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AN APPRAISAL OF TECHNIQUES TO
PRESERVE OPEN SPACE†

PETER AMES EVELETH*

Looking ten years into the future, what do you anticipate for your community? If the present trend continues unchecked, what is it likely to become? A vacationer will wind his way through a gaudy, seemingly endless jungle of neon-lit honkytonks. On every conceivable inch of space buildings will be so tightly packed the Lake will be concealed from view.

* * * * *

Ugliness is out of place here, and business has a responsibility to see that the mistakes of the few are not allowed to destroy the beauty of our land and its tremendous dollar potential. Garish, trashy honkytonks are in keeping with the surroundings of Coney Island — and in Lake George Park they are ugly, and ugliness is bad business.¹

THE PRESERVATION of open space is no longer just good conversation practice; it is good business. It is no mere coincidence that the recent efforts of the business community in the drive for open space have been accompanied by a spurt of legislative activity on both the state and national levels. The question is not that open space is

† This article is based on a paper written in conjunction with the Land Development and City Planning Seminar at the University of Pennsylvania Law School conducted by Associate Professor Jan Z. Krasnowiecki. The writer wishes to acknowledge his appreciation for the critical assistance of Professor Val Nolan, Jr., Indiana University School of Law and to Mr. Edward J. Monroe, Chairman, Lake George Park Commission for materials he provided concerning the operation of the commission.

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¹ Address by L. Judson Morehouse, Chairman, New York Republican State Committee, to members of the Lake George Chamber of Commerce, September 23, 1962. Mr. Morehouse is chiefly responsible for the creation of the Lake George Park Commission which is discussed, infra. His assessment of American honkytonk is in accord with the view of Eric Sevareid who sees the United States as “the most affluent slum on earth”: The Sunday Bulletin (Philadelphia), News and Views, Jan. 12, 1964, p. 1, col. 1.
sufficiently attractive to the prospective homebuyer to justify its preservation;\textsuperscript{2} for state legislatures, despite the reticence of some courts, have determined that such areas are "necessary to human welfare and happiness".\textsuperscript{3} This happy condition, however, has created a most difficult task for the planner and the lawyer who must now select the most efficacious techniques for acquiring and preserving this country's open areas.\textsuperscript{4}

The problems of selection are complicated by the varied and sometimes conflicting purposes that are contained within the concept of open

\textsuperscript{2}Many subdividers indicate that clusters sell better than the traditional pattern of development: Huxtable, New York Times (Magazine), Feb. 9, 1964, pp. 37, 42.


\textsuperscript{4}In recent years a voluminous amount of material on the open space problem has been published. The writer has found the following publications to be most useful: 2 American Law of Property (Casner ed. 1952) (easements and covenants); Ascher, Private Covenants in Urban Redevelopment, Urban Redevelopment: Problems and Practices (Woodbury ed. 1953) (introduction to the common law property intricacies inherent in the use of private covenants in subdivisions; discussion of the Radbam, New Jersey restrictions). Clark, Covenants and Interests Running with the Land (2d ed. 1947) (a scholarly analysis of this complex area of the law; extensive citation of authority).

Jacobs, The Death and Life of Great American Cities (1961) (not required reading but a most interesting and controversial study of what makes our cities successes or failures).

Krasnowiecki, Homes Association Study (First Draft) (1962) (An extensive study of the home owners association with particular emphasis on federal taxes).

Recreation and Open Space, State Responsibility in Urban Regional Development (The Council of State Governments) (1962) (brief introduction with current references and bibliography).

Siegel, The Law of Open Space (Regional Plan Association) (1960) (particular emphasis on the law of New York, New Jersey and Connecticut; very comprehensive citation to case authority).


Loopholes in State and Local Taxes, 30 Tax Policy (Feb.-Mar. 1963) (these four articles present a concise, current and persuasive discussion of land use controls and property taxation).


Cutler, Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe, 1961 Wis. L. Rev. 370 (summary of the numerous land use control techniques).


Reno, The Enforcement of Equitable Servitudes in Land (two parts) 28 Va. L. Rev. 951 (1942) (a starting point for anyone who wishes to understand easements and covenants; the best article in the field).
space. If the community simply wishes to encourage open areas around new subdivisions, then “cluster zoning” may be sufficient. If, rather, a large regional park is desired, the use of the police power alone will be inadequate. Condemnation may be required in areas which face impending development; purchase of scenic easements may suffice in primarily rural regions.

But where are the planner and the lawyer to begin? The planner must first assess the open space requirements of his community. Then the lawyer must determine which of the various planning tools have been made available by the state through enabling legislation. Finally, both must select the correct planning device for each open space need.

This last step in the planning process is most critical for it involves considerable political judgment as well as technical skill. Most of all, however, it requires an awareness of the legal limitations inherent in each of the planning techniques. This paper is directed at that last step in the procedure.

5. Since the uses of open space are many and varied, there are a number of different techniques which can be employed to preserve the open areas for each particular need. A partial listing of the needs and the tools that could be used for preservation is illustrative of this diversity:

a. Active recreation: health and pleasure — backyards, vacant lots, neighborhood parks and rugged wilderness preserves.
c. Urban containment: community identification; relief from the “cityscape”; reduction of dirt and noise — buffer strips, “webs of greenery” and “green-belts.”
d. Resource conservation: ecological balance; watertable maintenance; flood and soil erosion prevention — wildlife and forest preserves, parks, and agricultural and density zoning.
e. Subdivision development efficiency: reduction of wasteful utility services; lower housing and government costs — density zoning and building code restrictions.
f. Timed development for future uses: airports, parks and industry — flexible zoning, limited term development easements, option and official maps.
g. Preservation of distinctive areas: educational, historic, architectural and geological areas — zoning, purchase, condemnation and private restoration and preservation.

See generally Regional Parks and Open Space: Selected Conference Papers (University of California) 12-14, 82 (1961) (hereinafter California Conference); Comment 37 So. Calif. L. Rev. 304 (1964); Strong, Open Space for the Penjedel Region (Workshop II) II-2 to II-6 (1961);


6. Krasnowiecki & Paul, supra note 5, at 180-81 n. 5; Strong, op. cit. supra note 5, at (Workshop II) 11-1 to 11-3.

7. The Federal Housing Act of 1961 specifically recognizes the necessity for employing a variety of techniques:

In extending financial assistance under this title, the Administrator shall take such action . . . to assure that local governing bodies are preserving a maximum of open-space land, with a minimum of cost, through the use of existing public land; the use of special tax, zoning, and subdivision provisions; and the continuation of appropriate private use of open-space land through acquisition and leaseback, the acquisition of restrictive easements, and other available means. 64 Stat. 558, 42 U.S.C. § 703(b).
The Scope of the Problem

The problem of maintaining sufficient open space is presently limited to several small belts of concentrated population. However, the current shift of economic activity to the heretofore sparsely populated areas of the Southwest makes this problem one of national significance.

The total area of land populated by 1000 persons and over, in 1954, amounted to less than one percent (18.6 Million acres) of the total land area in the United States, forests, croplands, and pasture occupied over ninety percent. In the continental United States population density varies greatly — from 1.5 persons per square mile in Nevada to 88 thousand per square mile in Manhattan. Furthermore, demographers predict that most of the future increase will be concentrated in areas where a town or city now exists. While the federal government's actions have had mixed effect on population movement, the changing nature of defense technology has resulted in some deep regional and local dislocations of employment and population. Undoubtedly the great concern with the Appalachian problem will lead to additional shifts of industry into that area. An even more direct federal solution might lie in the active promotion of "New Towns," new communities built under the aegis of the government on lands now held in the public domain since over twenty-five percent of the continental United States is in public ownership. While the government holds over ninety percent of the land in some areas of the West, the percentage is much lower in the eastern region where the open space problem is more acute. In 1950, the federal government owned two percent of New Jersey and Pennsylvania and three percent of Delaware.

But neither population increase nor high density concentration is, in itself, the primary cause of the disappearance of usable open space. The real reason seems to be the inefficient manner in which land is being developed:

It is not the growth itself that is the problem, but the pattern of growth. Many acres of open space have been left behind as a result of scattered development, but much of this is too small or too poorly sited to use well; it is not effective open space.

9. Id. at 4.
11. Id. at 111. However, the hardy pioneer can still acquire a five acre homestead tract for a nominal annual rental of $5; Community Recreation and the Public Domain (U.S. Dept. of the Interior) 19 (May 1963).
14. Strong, (Workshop I), op. cit. supra note 5, at 1-3.
Even in our more crowded cities, such as New York and Chicago, over ten percent of the land is left vacant. This land is unsuitable for park and recreation purposes, not only because of its size and location, but because the chain of title to the land is hopelessly confused.

I.

GOVERNMENT ACQUISITION: PURCHASE AND EMINENT DOMAIN

A. Acquisition of the Fee Simple

Having assessed the need for open space areas in their community, the planner and lawyer must then select the legal tools to preserve it. The acquisition of the fee is the most frequently employed device. While there has never been substantial doubt that governments have the constitutional capacity to purchase or use their power of eminent domain for park and recreation purposes, there has been some question of how far in advance of their immediate needs they may condemn land. Generally, advance acquisition has been upheld, particularly if pursuant to a comprehensive community plan.

It has long been settled that the federal government may acquire land for park and recreational purposes. While the states also possess such powers, they have used them less extensively in recent decades. In the last few years there has been a flood of state legislation which specifically authorizes and encourages the purchase and/or condemnation of land — including less than fee interests — by local governments for park, conservation, open space and recreation purposes. These states include those most concerned with the open space problem, such as New York, New Jersey, California, Maryland, Connecticut and Massachusetts. New Jersey has already acquired over


17. See, for example, Grand Rapids Bd. of Educ. v. Baczewski, 340 Mich. 265, 65 N.W. 2d 810 (1954) (schools not needed for 30 years; acquisition of land for sites did not meet necessity test).


14,000 acres at a cost of $5.8 million since it initiated its Green Acres program in 1961.22

The most serious obstacle to governmental acquisition has usually been a lack of local financial resources; little state assistance has been available. In 1960, less than two percent (less than $6 million) of the funds spent by local authorities for park and recreation purposes came from the states.23 This need should in part be ameliorated by recent bond issues in New York ($100 million),24 New Jersey ($60 million),25 and Pennsylvania ($70 million).26 Wisconsin financed a $50 million program through a one cent cigarette tax increase.27 These programs provide for considerable assistance to local governments. For example, Pennsylvania's "Project 70" authorizes $20 million for matching grants to regional county and municipal authorities; New York furnishes aid of up to 75% of acquisition costs, and Wisconsin and New Jersey both 50%. There are, in addition, numerous other sources of revenue available for open space and related programs.28 In Pennsylvania all state revenue from oil and gas leases is allocated for conservation, recreation and flood control purposes.29 Adequate enabling legislation to authorize bond issues by local governments now exists; however, it is rarely utilized. Evidently there is great reluctance to create bonded debt.30

Finally, the federal government initiated its first open space program in Title VII of the Housing Act of 1961.31 It authorizes grants of up to 30% of the cost of permanent interests in open space land (predominately undeveloped land in urban areas) which has value for park, recreation, scenic, historic and conservation purposes.

Even where there are adequate monies available to finance an extensive land acquisition program, however, some commentators have expressed serious doubt whether public ownership is an appropriate device, especially where the land acquired is not immediately needed for public use. Aside from the frequent warning against "the govern-

23. STATE RESPONSIBILITY IN URBAN REGIONAL DEVELOPMENT, op. cit. supra note 15, at 155.
25. WHYTE, Ibid.
28. California Conference, supra note 5, at 64–68.
29. PA. STAT. ANN. tit. 71 § 1331. The Commonwealth is also empowered to make payments in lieu of taxes lost to counties and townships on lands acquired by the Commonwealth for conservation or flood prevention. PA. STAT. ANN. tit. 72 §§ 5501–5502.
30. STRONG, op. cit. supra note 5 (Workshop II), at II–20 to II–21. But there is also a great deal of public apathy as well. In New York's $75 million open space bond proposition, 56% of the ballots were blank.
31. 75 Stat. 149.
ment in the real estate business,” one may well question whether a more rational allocation of resources would not dictate more schools rather than greener highways.\textsuperscript{32}

B. Acquisition of Interests Less Than a Fee: Development Rights and Scenic Easements

William H. Whyte, Jr., has been the foremost advocate of the so-called scenic or conservation easement approach to preserve open space areas.\textsuperscript{33} He suggests that this method has several advantages over fee acquisition:

1. The land remains on the tax rolls.
2. There are no public maintenance costs.
3. There is less landowner opposition since the owner may remain in possession.
4. It is less costly than fee acquisition.
5. The land remains in private rather than governmental ownership and management.
6. The land remains productive.
7. There is less pressure on the farmer to sell since realty taxes will no longer reflect the value of potential development.

Whyte’s program has prompted several state legislatures to enact enabling legislation: New York,\textsuperscript{34} Maryland,\textsuperscript{35} Massachusetts,\textsuperscript{36} Connecticut,\textsuperscript{37} California\textsuperscript{38} and New Jersey.\textsuperscript{39} Nevertheless, serious criticisms have been raised, not only as to the efficacy of this approach, but also to its desirability. It is clearly not workable in areas where development is imminent, as Whyte himself admits.\textsuperscript{40} Furthermore, except for a few states such as New Jersey,\textsuperscript{41} West Virginia\textsuperscript{42} and New York,\textsuperscript{43} local governments are not enabled by statute to condemn such easements. Without such power an effective program cannot be imple-

\textsuperscript{32} Krasnowiecki & Paul, supra note 5, at 182–83.
\textsuperscript{33} WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Urban Land Institute, Technical Bulletin 36) (1959); WHYTE, op. cit. supra note 24.
\textsuperscript{34} N.Y. GEN. MUN. LAW § 247 (1960).
\textsuperscript{35} Md. Code Ann. art. 66(c) § 357(A) (1960).
\textsuperscript{36} 1b Mass. Gen. Laws ch. 40 § 8(C) (1961).
\textsuperscript{40} WHYTE, op. cit. supra note 24, at 17.
\textsuperscript{43} N.Y. Conservation Law § 1-0707 (C. 174 L. 1964).
There is some authority, however, to the effect that the power to condemn land necessarily includes the power to condemn less than the fee. There is no doubt that condemnation for scenic purposes is for a proper public use. But before the power of eminent domain is exercised it should be certain that adequate safeguards are established to protect landowners whose development rights are condemned:

1. Surrounding tracts must be similarly restricted so that the development value of the tract which is restricted is not merely shifted to other unrestricted tracts.

2. The surrounding land must be limited in such a manner that uses which are allowed on the unrestricted tracts will be compatible with the uses permitted on the restricted land — farming remains economically and socially feasible on the restricted land.

3. The rights and limitations on the owner's use of his restricted land must be clearly specified.

Williams suggests that the typical enabling act is deficient, if not fatally vague, in this third respect. In his opinion, "a policy of taking conservation easements under the characteristic general statute is undesirable, potentially unfair, and legally dangerous." This caveat was well illustrated by the case of Pontiac Co. v. Board of Commissioners, which he cites in support of his thesis. In that case the park commissioners sought to condemn certain easements (plantings, building types, billboards, etc.) under an Ohio statute which authorized the acquisition of "the fee or any lesser interest." The property owners successfully enjoined the attempt, inter alia, because of a lack of a clear statement of the exact interests to be taken:

[When an interest less than the fee is sought to be acquired the owner whose property is to be taken against his will should be appraised of the exact extent of the lesser interest, so that he may know definitely the extent of the interest which is not taken from him. And the lesser interest taken must be described with such certainty as to enable a jury to intelligently assess the compensa-

44. Krasnowiecki & Paul, supra note 5, at 192.
49. 104 Ohio 447, 135 N.E. 640 (1922) (alternative holding). A covenant that "no act or thing shall be done or placed or permitted to remain upon [land of covenantors] which shall injure, prejudice, affect or destroy the natural aspect and condition of the land" was held void for uncertainty. National Trust v. Midlands Electricity Board, [1952] 1 Ch. 380.
tion to be paid for the interest taken in accordance with the Constitution.  

But even where these legal obstacles have been surmounted, the use of scenic easements, where they would be thought to be most effective, has not been altogether satisfactory. The National Park Service has had substantial experience with scenic easements covering some 7,500 acres acquired along several parkways in Virginia, Tennessee and other Southern states. While there has been scant litigation, the Service has experienced considerable difficulty in enforcing the restrictions. The courts are reluctant to issue injunctions prior to the actual violation of the restrictions, and damages are not only difficult to ascertain but are insufficient relief (as where trees are cut). There have been frequent misunderstandings between the government and landowners as to the meaning of the restrictions, and even as to the existence of the easement where the restricted land was purchased without actual notice. As a result, many property owners have been willing to exchange a portion of their land in fee for the extinguishment of the scenic easement on the remainder. The Service, faced with such difficulties, has discontinued the acquisition of scenic easements.

The federal experience presents a most instructive lesson concerning the feasible limitations of the scenic easement approach. The easements, according to Williams, were most successful where they protected against serious dangers where the land was not subject to strong development pressures and where its normal use was not greatly affected, and finally, where the easements were affirmative, rather than negative, in character. Easements were generally inadequate where there was considerable interference with existing land use or where the land was subject to real estate speculation pressure.

These limitations are well worth serious consideration. They suggest the necessity for careful drafting of the easement agreement and the need to employ several techniques, not only initially, but as the land development pressure begins to grow. The difficulties in enforcement do not necessarily suggest that easements are inadequate per se,

51. WILLIAMS, op. cit. supra note 16, at 44 n.42.
52. Id. at 45.
53. H.R. REP. No. 273, 87th Cong., 1st Sess. (1961): "On the basis of 20 years of experience, such easements breed misunderstandings, cause administrative difficulties, are difficult to enforce, and cost only a little less than the fee." "Whyte challenges the cost criticism"; OPEN SPACE ACTION, supra note 24, at 18. However, Lower Gynedd Township in Montgomery County, Pennsylvania, rejected the development rights approach as too costly: COMPREHENSIVE PLAN FOR LOWER GYNEED TOWNSHIP (Montgomery County Planning Commission, Norristown, Pa.) 129 (Jan. 1961).
54. WILLIAMS, op. cit. supra note 16, at 46.
but at a particular state of the area's development, they may no longer be sufficient, and that the land should then either be purchased to preserve its open state or be developed.

C. The Legal Intricacies of Scenic Easements

An examination of the easement approach is not complete without highlighting a number of common law technicalities which may jeopardize the community's open land preservation program unless particular attention is given to the drafting of the easement agreements. It may even be necessary that the state's open space enabling legislation be drafted to abrogate some of these rules. In any event, it seems inadvisable, in the absence of such legislation, to consider scenic or conservation restrictions as "easements" and to seek to bring them within the traditional and rather inflexible category of common law rights.

The first limitation on the use of legal easements as devices for land use control is the proposition that the law will not recognize new kinds of easements.55 While this view is not always adhered to, it does represent a reluctance to create additional encumbrances on land.56 The doctrine is most frequently applied in the case of negative easements, where the owner of the land subject to the easement (burdened land) must refrain from certain otherwise lawful uses of his land. Negative easements are said to be limited to the four categories of light, air, support and flow of artificial streams.57 Scenic easements would be generally negative in nature (prohibiting erection of buildings, removal of trees, etc.).

55. Keppell v. Bailey, 2 Myl. & K. 517, 535, 39 Eng. Rep. 1042, 1049 (Ch. 1834) is often cited for this view: "It must not . . . be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and the public weal, that such latitude be given." But compare the statement in Dyce v. Hay, 1 Macq. 305, 312 (H.L. 1852): "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind." An example of the Keppell view is the refusal of English courts to recognize easements of prospect on the ground that such servitudes would prevent the development of cities. Fratcher concludes that this refusal to enforce legal easements having purely aesthetic value has destroyed the utility of legal servitudes as devices to impose the types of restrictions most needed for city planning. Fratcher, Legal Servitudes as devices for Imposing Use Restrictions in Michigan, 2 WAYNEX L. Rev. 1 (1955). However, the following easement was upheld in In re Ellenborough Park, [1955] 1 Ch. 131: "the full enjoyment at all times hereafter of the [Park] . . . subject to the payment of a fair and just proportion of the costs, charges and expenses, of keeping in good order and condition the same pleasure ground." This case is analyzed and the doctrine of jus spatium is discussed in 221 L.T. 34 (1956). See also Rights Capable of Existing as Easements, 186 L.T. 459 (1938); Conrad, Easement Novelties, 30 CALIF. L. Rev. 125 (1942).

56. It should also be noted that with the exception of a few "spurious" easements, the common law was unwilling to recognize easements which imposed affirmative duties upon the servient tenement which would run to subsequent owners. Reno, infra note 57, at 958-60, 970; The modern American view seems contrary, note 134 infra.

A second difficulty is posed by the traditional English notion that the easement is created for the benefit of the land of the holder of the easement, and, therefore, is said to be appurtenant to that land. The benefited land was designated the dominant tenement, or under Roman law, the master estate; the burdened land was referred to as the servient tenement or slave estate. Therefore, unlike profits à prendre, easements which were in gross (beneficial to the owner of the easement irrespective of the existence of a dominant tenement) were not recognized in England, or at least the burden would not run to subsequent owners of the burdened land. In the case of scenic easements it is unlikely that the public authority to which the easements are granted would possess a dominant tenement to which the benefit would be considered appurtenant.

While most American courts recognize easements in gross, the benefit of the easement, as in England, is generally unassignable.

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58. Reno, supra note 57, at 954.
59. A profit à prendre is another category of incorporeal hereditament, or legal servitude, but is a right to remove a corporeal portion of the servient tenement, such as timber, fish and turf. It is different than an easement which is a right without profit, although both are treated as easements by the Restatement of Property. Restatement, Property (Servitudes) Vol. V, 450, Special Note (1944). See criticisms of the Restatement approach in Clark, Covenants and Interests Running With the Land, 8 n.23 (2d ed. 1947).
60. King v. Allen & Sons, 2 A.C. 54 (1916), same case below, 2 Ir. R. 448 (1915); Rangely v. Midland Ry. Co., L.R. 3 Eq. 306, 310 (1868); Gale, op. cit. supra note 57, at 7.
62. In a brief footnote, William Whyte, Jr., the chief proponent of conservation easements, submits (without citing authority) that “a park commission which purchases a scenic easement would be the ‘dominant tenement.’” However, this may not be the view of some courts unless the deed restrictions clearly indicate the particular land owned by the commission to which the easement is intended to be appurtenant. It is not enough that the commission owns some land; there must be a sufficient nexus between the servient and dominant tenements. Even in the case of scenic easements along highways, the court might not deem that a local park commission possesses a dominant tenement in a state highway: Compare United States v. 64.88 Acres of Land, 144 F. Supp. 29 (W.D. Pa. 1956), rev’d, 244 F.2d 534 (3d Cir. 1957). It may be necessary that the rule of London County Council v. Allen be abrogated by statute as in Wisconsin, or that some portion of the land be deeded in fee to the commission: See Sylvania Elec. Products, Inc. v. Town of Newton, 183 N.E. 2d 118 (Mass. 1962). It is sufficient to say that in the view of this writer, Mr. Whyte’s casual reference may be misleading. See text and cases cited at notes 128-132 infra, and Whyte, op. cit. supra note 33, at 11 n.1 (1959).
64. Ackroyd v. Smith, 10 C.B. 164 (1850).
Where it has been held assignable it was of a commercial or economic nature. A corollary of the rule of unassignability is the doctrine that easements appurtenant may not be severed from the dominant tenement. An attempt to transfer or sever an appurtenant easement and create an easement in gross might well extinguish the easement. Thus, even if the public authority was deemed to possess a dominant tenement, it would be unable to transfer the easement, as it might wish to do if it were necessary to vest control in a different public agency.

A final problem arises where there is unity in the ownership of the fee and the easement. In such a situation the easement will be extinguished as, for example, where the public authority acquires the servient tenement. The easement then would be ineffective against a subsequent purchaser without express stipulation.

If the scenic restriction is not a common law easement, it is likely to be considered either a real covenant or an equitable servitude. The problems which are inherent in these classifications will be examined in connection with the discussion of private restrictive covenants, infra.

D. Compensable Regulations

Occupying an intermediate position between compensatory government acquisition (eminent domain and purchase and non-compensable regulation utilization of the policy power) is the “compensable regulation” originated by Professors Krasnowiecki and Paul in a study sponsored by Penjerdel, Inc., a regional planning association for Pennsylvania, New Jersey and Delaware. They propose controls on development similar to zoning, but with a government guarantee that

66. Restatement, Property §§ 489-492. For criticisms of this dichotomy see Clark, op. cit. supra note 59, at 79-83. Judge Clark has asserted that the English view of unassignability of easements in gross, as opposed to profits in gross, is basically a sound result of balancing the utility of the easement with the disadvantages of unmarketable titles. He argued that easements in gross are often of little value, easily forgotten, and if the holder of the easement in gross sells his land, remarries and dies, it would be difficult to locate the present owner. This would create serious clogs on titles to the burdened lands, thereby impeding their free alienability. Clark, op. cit. supra note 58, at 72-74.

67. Cadwalader v. Bailey, 71 R.I. 495, 23 Atl. 20 (1891); American Law of Property, op. cit. supra note 65, at § 8.73; Clark, op. cit. supra note 58, at 89.


70. There is also some authority that a tax foreclosure will extinguish the easements. American Law of Property, op. cit. supra note 65, at §§ 8.103-104; Friedman, op. cit. supra note 69, at 222-24, 286; Contra, O’Malley v. Comm. of Public Works of Boston, 340 Mass. 542, 165 N.E. 2d 113 (1960). See discussion of majority and minority rules in Note, 41 Geo. L.J. 525 (1953). Furthermore, the easement may terminate when the purpose for which it was created no longer exists: Compare American Law of Property, op. cit. supra 65, at 298 n.1b (Supp. 1956); Friedman, op. cit. supra note 69, at 222 n.8. But see, Restrictions voluntarily imposed on the use of land, New York Law Revision Commission, 249, 256-57 (1958).

71. Infra, notes 108 to 137.
the owner will receive, at the time of sale, an amount equal to the fair
market value of the property determined at a time prior to the imposi-
tion of the controls. The owner is paid nothing to compensate for
the restrictions until he sells his property, and then only an amount
equal to the difference between the sale price (at a review board
supervised public auction) and the earlier assessed value. Appropriate
adjustments are made for inflation.

Such a scheme is, by necessity, more complex than easement
acquisition or fee condemnation, and would require more administra-
tive machinery. The enforcement problems of development rights
(scenic easements) exist here as well. It is difficult to predict the cost
of such a program. Initially one might suspect it would cost little.
However, it would seem that property owners subject to existing,
non-compensatory regulation would seek to come under this program.
As Miss Siegel said in relation to scenic easements, "one may wonder
why, insofar as the community may legally restrict land use through
the regulatory processes of zoning, serious thought is given to a
proposal to buy such restrictions." Others may object to widespread
public ownership of development rights and the concurrent denial of
the "farmer's" right to the speculation worth of his property. While
in theory "just compensation" in condemnation proceedings need not
reflect the loss of the chance to realize potential increment in value,
it is questionable whether that solution would be quite so perfect as
it might first appear. There is a danger that such rights will be over-
condemned since vast areas of land may be "regulated" at no initial
cost to the government and little actual public inquiry, despite provision
for notification to owners of the proposed regulations. A farmer
notified that his farm will be restricted to farming may not be too
aroused if the pressures of development have not yet reached his area.
There would be little opportunity for the ordinary layman-landowner,
in actual practice, to adequately insure himself a fair guarantee. He
clearly will be less aware of the consequences to the assessed worth of
his property, at the time of assessment, than if his fee were condemned.
When he later comes to collect his guarantee and contest the assessed
worth, he will have a difficult burden showing that the assessment was
unreasonable. Who can testify that his land was more valuable twenty
years ago? In any event, the negation of potential value in property
on such a vast scale can be expected to raise the hackles of many
conservatives. Yet, liberals have criticized this proposal as too reac-
tionary to meet the pressing needs for open space and as "tainted"

72. Krasnowiecki & Paul, supra note 5; Krasnowiecki & Strong, supra note 47.
by the "all too prevalent view that that government is best which spends least and slowest." 74

Finally, compensable regulations, good or bad, are subject to the same pressures of development as zoning. Nevertheless, this proposal should be commended for its attempt to combine the use of the condemnation and police powers and to resolve their court-made dichotomy. 75

II. GOVERNMENT REGULATION

Various non-compensatory regulatory techniques have been employed to freeze existing uses of property to preserve open space. On the state level, only a few non-compensatory programs have been attempted. 76 Recently, Hawaii passed an extremely encompassing zoning act which classified land as urban, conservation or agriculture. Its provisions have been subject to major revision because of its impact and scope. 77 Clearly Hawaii in size alone presents a unique situation. But on the local level more extensive use of the police power is evident. Some use has been made of the official map. New Jersey prohibits development within an area mapped as a park or playground; this is limited, however, to a one year period from the application for plat approval. 78 The official map technique is limited by the requirement that the owner be allowed to develop if he can show that his property cannot yield a reasonable rate of return as restricted. 79 However, the official map has been frequently overrated by city planners for they often assume that by coloring a person's land green on a map, he will cheerfully sell to the city at its price. 80

Various forms of zoning are being widely used by communities, including flood plain, 81 wetlands, historic, 82 scenic, 83 agriculture 84 and

74. Lipman (State Office of Planning, Sacramento, Calif.), Comments, 29 JOURNAL OF THE AMERICAN INSTITUTE OF PLANNERS 87, 98.
75. Krasnowiecki & Paul, supra note 5, at 190-91.
76. E.g., Wis. Stats. Ann. § 59.07(49) (1959) (billboard control) and cases collected in Spillman, ARCHITECTURAL CONTROLS BASED ON AESTHETIC CONSIDERATIONS (University of Pennsylvania Law School Land Use Seminar, unpublished paper) 10 (Jan. 1964).
79. Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); State ex rel. Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957); Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951).
80. E.g., Strong (Senior Planner, N.Y.C. Planning Comm.) LOCAL PLANNING ADMINISTRATION 284 (McLean ed. 1959): "Most people are not interested in constructing a dwelling on a piece of land that the city will be acquiring even some time in the future. They are not interested in moving into a house only to have to move out later, and are therefore usually only too glad to sell."
84. CITY, THE NEE, CONSTITUTIONAL AND LIMITATION OF AGRICULTURAL ZONING (Fresno, Calif.) (June 1957); Wershaw, Agricultural Zoning in Florida, 13 U. FLA. L. Rev. 479 (1960).
recreation or so-called "O" (open) zones. Until recently, the most accepted regulatory device has been the low-density, high acre zoning. It has been employed both as a means to preserve open space and to time the community's development. Like all methods of zoning it has two serious drawbacks: (a) it may be struck down as confiscatory and (b) it may not withstand the pressures of development. Yet, courts have sustained minimum lot requirements ranging from 5,000 square feet to five acres. When zoning is used for the express purpose of timing development, it has often been struck down.

Recently, planners have begun to doubt the efficacy of minimum acre zoning as a solution to the open space problem:

While Lower Gynedd's two acre zoning will, if permanent, insure relatively low density development and large lot sizes, it will not preserve the present rural character of the Township. Two acre 'suburban estates' attractive as they may be, will replace many of the natural amenities and destroy the rural character of the Township.

In a recent study the Urban Land Institute estimated that it would take lot sizes of five to ten acres to accomplish these open space objectives. Some planners have rejected the minimum acre zoning as a solution to the open space problem:


89. The Effects of Large Lot Zoning on Residential Development, 32 U.L.I. Tech. Bull. 10 (1956). "Nor should large lot zoning be expected to guarantee the preservation of open space except when so extreme as to totally discourage development. It may merely deconcentrate residential populations, tending to distribute development farther out into the metropolitan periphery. When employed in a wide scale . . . this practice suggests serious long range implications concerning extension of communi-
approach as undesirable, regardless of the size lots required, on even broader grounds:

The acre lot is not a solution to open space. Yet, zoning and planning, by and large, have frozen the pattern of neighborhood development to the large lot with its relatively high cost of facilities per housing unit. In industrial and payroll areas where incomes are limited, we find the yardspaces cramped, poorly utilized and all too often overgrown with weeds and strewn with rubbish.

The attempt to obtain open space through large lot or acreage zoning has been shown to be illusory. Not only has it intensified rather than minimized the evils of urban sprawl, but it has entailed the corresponding evils of inefficiency and costliness of utilities, services, schools; and has wasted land without producing open space in the true meaning of the term. Public authorities which continue to recommend this way of controlling population density are kidding themselves as to its economy, desirability, or ultimate assurance of a solution to open-type development.

III. PRIVATE TECHNIQUES

A. Donation of Open Space

At a time when New Jersey is willing to spend $60 million for its Green Acres program; Wisconsin $50 million; Pennsylvania $70 million and New York $100 million, it seems strange that state and local governments have frequently overlooked the potential value of acquiring rights in land through conditioned and unconditioned gifts, devises and voluntary restrictive agreements. The Regional Plan Study of New York-New Jersey-Connecticut found that about 25-30% of the total land acquired by states for parks (1942-1956) was obtained through gifts. Large estates have been donated to local public authorities and to private conservation associations. One appealing variant is the gift of the fee simple with the retention of a term for years or a life estate by the donor. Some attempts have been made to encourage such donations through real estate tax concessions. Unfortunately,
difficult constitutional as well as statutory problems are apt to arise in many states. For example, in *Whipple v. Teaneck Township*\(^93\) the court held that the municipality could not exempt land from taxation which had been donated to the township for park purposes with the reservation of a life estate.\(^94\) Yet, where development rights and the like are donated, it would seem that the assessor should be limited to the value of the land as restricted.\(^95\)

B. *Private Restrictive Covenants*

There has been surprisingly little discussion of the role of private preservation of open space and scenic attraction through the use of mutual restrictive covenants. The failure to employ such techniques may reflect in part the legal intricacies of real covenants and equitable servitudes. It also may indicate that some specialized organization is needed to encourage owners to enter into such schemes and to provide legal and technical assistance to them.\(^96\) While the imposition of building restrictions in new subdivisions is not uncommon, there have been few government attempts to suggest the types of restrictions which would be best for the community, and even less encouragement of restrictions in established neighborhoods.\(^97\)

One of the best known and most successful schemes is the "Mill Creek Valley Agreement" of Lower Merion Township, (Pennsylvania) which was originated in 1941.\(^98\) Through mutual deed restriction the owners are prohibited, with certain exceptions, from erecting buildings, walls and fences within the restricted area, and from destroying trees and other natural cover without the approval of the township's planning or shade tree commissions. The township made preliminary surveys and provided legal assistance in framing the agreements.

The most extensive and imaginative utilization of this technique is now being employed in the beautiful Lake George region of New York's Adirondack Mountains. Prompted by the alarming spread of honkytonks and garish motels, L. Judson Morehouse, New York Republican State Chairman, initiated preventive legislation\(^99\) which

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\(^{93}\) 135 N.J.L. 345, 52 A.2d 44 (1947).

\(^{94}\) Accord, N.Y. Conservation Law § 1.0713.


\(^{97}\) One of the leading cases which upheld restrictions between landowners not deriving title from a common grantor is Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877).


\(^{99}\) See address to Lake George Chamber of Commerce, supra note 1.
created the Lake George Park Commission in 1961. Until that time, most of the area was not protected from commercial encroachment by zoning regulations. Within the Park area the Commission is empowered to:

2. Adopt, sponsor, and encourage the use of forms of deeds, agreements, covenants, and other legal documents by means of which owners of real property within the Lake George Park may voluntarily prohibit, restrict, and control the use thereof for commercial purposes.

3. Encourage owners of real property... by written instrument to prohibit, restrict or control voluntarily the use of such real property for commercial purposes.

4. Acquire interests or rights in real property... for the purpose of prohibiting, restricting, or controlling the use of such real property for commercial purposes.

5. Establish rules, regulations, and procedures by which the Commission may authorize or permit a necessary or desirable use of land or prevent unnecessary hardship in an individual or particular instance by altering or modifying in whole or in part any restriction contained in any conveyance to or agreement with the Commission or which the Commission has power to alter or modify.

6. Encourage... and assist municipalities... in preparation and adoption of zoning laws or ordinances and other local legislation to restrict or control commercial uses....

17. Establish advisory committees and enlist and accept the support and cooperation of organizations of property owners or others interested in promoting the purposes and objectives of this part.

In addition, the use of certain signs and advertising devices are restricted in the Park and various objectionable uses of land, such as junk yards, circuses, dance halls and trailer camps are prohibited without a permit issued after public hearing.

The Commission is not empowered to zone any area unless all owners within the proposed zone agree thereto and execute agreements with the Commission, hence its appellation, "do-it-yourself-zoning." It is clear that a "non-signed" cannot be bound by this type of

102. N.Y. CONSERVATION LAW § 843.
103. Id. at § 847.
"zoning." At last report three permanent resident zones and six proposed zones have been established; preliminary work is underway to create eight additional zones.

It is too early to assess the success of this plan, and no court cases have arisen to test the validity of the restrictions. Nevertheless, this plan merits the attention of all lawyers and planners who seek to utilize private cooperation in solving the problems of preserving attractive scenic areas.

The success of this program as well as other schemes which seek to employ such restrictions depends upon the extent to which the agreements reflect an awareness of the many intricacies which are inherent in the law of legal covenants and equitable servitudes. It is, therefore, advisable to examine the nature of these restrictions to determine what legal and equitable limitations might diminish their effectiveness. It is worthwhile to reconsider the scenic "easement" at this point as well.

A real covenant or covenant running with the land is another category of incorporeal interest which was developed concurrently with the growth of the law of profits à prendre and easements. The requisites for creating a covenant which would run with the land were very stringent, and the most difficult was frequently the requirement of privity of estate. Unless there was a complete assignment of the covenantor's estate, the burden of the covenant would not run to subsequent possessors of the land since the necessary privity of estate with the covenantee or his assigns would be absent. Furthermore, unlike profits and easements, the real covenant was considered a contractual obligation which created in the covenantee rights in personam against the covenantor and his assigns but not rights in rem against the general public. Thus, the only type of relief that a court of law would grant for breach of covenant was a judgment for money damages. Finally, the English courts refused to extend the rule of covenants running with the land beyond cases of covenants in leases between landlord and tenant, and, therefore, the running of the burden of covenants between owners in fee was not recognized. This view still prevails in England and a few American states.

109. The requirements were laid down in the famous Spencer's Case, 5 Co. 16a, 77 Eng. Rep. 72 (Q.B. 1583).
111. Id. at 965; 2 AMERICAN LAW OF PROPERTY 362-63 (Casner ed. 1952).
112. AMERICAN LAW OF PROPERTY, Ibid.
113. Austerberry v. Oldham Corp., 29 Ch. D. 750 (C.A. 1885); AMERICAN LAW OF PROPERTY, Id. at 382.
It is apparent from these serious limitations that real covenants were totally inadequate as devices for land use control in an increasingly urbanized society. But, while the English courts of law were frustrating attempts to expand the function of real covenants, equity was developing new devices more suitable to deal with the growth of cities. Tulk v. Moxhay, the English case that originated the doctrine of equitable servitudes, held that an agreement to use land in a particular manner will be enforced against purchasers of the land with notice, whether or not the agreement satisfied the requirements of a legal covenant. The rationale of the decision is somewhat unclear. As a result two different theories of enforcement of such agreements have emerged; first, that the restrictions are specifically enforceable as a contract concerning land, and second, that the agreement creates an equitable property interest in the burdened land, similar to easements and profits. This latter theory seems to be supported by English courts, most learned writers and a majority of American cases.

Thus, according to the majority view the owner of the benefited land is entitled to injunctive relief without being required to show damage.

The easement analogy has, however, created considerable difficulty in certain respects which are germane to the problem of scenic "easements." It was previously pointed out that the English courts had refused to recognize legal easements in gross, and, since equitable servitudes were considered analogous to legal easements, the courts refused to enforce equitable easements in gross against subsequent purchasers. The leading case is London County Council v. Allen in which the covenantor promised the Council not to construct buildings on a portion of his land in return for permission to lay out a road. The Council sought to restrain covenantor's successor (with notice) from violat-

115. Reno, supra note 108, at 970. The use of rights of entry and possibilities of reverter as devices to restrict land use are not discussed in this article. See the references cited in Fratcher, Legal Servitudes as Devices for Imposing Use Restrictions in Michigan, 2 WAYNE L. REV. 1, 11 n.66 (Part I) (1955).

116. Reno, supra note 108, at 970-79 and Part II, 1067-1101. Fratcher suggests that equitable servitudes are more suitable than legal servitudes since the latter are too rigid for changing urban conditions. Fratcher, supra note 115, at 11-12.

117. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

118. Reno, supra note 108, at 973; CLARK, op. cit. supra note 114, at 170; AMERICAN LAW OF PROPERTY, op. cit. supra note 111, at 403.

119. London County Council v. Allen, [1914] 3 K.B. 642; CLARK, op. cit. supra note 114, at 174; AMERICAN LAW OF PROPERTY, op. cit. supra note 111, at 403. Reno, thoroughly discusses the significance of these two theories; See also the able discussion in Stone, The Equitable Rights and Liabilities of Strangers to a Contract, 18 COLUM. L. REV. 291, 295 (1918).

120. 2 AMERICAN LAW OF PROPERTY 404 (Casner ed. 1952).

121. [1914] 3 K.B. 642.

122. A subsequent purchaser of the burdened land who takes without notice is not bound by equitable servitudes, but presumably constructive notice provided by recording would negate this defense: AMERICAN LAW OF PROPERTY, op. cit. supra note 120, at 404.
ing the agreement, but the Court of Appeals refused to extend the doctrine of *Tulk v. Moxhay* to a situation where the covenantee (Council) did not possess a dominant tenement.\(^{123}\) Unfortunately, the English view has been followed by a majority of American cases.\(^{124}\) There are some cases to the contrary,\(^{125}\) and in at least one jurisdiction, the rule has been abrogated by statute.\(^{126}\) The American result is somewhat illogical since a majority of jurisdictions have recognized that legal easements in gross run against subsequent owners of the servient land, though holding the easement to be unassignable.\(^{127}\) This hostility toward interests in gross may be fatal to many current scenic easement schemes since the courts may find that the public authority possesses no dominant tenement.\(^{128}\)

A further difficulty (perhaps based on the easement analogy) is posed by the English rule that agreements which impose affirmative obligations on the burdened land will not be enforced against subsequent takers with notice.\(^{129}\) Under this view it would seem that some desirable requirements of a scenic restriction agreement which were affirmative in nature (removal of dead trees, roadside brush, etc.) would be unenforceable against purchasers with notice.\(^{130}\) The English rule, however, is not followed by most American cases.\(^{131}\)

Several other obstacles to the use of equitable restrictions should be considered by local open space planners. One is the generally accepted doctrine that if the covenantee (subdivision developer) reserves a power to release or modify the restrictions on some lots, the covenantors (lot owners) will be unable to enforce the restrictions inter


\(^{125}\) Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913) (leading case); Pratte v. Bakatsos, 99 N.H. 430, 113 A.2d 492 (1955); Reno, supra note 108, at 1088 n.165; Clark, op. cit. supra note 114, at 182 n.49.


\(^{127}\) Reno, supra note 108, at 1089 n. 164; Clark, op. cit. supra note 114, at 68 nn.15 & 17.

\(^{128}\) See discussion of William Whyte’s view at note 62, supra. Compare Sylvania Elec. Products, Inc. v. City of Newton, 183 N.E.2d 118 (Mass. 1962) (Option on parcel of land granted to city to allow it to have dominant tenement to enforce restrictions).

\(^{129}\) Haygood v. Brunswick Building Society, 8 Q.B.D. 403 (1881).


\(^{131}\) Nepos Property Owners’ Ass’n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (land assessment); Clark, op. cit. supra note 114, at 179-80; American Law of Property, op. cit. supra note 111, at 439 n.8.
The existence of such a power is deemed to negate any intent to create a uniform development, and therefore, the restrictions are considered to be imposed solely for the developer's benefit. Furthermore, indiscriminate use of this power by the developer may well cause the court to deny him injunctive relief.133

Finally, some states prescribe a short period of limitations for breach of restrictive covenants,134 or place a time limit on their duration.135 Equitable relief has also been denied where there has been a substantial change in the character of the area.136

While these restrictions present serious limitations to the use of equitable servitudes in the community's open land preservation program, they are not insurmountable if the enabling legislation and the terms of the agreements are carefully drawn.137

IV. Bargaining With the Housing Developer

A. Cluster Zoning

While the scenic easement may be an appropriate device to preserve scenic views, agriculture, flood and "O" zoning sufficient to hold large areas of rural land in their open state, once the community and the subdivider consider a tract suitable for development, other planning


133. Cf. Brighton by the Sea v. Rivkin, supra note 132 and discussion in Sohns v. Beavis, 200 N.Y. 268, 274, 93 N.E. 935, 937 (1911); Krasnowiecki & Paul, supra note 5, at 194 n.57. See also the powers granted to the Lake George Park Commission to alter or modify the restrictions: N.Y. CONSERVATION LAW § 843(5). This power may well prevent the covenantors from enforcing the restrictions inter se (see note 131 supra). If this is the intention of the Commission, it should be clearly indicated in the covenant agreements.


135. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY, 275–76 n.21 (2d ed. 1963); Restrictions Voluntarily Imposed on the Use of Land, supra note 70, at 275.

136. Id. at 271, 275 n.20; WILLIAMS, op. cit. supra note 16, at 52; AMERICAN LAW OF PROPERTY, op. cit. supra note 111, at § 9.39.

137. A further attraction to such schemes as proposed by the Lake George Park Commission is the possibility that the Federal Internal Revenue Code permits a charitable deduction for the grant of a perpetual easement to the Commission for the fair market value of the restrictive easement with an adjustment in the basis of the property. Rev. Rul. 64–205, INT. REV. BULL. 1964–30, 6 (§ 170(c)(1) deduction allowed). But if the restrictions are enforceable inter se, there is a corresponding benefit to the landowner which might negate a donative intent. Valuation, of course, might be quite difficult. See also Mattie Fair, 27 T.C. 866 (1957). (Acq.) 1957–2 CUM. BULL. 4.
tools will have to be employed to guarantee the most desirable employment of the open areas generated by the particular development. Whether there has been a genuine recognition of the need for open space by developers or simply buyer resistance to the "housing development" with its mediocre sameness in design, the standard grid pattern has given way to the more flexible "overall density-varying lot size" scheme. The post-war building boom significantly reduced the importance of custom building, and with the collapse of that boom, the mass builder has been forced to build more imagination into his subdivision plan.138 The trend toward better land use has been greatly aided by the joint efforts of the Urban Land Institute and the National Association of Home Builders. The result of their efforts is the "cluster development."139 The cluster pattern of development has been enthusiastically received by many planning authorities. The Lower Gynedd Comprehensive Plan espoused this pattern because it:

allows the developer to 'break away' from the restrictions which have frequently resulted in monotonous subdivision developments. Uniform lot sizes rigidly oriented to street frontages have been the result of many zoning ordinances and subdivision regulations. This recently conceived pattern of development is predicated on an 'overall density-varying lot size' requirement. In keeping with the present two acre zoning requirement, this does not provide any more lots than the usual grid pattern. . . . However, by reducing the lot size to less than one acre (26,400 square feet) and leaving the rest of the land in its natural state, many advantages are derived over the traditional subdivision pattern.140

The Lower Gynedd Plan suggested several advantages of cluster zoning:

- the lots more easily fit the topography of the tract;
- the most scenic areas, such as streams and knolls, are preserved;
- the homeowner has less ground to maintain;
- the homeowner feels less isolated;
- the architectural pattern is more unified and interesting;
- the open area can be used for tile fields for sewage where sewer services are unavailable;
- numerous costs usually attendant to the grid development (streets, sidewalks, drainage structures, utility lines and land-

138. Huxtable, supra note 2.
140. Comprehensive Plan, supra note 53, at Appendix B, 151, 159-60.
scaping) are reduced, and these savings can be passed onto the home buyer;
— there are less street intersections thereby creating safer environment for children.

The original draft of Title VII of the Housing Act of 1961 contained a section to promote cluster development by providing grants to communities which encourage cluster zoning. These grants would have amounted to ten percent of the cost of the open land. At the request of the H.H.F.A., this section was deleted as unnecessary — clearly an indication that clusters have been accepted when federal money is not required to encourage it. Finally, the F.H.A. has revised its minimum building requirements in terms of minimum ratios to encourage subdividers to experiment with clusters.

B. Compulsory Dedication of Land or Payment of Fees for Open Space Purposes.

Frequently local ordinances require that the open space which is generated by the density procedure be dedicated to the public. Developers evidently have shown a rare willingness to accept this approach, probably because the public response to clusters has been favorable. There has been little case law to date, but one New Jersey case, *Crinko v. South Brunswick Planning Board*, upheld an ordinance which allowed the developer to reduce minimum lot size 20-30% upon deeding an equivalent percentage of the tract for parks, school sites and other public purposes with the approval of the planning board. The percentage of the tract which is dedicated to the community greatly varies — in some instances from 5% to as much as 93%. If the local ordinance allows the planning board too much discretion, however, it may be struck down.

The builder who is forced to choose between minimum acre lots and clusters might well argue that there is no justification for the large

141. *Whyte*, op. cit. supra note 24, at 17 n.3.
142. *Apartments in the Suburbs*, A.S.P.O. INFORMATION BULLETIN #187 (June 1964); Ward (unpublished paper for the University of Pennsylvania Law School Land Use Seminar). See also Housing Act of 1961 § 233(a) : F.H.A. insured mortgages for housing which tests experimental standards for neighborhood design.
143. Huxtable, supra note 2, at 42.
145. Siegel, op. cit. supra note 16, at 17; The Race for Open Space, supra note 91, at 56.
acre requirement and that it is merely a guise to force him to dedicate a portion of his tract for open space without compensation. Several states authorize compulsory reservation or dedication of land for park purposes. Generally these statutes have been sustained, but the cases are clear that a community cannot require a subdivider to contribute land or donate funds for schools, parks or other places that are to be used for the general public. However, a developer may be required to assume costs which are specifically and uniquely attributable to his activities.

The developer's attack has been more successful where the planning commission required the payment of a fee to be used for land acquisition for or for recreation programs in lieu of land dedication. Such requirements have been frequently struck down, primarily because of poor legislative drafting of the enabling statute or ordinance. New York Town Law is illustrative. It provides:

Before the approval by the planning board of a plat . . . , such plat shall also show in proper cases and when required by the planning board, a park or parks suitably located for playground or other recreational purposes. If the planning board determines that a suitable park or parks of adequate size can not be properly located in any such plat or is otherwise not practical the board may require as a condition to approval of any such plat a payment to the town of an amount to be determined by the town board which amount shall


be available for use by the town for neighborhood park, playground or recreation purposes including the acquisition of property. 152

*Reggs Homes, Inc. v. Dickerson*153 reaffirmed the validity of the compulsory dedication provision (first sentence of section 277) but held that without further authorization, the town could not require the payment of fees in lieu of land. In response, the New York legislature amended Town Law 277 in 1959 by adding the second sentence quoted above. The Town of Newburgh by ordinance required a deposit of $50 per lot for the “future acquisition and/or for improvements of recreational facilities.” In an action by a developer in *Gulest Associates v. Town of Newburgh*,154 the Supreme Court struck down the ordinance and statute as violative of both the United States and New York constitutions. Since the statute did not restrict the neighborhood parks to the subdivider’s neighborhood, or strictly limit the recreation programs to the same area, the court found that the statute “compels a landowner who proposes to subdivide to pay more than his proportionate share of the money to be spent on parks, playground and recreational facilities for the town as a whole.”155 Furthermore, the phrase “the board may require” was too vague, indefinite and uncertain since the board’s discretion was limited by no ascertainable standard. The decision was affirmed by the Appellate Division.156

As the Regional Plan Association concluded in respect to “in lieu” payments,

Clear and uniform standards in subdivision regulations are important in the use of this technique. Developers should be put on notice as to the circumstances under which such contributions should be made and in what measure. The existence of such standards linked with provision for public hearings and a master plan would undoubtedly carry weight with courts in test cases.157

C. Organizational Techniques for Holding Open Space Generated by the Development

Once the developer has elected the cluster method of development, he must decide how the open space which is generated thereby is to be owned and managed.158 The simplest approach is dedication to a local

152. (As amended c. 846, L. 1959) § 277.
155. Id. at 1007.
158. See generally, *Krasnowiecki, Homes Association Study* (First Draft, University of Pennsylvania Law School 1962). The developer will also wish to
public authority. However, some prospective home-buyers would object to the public nature of the open area and the attraction of "undesirables" to it. Furthermore, they may be concerned that the local government will not properly maintain the area. As a consequence, they may be unwilling to pay as much for their land as they would if the open space were privately owned and operated. The developer may attempt to impose certain conditions on the transfer of title to the authority to mollify these criticisms. Unless there is adequate enabling legislation, however, the municipal corporation may lack the power to accept such a conditioned dedication. Furthermore, these conditions may not necessarily bind the municipality. One possible solution is the creation of a special park district. Such legislation has been enacted in several states. There is no guarantee, however, that such districts will not be consolidated, and, therefore, no longer restricted to a single subdivision's residents.

An alternative to public dedication is ownership by a home owners' association. While this approach has the advantages of local control and privacy, lack of administrative expertise; potential tort liability; unwillingness of owners to participate; and reluctance to pay association assessments may pose serious limitations to this technique.

A typical association plan would subject each lot to a maximum annual charge determined by the number of persons in a family who use the park facilities, the area of the owner's lot, or in some instances the market value of the owner's property.

Frequently problems of insufficient maintenance will arise. If the land is dedicated to the public but limited to subdivision use, the courts will uphold special assessments. If it is owned by the subdivision, but that organization fails to properly maintain the open area, the local public body would undoubtedly have the right under its police powers to force individual owners to act.

consider the possibility of obtaining a charitable deduction under the federal income tax laws. The allowance of such a deduction may depend upon whether the land is donated to a governmental body or a private home owners' association. See discussion in footnote infra.

160. Atlantic Beach Ass'n v. Hempstead, 3 N.Y.2d 434, 144 N.E.2d 409 (1957).
162. Atlantic Beach Ass'n v. Hempstead, supra note 160.
163. Such charges are often liens on the property. For a comprehensive agreement see the Radburn Association Declaration of Restrictions in DUNHAM, MODERN REAL ESTATE TRANSACTIONS 129-47 (1958).
165. II McQuilllin, MUNICIPAL CORPS. § 32.27 (power to require weed removal), § 30.18 (snow removal); CHROSTWAITe, ET. AL., PENNA. MUNIC. ORDINANCES 277 (1954).
A further drawback to the association device is the possibility that the dues or assessments of the organization will be subject to the federal excise tax.\textsuperscript{166} If the association is operated exclusively for "pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inure to the benefit of a private shareholder," it is exempt from income taxation under section 501(c)(7).\textsuperscript{167} Of course, if the association derives outside income from the rental of its facilities, it may lose its exempt status.\textsuperscript{168} However, section 4241 imposes a twenty percent tax on amounts paid as dues, and membership and initiation fees to "any social, athletic or sporting club or organization." It first appeared that if an organization received an income tax exemption under section 501(c)(4) (operated exclusively for the promotion of social welfare), it would also be exempt from excise taxation.\textsuperscript{169} But if it were exempted under section 501(c)(7) (pleasure, recreation and other non-profit purposes), it would be subject to section 4241 taxes as a "social, athletic or sporting club."\textsuperscript{170} It is now clear, however, that whether the organization is qualified under 501(c)(4) or 501(c)(7) is not controlling on the excise tax issue.\textsuperscript{171} If the association strictly limits its function to maintenance, the organization should not be subject to excise taxes. For example, in \textit{Vecellio v. United States}\textsuperscript{172} a cooperative real estate venture was formed to create an artificial lake and subdivide the surrounding land; the association neither maintained recreational facilities nor sponsored any athletic or social events. The court held that the organization was not subject to excise taxes.

\section*{V. Local Real Property Tax Concessions\textsuperscript{173}}

Local authorities have frequently sought to encourage the preservation of open space through real property tax abatement or deferral schemes. In the past few years many states have enacted preferential

\textsuperscript{166} \textsc{Int. Rev. Code of 1954} §§ 4241–4243 (but see various exemptions for skating and swimming facilities — section 4243).

\textsuperscript{167} Treas. Reg. § 1.501(c)(7)–1(a) (social clubs).


\textsuperscript{170} For a full discussion of the excise tax problem, see \textsc{Krasnowiecki, Homes Association Study (First Draft)} (1962).


\textsuperscript{173} It is possible that the developer who \textit{voluntarily} dedicates part of his land to a \textit{public} authority for park purposes will be allowed a charitable deduction under the federal income laws. Rev. Rul. 54–466, 1954–2 Cum. Bull. 93. See generally Lee, \textit{Tax Treatment of Improvements Donated to the Public}, 41 Taxes 361 (June 1963). The advantage of the charitable deduction (\textit{v.} business expense) is that amount deducted is the value at the time of contribution although greater than cost: Treas. Reg. § 1.501(c)(7); Rev. Rul. 55–410, 1955–1 Cum. Bull. 297. However, where a dedication is required as a condition to plat approval, there can be no charitable deduction for want of a gift, although allowed as part of the cost basis of the
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It seems to be part of our national psychological heritage to consider property tax exemptions as an ideal means of promoting worthwhile enterprises, dispensing charitable aid, furthering social reforms, or showing esteem and gratitude. There is little or no recognition of the fact that many of these objectives could be more effectively, more economically, and more equitably achieved through a direct and visible subsidy. Instead, however, we prefer the devious, never-count-the-cost method of chiseling away at our property tax base, in true devil-take-the-hindmost fashion.

This process of granting exemptions feeds upon itself. As more and more exemptions are granted, the tax burden becomes higher upon the persons left to carry the load, so demands begin to be heard for even more exemptions.174

A brief review of local property tax history is perhaps in order at this point. During the early 1900's most state constitutions were


Additional problems arise when title to the park land is donated to a home owners' association. But it is possible that such an organization would qualify for the charitable deduction: Isabel Peters, 21 T.C. 55 (1953), (Non-acq. withdrawn) 1955-2 CUM. BULL. 6; Rev. Rul. 59-310, 1959-2 CUM. BULL. 146, 148, contribution to foundation to provide beach and playground facilities allowed; a "public purpose which tends to lessen the burdens of government." The biggest difficulty is that such an association may not benefit an "indefinite number of persons." Compare, Isabel Peters, supra; T. J. Moss Tie Co., 18 T.C. 188 (1952) (Non-acq.) appeal dismissed, 201 F.2d 512 (3d Cir. 1953); Gimbel v. Commonwealth, 54 F.2d 780 (3d Cir. 1931); Havemeyer v. Commonwealth, 92 F.2d 706 (2d Cir. 1938), with Andrew Tilles, 38 B.T.A. 545 (1938), aff'd on other issues, 113 F.2d 907 (8th Cir. 1940); Lake Forest, Inc., 305 F.2d 814 (4th Cir. 1962), reversing 36 T.C. 510 (1961) and Rev. Rul. 56-138, 1956-1 CUM. BULL. 202.


amended to provide that "all taxation shall be equal and uniform."\textsuperscript{175} Gradually there has been a trend toward classifying property by use, and taxing accordingly, although less markedly for real property.\textsuperscript{176} There are presently more than 87,000 local government units in the United States and practically all rely on the property tax. Real property constitutes the third largest source of tax revenue in this country\textsuperscript{177} ($16.4 billion in 1960) or 88\% of local collections.\textsuperscript{178} Unfortunately, there is widespread inequity in the method and rate of assessment. Tax resources are unequally distributed among the taxing units; tax administrators are inexperienced and subject to political influence; and there is incomplete information available on which to accurately base assessments.\textsuperscript{179} Farmers have been particularly pressured by mounting real estate taxes, especially those whose land is located in the path of impending development. Since the tax assessor must, in theory, base his assessment on the market value of property, not limited to its agricultural use, taxes have often forced the farmer to subdivide prematurely. The direct result has been a drastic reduction in available open space.\textsuperscript{180}

The legislatures of several states have responded to the farmer's plight with alacrity. Some have required the assessor to consider the value of the land without regard to its non-farm potential use. The courts have frequently struck down this approach as violative of the "uniform" tax clause of their state constitutions.\textsuperscript{181} For example, the Maryland Court in \textit{State Tax Commission v. Gales}\textsuperscript{182} found the following provision an unconstitutional violation of the uniform taxation clause of its Bill of Rights:

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{177} Walker, supra note 175, at 10.
\item\textsuperscript{178} Haviland, \textit{Total Tax Collections in 1962}, 31 \textit{TAX POLICY} 8 (Jan. 1964).
\item\textsuperscript{179} Walker, supra note 175, at 7; Kendrick, \textit{The Assessment of Real Estate; Recent Changes in the Provisions of 43 States}, CORNELL UNIVERSITY EXTN. BULL. 1041 (Reprint 1961).
\item\textsuperscript{182} 222 Md. 543, 161 A.2d 676 (1959).
\end{enumerate}
\end{footnotesize}
Lands which are actively devoted to farm or agricultural use should be assessed on the basis of such use, and shall not be assessed as if subdivided or on any other basis. In response, the Maryland Constitution was amended to permit such classification. Attempts to classify real property by use have been declared invalid in New Jersey, Ohio, and Massachusetts; the situation in other states such as Pennsylvania and Indiana remains unclear. A more defensible though more complex method is the tax deferral scheme, similar in principle to the severance tax which has been employed for many years to encourage conservation of timber resources. Basically, it provides that the assessor evaluate land both as to its agriculture and its potential non-farm use. The farmer may elect the former valuation, but if he converts the land to non-farm use, he is charged with the back tax differential. This

183. c. 9, § 1(17) L. 1956; In re-enacting the farm assessment, the legislature stated: "[I]t being the intent of the General Assembly that the assessment of farm land be maintained at levels compatible with the continued use of such land for farming and shall not be adversely affected by neighboring land uses of a more intensive nature. The General Assembly hereby declares it to be in the general public interest to encourage the preservation of open space as an amenity necessary to human welfare and happiness, and to prevent the forced conversion of such open space to more intensive uses as a result of economic pressure caused by the assessment of land at a rate incompatible with the practical use of such land for farming." Art. 81 § 19(b) (1961).

186. Cf. State ex rel. The Park Investment Co. v. Bd. of Tax Appeals, 195 N.E.2d 908, 910 (Ohio 1962) ("There is no constitutional authorization for classification of real property for taxation in relation to its nature or use. All property, whether commercial, residential or vacant, must be assessed on the basis of the same uniform percentage of actual value") (commercial property taxed at greater percentage than other realty, mandamus to decrease upheld).

188. Lanier v. Tyson, 156 S.2d 833 (Fla. 1963), reversing 147 S.2d 365 (Fla. App. 1962). (But the majority opinions are confused and only the dissents meet the real issues on both sides; the constitutional problem seems to have been avoided.) See discussion of Florida, California, New Jersey and Maryland experiences in Wershaw. Ad Valorem Taxation and its Relationship to Agricultural Land Tax Problems in Florida, 16 U. FLA. L. REV. 521 (1964).

189. State ex rel. Lyman v. Stewart, 58 Mont. 1, 190 Pac. 129 (1920).
194. IND. STATS. ANN. § 64-7119(b) (assessed as agricultural so long as such use continues); 38 IND. L. REV. 72, 82-83 (1962) (doubt shed on non-uniform tax assessments).
method has been proposed, but not adopted in Massachusetts and California. It has been enacted in Hawaii, contingent on agricultural zoning, New Jersey and Oregon. Nevada provides that back taxes becomes due whenever the land is sold, presumably even if it were to remain in exclusively agricultural use. Strangely, the California voters approved tax abatement for golf courses but rejected tax deferral for farmers. One critic of the California farm plan suggested that it would have created a landed gentry.

Most commentators (other than farmers) prefer tax deferral to tax abatement. Further, they suggest that the land be zoned as "O" or agriculture, or that the farmer be required to dedicate his development rights to the public. While the property of those who have held out from the tax scheme will be more valuable for development, this enhanced value should be reflected in tax assessments. Where development rights are dedicated to the public, the assessor should not value the land for non-farm uses.

A. Taxation of Land Restricted to Open Space Use

Land which is used for park purposes for the benefit of adjacent property owners should not be taxable. Condominium legislation assures that the value of park land will be taxed to the adjacent owners rather than to the park owners association or the developer. Thirty-three states enacted condominium legislation in 1963.

199. The Switz decision supra note 185 was overridden by a constitutional amendment: N.J. CONST. art. 8 § 1 (adopted by general election Nov. 5, 1963). See N.J.S.A. 54: 4-23.1-54: 4-23.23 (c. 48 L. 1964) (2 year "roll back" of back taxes; Farmland Assessment Act of 1964).
200. ORE. STATS. ANN. 308.370-395 (c. 577 L. 1963) (5 years back taxes + 6% interest).
202. CALIF. CONST. art. XIII § 2.6 (1960).
203. Haviland, supra note 197.
205. E.g., Hawaii, supra note 198, at 769-70.
206. Stocker, supra note 180; Whyte, op. cit. supra note 24, at 9.
207. But see Krasnowiecki & Paul, supra note 5, at 190.
208. See 4 OPIN. ST. COMPR. 205 (New York 1948); N.Y. GEN. MUN. LAW § 2479(3) (1960).
VI. Summary

Open space is a term which encompasses a variety of land use needs. As a result the planner will have to employ many different techniques to acquire and preserve the desired open areas. Each of the techniques has a number of inherent limitations which may seriously affect the success of any community’s open space program.

The most common tool is government purchase or condemnation through eminent domain powers. It is best used where development pressures are great, but the costs are often too prohibitive if used on the large scale necessary to control the community’s orderly growth.

Conservation “easements” are novel, hence, relatively untested. What little experience there has been, has not been satisfactory, and unless there is a complete appreciation for its legal intricacies, the results are bound to be even less satisfactory. However, if properly employed, they should be useful in slowing down urban sprawl, perhaps at less cost to the community than purchase of the fee.

Professor Krasnowiecki’s compensable regulation is a unique combination of regulation and acquisition. To some extent it possesses the best and worst features of both. It is certainly the most promising new approach that has been recently proposed.

Zoning remains the mainstay of most community planning programs and will continue to be for some time since local governments are most familiar with its operations. Unfortunately, it has been used too extensively, particularly in situations where compensation was clearly owed to the regulated landowner. Some scheme should be provided whereby development is arrested until the land can be acquired by the community, with some provision for tax abatement or other forms of compensation.

The cluster zone is an improvement over the minimum lot requirement which has fallen into recent disfavor with communities and legal commentators. The existence of the cluster option should not, however, limit the developer’s right to challenge the constitutionality of the minimum lot size regulation. Fortunately, clusters are popular with developers because they sell better than the standard grid pattern of development.

Forced dedication of land or payment of fees in lieu of donation is becoming increasingly popular to the dismay of many developers. The fact that such ordinances are frequently voided by the courts attests to the general lack of careful drafting and blatant unfairness to developers. While the large development should be required to provide playgrounds
and parks for its subdivision residents, adequate standards should be provided to channel the zeal of the planning board.

The role of private covenants and gifts of land in preserving open space has been given too little consideration. This is particularly true in established residential areas which are faced with commercial encroachment. The Mill Creek and Lake George Park Commission plans are encouraging examples of government technical and legal assistance to homeowners who wish to preserve the natural beauty of their surroundings. These schemes should be carefully watched by planners.

Finally, preferential real property taxation devices are being initiated in several states to protect farms from inflated taxes and the resulting pressure to subdivide prematurely. While these purposes are laudatory, the effects on unexempted property owners who are saddled with increased taxes are often overlooked. This technique is most shortsighted if not preceded by a thorough analysis of the real property burden on the entire community. Certainly tax deferment with the possible dedication of development rights is preferable to tax abatement with no quid pro quo required.

The particular devices which are chosen will, of course, vary with the political and economic climate of the individual community. But before any open land preservation program is initiated, the planner and lawyer must be certain that they are aware of the limitations of the techniques which they ultimately select.