set foot on may not be approved as a public purpose. In more cases than not this point is raised only as one more excuse for inaction, but at the very least a legislative statement would remove an alibi.

In seeking legislation, it is true, a hornet's nest may be opened. Under existing statutes, much open space could be conserved now, quietly, and a full scale debate, with cries of "socialism," and the like, might well endanger present, more modest efforts. This is indeed a danger, yet the postponement of the inevitable debate is a much greater danger. To return to the basic premise of this report: An open space program must be sought as a public benefit, and the essence of the law is that a public benefit is what the public, through its representatives, says is a public benefit. It cannot be bypassed, and the sooner, and more forcibly, the matter is taken to the public, the better. Speaking personally, I don't think public "education" is the answer; innocuous campaigns to enlist people for abstract good draw out the same well-meaning people time after time, produce unexceptionable resolutions and the like, but the people with power, save for honorary appearances, remain uninvolved. This problem needs closure, the discipline of having to amass a brief for legislative committees, the necessity of rousing support and asking people to stand and be counted. For effective public "education," there is no substitute for a good old-fashioned fight. And the obstacles may prove far less imposing than many people now suppose.

When this report was first written, there were only proposed bills. Now there is an Act. The history of it is instructive.

On May 4th, Senator Fred Farr of Monterey County, California, introduced a bill into the legislative hopper in Sacramento. It was a modest one, but it was the last day any bill could be introduced and the legislature would soon adjourn for two years. The object, simply, was to have an enabling act that would allow Monterey County and its cities to acquire open space easements. Thanks to the efforts of leading citizens, a campaign was getting under way to solicit gifts of easements and money to buy more. In Pennsylvania, at the behest of Lower Merion Township, a similar bill had just been introduced in the legislature; this suggested to the Monterey people that while legislation might not be needed, it would be very helpful to have it. And good if Monterey County were first.

Over the next few weeks, Farr and planner William Lipman of the State's Finance Department went to work improving the bill. After some forced draft study, they expanded the section on legislative intent, phrased a clear definition of what the easements would provide, and, for good measure, tucked in a provision for public purchase of the full fee and subsequent leaseback to private owners, subject to open space restrictions.

When the bill was referred to the Senate's Judiciary Committee, it came in for trouble.

There was no great antagonism to the idea of the bill but there was considerable unfamiliarity with the easement device, and in short order the bill was amended into a very frail vehicle indeed; among other things, it was made to apply only to Monterey County, and not all of it either.

The limited bill would undoubtedly pass. Should they take half a loaf, or try again? Farr decided to go for broke. As the legislature was about to close up shop, he introduced the previous, unamended version. The timing was fortuitous; there was also a feeling among many of the legislators that "it's Fred's turn now"—a bill for billboard control he had earlier pushed had been narrowly beaten, and there was some contrition about it.

On June 17th the Assembly, by unanimous vote, approved the bill. The next day the Senate did so, too, by unanimous vote. On July 7th, the Governor signed the bill.

Like the bill originated by Pennsylvania's Lower Merion Township, the California Act does not provide for eminent domain; the feeling of its proponents being, that hurdle can come later. As a first step, however, the Act is of great significance. For the first time, a legislature has clearly defined open space conservation as a valid public purpose, and in comprehensive terms. Definition of the tools—whether easements, purchase, or purchase and leaseback—is in this respect a secondary consideration. Whatever framework other bills may have, their authors can profit greatly from the California Act's statement of intent, and they might do well to swipe it word for word.

Eventually, eminent domain will be necessary, and so will involvement of the state's money and help. In the appendices (see Appendix B) is a proposed bill providing for eminent domain and the machinery for securing easements. It was tailored to the specific needs of Pennsylvania, but the main intent was to get some kind of model down on paper. The writer, who worked up the bill in collaboration with a top authority on eminent domain (who, unfortunately because of his official position, must remain unnamed) is sure better bills could be drafted; for one thing, the statement of legislative intent is inferior to that in the California Act, and the latter could be substituted for it to good effect. But it is something to shoot at, and in this report can serve the purpose of illustrating some of the general legal questions that must be faced.

In drafting enabling legislation, the following points will have to be noted:

(1) *Public use or purpose:* That the taking of protection easements for open space reservations is a taking for a public use will have to be established. The taking of protective easements for highway purposes, for parkway purposes, and to protect other kinds of public improvements have been sustained by the courts. Presuming an adequate presentation in court, little difficulty should be encountered on this point.

(2) *Authority to undertake the program:* In general, there must be either express or implied authority to take property or interests in property for this purpose. It would be much safer (from a legal point of view) if the authority is express, particularly if the power of condemnation is to be exercised. A general rule of law is that the power of eminent domain is seldom implied. The enabling act must be so written that all of its major elements are clearly and adequately spelled out. A well written, broadly conceived act is the best insurance against legal difficulties on this point.

(3) *Payment of just compensation:* In the acquisition of conservation easements, the established rules of just compensation must be adhered to, and the current market value of the rights sought to be acquired must be offered by the condemnor of the rights. This does not have to be delineated in the bill, but before the first court test, supporters of the program should be ready with a thorough report on the effect easements have on land values.

(4) *Stewardship of the development rights:* The enabling act should spell out a public and legslative policy with respect to the governmental body which will hold the easements. This will be a continuing and sometimes vexatious responsibility, because of the constant pressures that inevitably will be brought to bear against the continuation of the open space areas. Consistent with the enabling act, however, the public body must be given enough leeway to meet new conditions as they arise.

(5) *Offenses and penalty provisions:* Violations of the integrity of the open space reser-

vations should be specifically spelled out in the statute, and appropriate penalties provided for. These constitute the only effective means of enforcing the open space reservations. The nature of the offenses and the penalties must both be reasonable in scope if they are to be sustained by the courts.

(6) *Intergovernmental relationships:* If the program involves more than one governmental jurisdiction, the intergovernmental relationships should be appropriately spelled out in the statute, in general terms; the execution of this aspect of the program must jibe with the existing body of law relating to the several jurisdictions involved. The interrelationship questions would involve joint planning for open space reservations, their financing, acquisition, management, policing, the avoidance of conflicting exercises of eminent domain by other agencies—the Highway Department, for instance.

It would be of the utmost importance that, for the first legal challenge of a program, a thorough legal and economic analysis and presentation should be made for court purposes, lest any lesser effort result in an adverse finding by the judiciary. A "Brandeis" type of brief, with a full analysis of existing legal authorities directly in point as well as those applicable by analogy, should be contemplated, with an ample documentation of the economic and social implications of an adequate program of open space reservations.

APPENDIX A

PURCHASE OF INTERESTS AND RIGHTS IN REAL PROPERTY
(State of California)

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.

The following ruling by legislative counsel of the State of California is so important that it is reproduced here verbatim. This ruling so buttresses what might seem otherwise to be only a hope. It relates to the point made earlier in this report that an easement would protect an owner from having his land taxed as its subdivision potential.

State of California

Office of Legislative Counsel

3021 State Capitol, Sacramento 14
311 State Building, Los Angeles 12

Sacramento, California
October 15, 1959

Honorable Fred S. Farr
Box 3305
Carmel, California

"Scenic View" Property—#674

Dear Senator Farr:

Question

You ask whether the State or local governmental agencies may acquire "scenic view" property and lease it back to the person from whom it was acquired on an assignable lease basis, with a provision that the lease is terminable if any attempt is made to use the property for any purpose other than farming that will not impair the view.

Opinion and Analysis

We are unaware of any provision in the law under which the State may acquire "scenic view" property.

Such property may, however, be acquired by counties and cities (Stats. 1959, Ch. 1658; Senate Bill No. 1461 of the 1959 Session; Gov. C. Secs. 6950-6954).

Furthermore, the law contains this provision (Gov. C. Sec. 6953):

> ". . . 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" (i.e., the chapter containing Gov. C. Secs. 6950-6954).

We believe that this provision authorizes a county or city to acquire "scenic view" property and lease it back to the person from whom it was acquired on an assignable lease basis, subject to the condition that the lease is to terminate if any attempt is made to use the property for any purpose other than farming that will not impair the view.

Very truly yours,

RALPH N. KLEPS
Legislative Counsel

By s/ J. GOULD
J. Gould
Deputy Legislative Counsel

JG:lz

APPENDIX B

A PROPOSED BILL ON CONSERVATION EASEMENTS
(Commonwealth of Pennsylvania)

An ACT to enable the Department of Forests and Waters (Pennsylvania) to acquire easements for the conservation of open spaces; and for other purposes.

Section 1—Statement of Legislative Purpose: The Legislature hereby finds, determines, and declares that it is in the public interest to conserve key tracts of open countryside in its natural state to facilitate the protection of natural streams, flood control, soil conservation, preservation of amenities generally. It could also supplement, in the public interest, programs involving public parks, forests, reservoirs, wild life preserves, and other public properties and reservations. This Act is declared to be necessary for the preservation of the public peace, health, and safety, and for the promotion of the general welfare.

Section 2—Definition of Conservation Easements: For purposes of this Act, conservation easements are defined as an aggregation of easements in perpetuity designed to preserve in their natural state lands of cultural, scenic, historic, or other public significance. Such easements could include restrictions against erecting buildings or other structures; constructing or altering private roads or drives; removal or destruction of trees, shrubs or other greenery; changing existing uses; altering public utility facilities; displaying of any form of outdoor advertising; dumping of trash, wastes, or unsightly or offensive materials; changing any features of the natural landscape; and any changes detrimental to existing drainage, flood control, erosion control, or soil conservation; any other activities inconsistent with the conservation of open spaces in the public interest. Conservation easements will permit all present normal and reasonable uses, not conflicting with the purposes indicated above, to be engaged in by the landowners, their heirs, successors and assigns.

Section 3—Authority to Designate and Acquire Conservation Easements: The Secretary of Forests and Waters, acting alone or in cooperation with any Federal, State, or local agency, is hereby authorized to plan, designate, acquire, and maintain conservation easements in appropriate areas wherever and to the extent that the Secretary is of the opinion that the same will be in the public interest, by serving the objectives of this act, indicated in Section 1 of this Act. The Secretary is authorized to issue appropriate rules and regulations governing the care, use and management of areas where conservation easements have been acquired.

Section 4—Acquisition of Conservation Easements: The Secretary of Forests and Waters may acquire, in the name of the Commonwealth, conservation easements in private or public property, by gift, devise, purchase, or condemnation in the same manner as the State and its agencies are now or hereafter may be authorized by law to acquire property or interests in property for conservation, recreation, dam, or flood control purposes. All property rights acquired under the provisions of this Act shall be deemed to be in the nature of easements that "run with the land."

Section 5—Tax Policy: It is the intention of the Legislature that property covered by conservation easements be assessed on the basis of fair market value. For purposes of local taxation, accordingly, assessments made on such property should reflect the fact the property is not available for tract housing or commercial development. Conservation easement rights, as such, shall no longer be the object of local property taxation, anymore than other property which has been publicly acquired.

Section 6—Unlawful Use of Conservation Easement Areas: It is unlawful for any person to exercise any of the conservation easement rights in conservation easement areas after the Department of Forests and Waters has duly acquired such rights, as indicated in Section 4 of this act. Any person who violates any of the provisions of this act by the erection of structures in the conservation easement areas or by performing any other act contrary to this act or the rules and regulations promulgated by the Department of Forests and Waters, shall be deemed to have created a nuisance, subject to public abatement without any compensation whatsoever. Any other enforcement powers now lodged with the Department of Forests and Waters with respect to any kind of facility or activity under its jurisdiction shall be available to the Department in conservation easement areas for purposes of this act.

Section 7—Severability: If any section, provision, or clause of this act shall be declared invalid or inapplicable to any persons or circumstance, such invalidity or inapplicability shall not be construed to affect the portion not so held or persons or circumstances not so affected. All laws or portions of laws inconsistent with the policy and provisions of this act are hereby repealed to the extent of such inconsistency in its application to conservation easements provided for in this act.

APPENDIX C

SCENIC EASEMENT DEED*
(State of California)

*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 D

TYPICAL OHIO RESERVATION AGREEMENT

HIGHWAY RESERVATION AGREEMENT

State Highway No. _____, Section _____,
_____ County, Ohio.

These articles of agreement entered into in this _____ day of _____, 194___, by _____ and the Department of Highways, State of Ohio,

WITNESSETH:

That _____ for and in consideration of the sum of _____ _____ Dollars ($_____), to _____ paid by the State of Ohio, do _____ hereby reserve, as hereinafter provided, for the future use of the Department of Highways, the following described lands, situated in _____ County, Ohio, _____ Township, Section _____, Town _____, Range _____, and bounded and described as follows:

Parcel No. _____

as shown by plans on file in the office of the Department of Highways, Columbus, Ohio.

1. It is the intent of this highway reservation agreement to permit the State to conserve its funds by eliminating expensive building, public utility, and other rearrangement costs, pending the availability of funds for the construction of the proposed improvement, and to permit the owner, in the meantime, to utilize the land, hereinbefore described, in all normal ways not inconsistent with the purposes and terms of this agreement.

2. The owner agrees that within the limits of said Parcel No. _____, he will not construct or permit to be constructed any building or structure which can not be removed within 10 days, without cost to the State, upon order of the Director of Highways, and further that he will not undertake, or permit to be undertaken, any plantings of a permanent nature, such as orchards or other growths, which will interfere with the ultimate use of said parcel for highway purposes.

3. The owner agrees that he will neither lease nor convey an easement in any way affecting said Parcel No. _____, without first securing the written approval of the Director of the Highways, and further that should he dispose of said Parcel No. _____, or any lesser interest therein, such disposal shall be subject to the terms of this agreement.

4. The State agrees that the owner shall have the full right to use or cultivate said Parcel No. _____ in any manner not inconsistent with the terms and purposes of this highway reservation agreement.

5. The State agrees to make payment for a perpetual easement deed for highway purposes for Parcel No. _____ upon the award of a contract for the construction of the highway improvement as called for by the plans hereinbefore referred to.

6. The State agrees to negotiate with said owner for a perpetual easement deed for Parcel No. _____ at the time the State finds it necessary to make use of said parcel in the completion of the ultimate proposed highway improvement.

7. The Director of Highways shall have the right to cancel this highway reservation agreement in the event that the project is removed from the highway program, or subsequent changes in alignment or grade line require modification of the description of said Parcel No. _____ herein.

8. The State agrees to furnish the owner with a copy of this agreement, receipt of which is hereby acknowledged.

Signed this _____ day of _____, 194___, in the presence of:

_____

_____

STATE OF _____ }
_____ COUNTY } ss

Before me, a _____ in and for said County and State, personally appeared the above named _____ who acknowledged that ____he _____ did sign the foregoing instrument and that the same is _____ free act and deed.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal at _____, this _____ day of _____ A. D. 194___.

_____

My Commission Expires _____ 194___.

APPENDIX E

EXCERPTS FROM THE CONSERVANCY ACT OF OHIO

Chapter Eleven, Title Three, Part Second
of the General Code

To prevent floods, to protect cities, villages, farms and highways from inundation; to authorize the organization of drainage and conservation districts, water supply districts and to provide for the disposal of liquid wastes.

Passed February 5, 1914
Amended April 19, 1937

Sections 24a, 36a, 50a, 55a, 55b, 55c added
Effective July 19, 1937

Sub-section (i) of Section 2 added by amendment effective September 4, 1947

Article II, Section 36
The Constitution of the State of Ohio

CONSERVATION

Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals. (Adopted Sept. 3, 1912.)

Sec. 6828-15. In order to *accomplish the* purposes of the district, the board of directors is authorized and empowered:

(a) To clean out, straighten, widen, alter, deepen, or change the course or terminus of, any ditch, drain, sewer, river, water course, pond, lake, creek or natural *or artificial* stream *located* in or out of said district.

(b) To fill up any abandoned or altered ditch, drain, sewer, river, water course, pond, lake, creek or natural *or artificial* stream, and to concentrate, divert or divide the flow of water in or out of said disrict.

(c) To construct, *acquire, operate,* and maintain main and lateral ditches, sewers, canals, levees, dikes, dams, sluices, revetments, reservoirs, holding basins, floodways, *wells, intakes, pipe lines, purification works, treatment and disposal works,* pumping stations and siphons, and any other works and improvements deemed necessary *to accomplish the purposes of the district or* to construct, preserve, operate or maintain *such* works in or out of said district. *Provided that this chapter shall not limit the authority of public corporations to install, maintain and operate sewerage systems and water works systems as otherwise permitted by law; but the board of directors of the district shall have full power to require the use of the improvements, constructed or acquired by the district for the purpose of water supply or the collection and disposal of sewage and other liquid wastes, by the public corporations and persons, within the district, for which such improvements were installed.*

(d) To afforest lands owned by the district.

(e) To install improvements, on lands owned or controlled by the district, for the proper maintenance thereof or for the purpose of preventing or minimizing damage to the works and improvements of the district.

(f) To construct connections to the works of the district for the delivery of a water supply therefrom or for the delivery of sewage and other liquid wastes thereto.

(g) To construct or enlarge or cause to be constructed or enlarged any and all bridges that may be needed in or out of said district.

(h) To construct or elevate roadways and streets.

(i) To construct any and all of said works and improvements across, through or over any public highway, canal, railroad right of way, track, grade, fill, cut, *or other public or private property located* in or out of said district.

(j) To remove or change the location of any fence, building, railroad, canal, or other *structures or* improvements *located* in or out of said district; *and, in case it is not feasible or economical to move any building, structure or improvement situated in or upon lands required by the district and if the cost to the district is determined by the board to be less than that of purchase or condemnation, to acquire land and construct, acquire or install, therein or upon, buildings, structures or improvements, similar in purpose, to be exchanged for the aforementioned buildings, structures or improvements under contracts entered into between the owner or owners thereof and the district.*

(k) To hold, encumber, control, acquire by donation, purchase or condemnation, construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district for right of way, holding basin, *location or protection of works and improvements, relocation of communities and of buildings, structures and improvements situated on lands required by the district,* or for any *other* necessary purpose, or for *obtaining or storing* material to be used in constructing and maintaining said works and improvements.

(l) To replat or subdivide land, open new roads, streets and alleys, or change the course of an existing one, *and install therein improvements to replace those in the former roads, streets or alleys.*

(m) To procure insurance against loss to the district by reason of damage to its properies, works or improvements resulting from fire, theft, accident or other casualty or by reason of the liability of the district for any damages to persons or property occurring in the operation of the works and improvements of the district or the conduct of its activities.

(n) And to do all things necessary or incident to the fulfillment of the purposes for which the district is established.

Sec. 6828-16. When it is determined to let the work by contract, contracts in amounts to exceed one thousand dollars shall be advertised after notice calling for bids shall have been published, once a week for five consecutive weeks completed on date of last publication, in at least one newspaper of general circulation within said district, where the work is to be done, and the board may let said contract to the lowest or best bidder who shall give a good and approved bond, with ample security, conditioned on the carrying out of the contract. Such contract shall be in writing, and shall be accompanied by or shall refer to plans and specifications for the work to be done, prepared by the chief engineer. *The plans and specifications shall at all times be made and considered a part of the contract.* Said contract shall be approved by the board of directors and signed by the president of the board and by the contractor, and shall be executed in duplicate. Provided, that in case of sudden emergency when it is necessary in order to protect the district, the advertising of contracts may be waived upon the consent of the board of directors, with the approval of the court or *a common pleas judge of the county wherein the office of the district is located.*

Sec. 6828-17. Said board, where necessary for the purposes of this *chapter,* shall have a dominant right of eminent domain over the right of eminent domain of railroad, telegraph, telephone, gas, water power and other companies and corporations, and over townships, villages, counties and cities.

In the exercise of this right due care shall be taken to do no unnecessary damage to other public utilities, and, in case of failure to agree upon the mode and terms of interference, not to interfere with their operation or usefulness beyond the actual necessities of the case, due regard being paid to the other public interests involved.

Sec. 6828-18. Said board shall also have the right to condemn for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the appraisers, according to the procedure provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad rights of way, instead of having appraisals and assessments made by the board of appraisers.

Sec. 6828-19. *In order to accomplish the purposes of the district, to protect the works, improvements and properties, both real and personal, of the district, to secure the best results from the construction, operation, and maintenance thereof, and to prevent damage to the district by the misuse of any such works, improvements, or properties or by the pollution or misuse of the waters of the district or of any water course therein, the board of directors shall have authority to make and enforce such rules and regulations as they shall deem necessary and advisable:*

(a) To protect and preserve the works, improvements and properties owned or controlled by the district, prescribe the manner of their use by public corporations and persons, and preserve order within and adjacent thereto;

(b) To prescribe the manner of building bridges, roads or fences or other works in, into, along or across any channel, reservoir or other construction *of the district;*

(c) To prescribe the manner in which ditches, *sewers, pipe lines,* or other works shall be adjusted to or connected with the works of the district or any water course therein *and* the manner in which the water courses of the district may be used for sewer outlets or for disposal of waste;

(d) To prescribe the permissible uses of the water supply provided by the district and the manner of its distribution, and to prevent the pollution or unnecessary waste of such water supply; and

(e) To prohibit or regulate the discharge into the sewers of the district of any liquid or solid wastes deemed detrimental to the works and improvements of the district.

Such rules and regulations shall not be inconsistent with the laws of the state of Ohio or the rules and regulations or requirements of the state department of health, and shall be published in the manner provided by section 6828-1 before taking effect.

Whoever violates any rule or regulation adopted in accordance with this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars. The directors shall have authority to enforce by mandamus or otherwise all necessary regulations made by them and authorized by this *chapter,* and may remove any harmful *or improper* construction *or obstruction* or may close any opening *or connection* made *improperly or in violation of such rules and regulations,* and they are authorized to bring such suits in mandamus in the court of appeals in the first instance, if deemed advisable by them. Any person *or public corporation* wilfully failing to comply with such *rules and* regulations shall be liable for damage caused by such failure, and for the cost of renewing any construction damaged or destroyed.

No person or public corporation shall erect within the drainage area of the district any dam or reservoir upon any stream or water course . . .

APPENDIX F

OIL AND LEASE FUND
(Commonwealth of Pennsylvania)
Harrisburg

No. 256

AN ACT

Requiring rents and royalties from oil and gas leases of the Commonwealth land to be placed in a special fund to be used for conservation, recreation, dams, and flood control; authorizing the Secretary of Forests and Waters to determine the need for and location of such projects and to acquire the necessary land.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. All rents and royalties from oil and gas leases of any land owned by the Commonwealth, except rents and royalties received from game and fish lands, shall be placed in a special fund to be known as the "Oil and Gas Lease Fund" which fund shall be exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes.

Section 2. It shall be within the discretion of the Secretary of Forests and Waters to determine the need for and the location of any project authorized by this act. The Secretary of Forests and Waters shall have the power to acquire in the name of the Commonwealth by purchase, condemnation or otherwise such lands as may be needed.

Section 3. All the moneys from time to time paid into the "Oil and Gas Lease Fund" are specifically appropriated to the Department of Forests and Waters to carry out the purposes of this act.

APPROVED—The 15th day of December, A. D. 1955.

GEORGE M. LEADER
Governor

APPENDIX G

FEDERAL "RIGHTS IN LAND" ACT

[PUBLIC—NO. 646—70TH CONGRESS]
[S. 4126]

An Act Authorizing the National Capital Park and Planning Commission to acquire title to land subject to limited rights reserved and limited rights in land, and authorizing the Director of Public Buildings and Public Parks of the National Capital to lease land or existing buildings for limited periods in certain instances.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the authority of the National Capital Park and Planning Commission, established by the Act approved April 30, 1926 (Statutes at Large, volume 44, page 374), is hereby enlarged as follows:

Said commission is hereby authorized to acquire, for and in behalf of the United States of America, by gift, devise, purchase, or condemnation, in accordance with the provisions of the Act of June 6, 1924 (Statutes at Large, volume 43, page 463), as amended by the Act of April 30, 1926 (Statutes at Large, volume 44, page 374), (1) fee title to land subject to limited rights, but not for business purposes, reserved to the grantor: *Provided,* That such reservation of rights shall not continue beyond the life or lives of the grantor or grantors of the fee: *Provided further,* That in the opinion of said commission the permanent public park purposes for which control over said land is needed are not essentially impaired by said reserved rights and that there is a substantial saving in cost by acquiring said land subject to said limited rights as compared with the cost of acquiring unencumbered title thereto: (2) permanent rights in land adjoining park property sufficient to prevent the use of said land in certain specified ways which would essentially impair the value of the park property for its purposes: *Provided,* That in the opinion of said commission the protection and maintenance of the essential public values of said park can thus be secured more economically than by acquiring said land in fee or by other available means: *Provided further,* That all contracts for acquisition of land subject to such limited rights reserved to the grantor and for acquisition of such limited permanent rights in land shall be subject to the approval of the President of the United States.

Sec. 2. The Director of Public Buildings and Public Parks of the National Capital is authorized, subject to the approval of the National Capital Park and Planning Commission, to lease, for a term not exceeding five years, and to renew such lease, subject to such approval, for an additional term not exceeding five years, pending need for their immediate use in other ways by the public, and on such terms as the director shall determine, land or any existing building or structure on land acquired for park, parkway, or playground purposes.

Approved, December 22, 1928.

APPENDIX H

AN ACT PROVIDING FOR THE ESTABLISHMENT AND DEVELOPMENT OF THE MASSACHUSETTS BAY CIRCUIT

ACTS OF 1956—CHAPTER 631

Be it enacted, etc., as follows:

SECTION 1. The Massachusetts Bay Circuit is hereby established as a system of privately and publicly owned open spaces, including parks, forests, reservoirs, wild life preserves, scenic and historic sites and other properties or reservations, surrounding Metropolitan Boston, located in the cities and towns of Newbury, Rowley, Ipswich, Essex, Hamilton, Wenham, Topsfield, Boxford, Middleton, North Reading, North Andover, Andover, Wilmington, Tewksbury, Lowell, Chelmsford, Billerica, Carlisle, Bedford, Concord, Lincoln, Sudbury, Wayland, Framingham, Natick, Ashland, Holliston, Sherborn, Medfield, Millis, Norfolk, Walpole, Wrentham, Foxborough, Sharon, Easton, Stoughton, Brockton, West Bridgewater, Abington, Whitman, East Bridgewater, Bridgewater, Hanson, Halifax, Pembroke, Plympton, Kingston, Duxbury and Marshfield, as shown by the shaded area in Exhibit A of the report of a joint board for the study of The Bay Circuit contained in House Document, No. 2608 of nineteen hundred and fifty-six. In order to preserve said open spaces and make them available for the use, enjoyment, exercise and recreation of all the people of the commonwealth and visitors thereto, said spaces, scenic and historic sites, and reservations shall be connected by a tourist route to be known as The Bay Circuit, to be established and designated by the department of public works in accordance with the provisions of chapter one hundred and ten of the resolves of nineteen hundred and fifty-five.

SECTION 2. The commissioner of natural resources, hereinafter called the commissioner, is hereby authorized and directed to initiate, forward and administer the development of The Bay Circuit as hereinafter provided and for such purposes may expend such sums as may be appropriated or received as gifts therefor.

SECTION 3. The commissioner shall prepare such project area plans for sections of The Bay Circuit as he may deem advisable and shall designate thereon those areas which he proposes be acquired by the commonwealth or any political subdivision thereof and those areas which he recommends should be subject to a restrictive agreement, easement or other control in order to preserve scenic or historic features thereof. Said plans shall indicate the general character of use and development proposed for major portions of said project area. The commissioner, after public hearing in a city or town within that portion of The Bay Circuit which will be affected thereby and with the approval of the board of natural resources and approval in a town by vote of the selectmen and in a city by vote of the city council, subject to the provisions of its charter, may acquire by eminent domain on behalf of the commonwealth such property or such interest in property as may be required for the purposes of this act. The commissioner may by negotiation and agreement acquire such rights as he may deem necessary for the purposes hereof in property within The Bay Circuit and may enter into contracts and leases therefor on behalf of the commonwealth.

SECTION 4. Any department of the commonwealth and any political subdivision thereof may by agreement with the commissioner and with the approval of the governor and council transfer to the department of natural resources the care and control of any lands and rights or easements therein owned or controlled by it within The Bay Circuit upon such terms and for such period of time as may be agreed upon; or may enter into an agreement with the commissioner for joint care or preservation of such lands. The commissioner may, upon request, and upon such terms as may be agreed upon, and with the approval of the governor and council transfer to any city or town within The Bay Circuit the care and control of any land or property of the department.

SECTION 5. The commissioner shall make a survey of all lands held by the commonwealth or by any political subdivision thereof and located within the area designated in section one as the Massachusetts Bay Circuit. Thereafter he shall designate any property so held that may be necessary or useful to accomplish the purposes of this act, and shall notify the agency of the commonwealth or the political subdivision concerned. Such agency or political subdivision shall not sell or lease any such designated property until the expiration of one year after it has notified the commissioner of natural resources of its intention to sell or lease such property.

SECTION 6. Said commissioner is hereby authorized and empowered, with the approval of the governor and council, to receive and hold in trust for and on behalf of the commonwealth and for the purposes of this act any grant or devise of land. Said commissioner may, in like manner, receive and hold in trust for like purposes any gift or bequest of money or other personal property. Said moneys and property shall be known as The Bay Circuit Trust Fund, and shall be managed and expended under the direction of said commissioner.

SECTION 7. Said commissioner may acquire, maintain and care for historic buildings, monuments or sites in The Bay Circuit, and may erect and maintain such other structures as may be necessary for the proper administration of lands under its control or for the convenience of the public.

SECTION 8. Said commissioner may accept any deed to the commonwealth containing reservation of easements, rights of way and life estates and estates for years; may execute leases or permits in, upon, under, and over any portion of the lands now or hereafter acquired by the commonwealth within The Bay Circuit, including rights to hunting; may grant easements for public utilities, including gas meters, electricity and water or other activities over such lands with conditions fully safeguarding the public interest in the scenic and historic features of the area; all for such consideration or rents and upon such terms, restrictions, provisions or agreements as said commissioner after consultation with the board of natural resources may deem best; provided, that no such lease or permit shall be entered into for payment of less per year than the amount of the average annual real estate tax levied on the property concerned during the five years immediately preceding the date when the property is acquired for public use, and that from the annual receipts from any such lease a sum in the amount of such real estate tax shall be paid annually by the treasurer of the commonwealth to the city or town in which the property is located to help compensate such city or town for the loss of taxes occasioned by the taking or acquisition of such property, and provided, further, that no such lease shall be for a period longer than the life of the donor of the property involved, or, in the case of other persons for a period longer than ten years.

SECTION 9. In designing, constructing or reconstructing roads within The Bay Circuit, the department of public works shall, so far as possible, preserve and enhance the scenic features of the area.

Approved August 8, 1956.

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