Comments

EASEMENTS TO PRESERVE OPEN SPACE LAND

The virtual irreversibility of the loss of open space makes it a particularly critical area of environmental concern. To inhibit this loss, the public easement restricting development of private land has evolved as a novel and promising variation of an old legal tool. This Comment examines and evaluates the easement as a device to protect open space, especially within California's statutory framework authorizing local government acquisition of easements. Special emphasis is placed on the easement's flexibility as a preservation device. Since conservation of open land is a concern of state and national, as well as local, governments, the Comment analyzes the financial burden of open space easement programs, exploring actual and potential sources of local, state, and federal funding.

Land is a limited resource. Open and undeveloped land has a psychological and spiritual importance to Americans that is difficult to quantify, yet is very real. Land "has given us a love of freedom, a sense of security, and courage to test the unknown." Undeveloped land is an important aesthetic and psychological resource to urban populations, and biological balances are intimately connected to forces of nature preserved by wilderness land.

Yet Americans have rarely treated open land as the delicate resource that it is. Every year, 580,000 acres are lost, covered by high-
open space land

ways or airports or converted to urban uses. Some 22,000 acres of urban parkland, much of it close to the inner city, has been lost in the last six years. Open land, once lost, is rarely recovered: population pressures and profits from commercial development insure that land, once developed, will rarely be recovered for non-urban uses. Prevention of intensive development, rather than redemption of previously developed land, is the only realistic approach to open space preservation. The American frontier faith in limitless land resources must yield to a recognition of the necessity to husband carefully our remaining open space.

A number of tools are available to local governments to preserve the open space character of land. Zoning, with little direct cost to taxpayers, classifies land as to permitted uses and development. Zoning, however, is ineffective in preserving open space wherever significant pressure for development exists. Purchase of the entire fee interest in land is another approach to restricting development of land.

7. See M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 50 (1971).
8. For a good compilation of the various techniques see INSTITUTE OF GOVERNMENTAL STUDIES, OPEN SPACE AND THE LAW (F. Herring ed. 1965) [hereinafter cited as OPEN SPACE AND THE LAW].
9. Statutory authority for zoning by cities and counties in California is provided by CAL. GOV'T CODE §§ 65850-51 (West 1966), as amended, § 65850 (West Supp. 1971). A 1970 amendment to the code specifically authorizes local governments to "[r]egulate . . . the use of . . . land as between . . . open space, including agriculture, recreation, enjoyment of scenic beauty and use of natural resources, and other purposes." Id. § 65850.

In addition, all cities and counties are required to adopt an open space plan, including an implementation program, by June 30, 1972, and a compatible open space zoning ordinance by January 1, 1973. Id. §§ 65563-64, 65910.
10. The widespread disenchantment of planners and lawyers with zoning administration has been amply noted. See CALIFORNIA LEGISLATURE, JOINT COMM. ON OPEN SPACE LAND, FINAL REPORT 99-100 (1970) [hereinafter cited as JOINT COMM. REPORT]. Local zoning boards are particularly susceptible to the influence of commercial interests. Variances and amendments to open space zoning usually reflect the desires of local land developers, who often enjoy a close relationship with members of the zoning board. 1970 ENVIRONMENTAL QUALITY REPORT, supra note 1, at 185; THE CITIZENS' ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY, COMMUNITY ACTION FOR ENVIRONMENTAL QUALITY 13-14, 16 (1970) [hereinafter cited as COMMUNITY ACTION].
11. The local entity has three alternatives: (1) to purchase the entire fee outright, (2) to purchase the fee and lease the land back to the owner for prescribed uses, or (3) to purchase the fee subject to a life tenancy held by the owner. COMMUNITY ACTION, supra note 10, at 16. Statutory authority for such transactions by California city and county governments is provided by CAL. GOV'T CODE § 6953 (West 1966).
but purchase of the fee, even with provisions for lease-back or life tenancy, can be prohibitively expensive.\textsuperscript{12} In addition, such techniques as eminent domain,\textsuperscript{13} subdivision exactions,\textsuperscript{14} and acceptance of gifts\textsuperscript{15} all have some limited potential for the preservation of open space.

Cities and counties in California have two additional approaches, which involve acquisition of less than the fee interest in the land. The California Land Conservation Act of 1965, the Williamson Act,\textsuperscript{16} authorizes local governments and landowners to enter into long-term contracts restricting use of the land\textsuperscript{17} in return for reduced tax assessment

\textsuperscript{12} A study indicated that acquisition of land to carry out a proposed regional open space plan in the nine-county San Francisco Bay Area would cost $1.25 billion. A study of acquisition of open space near all of California's metropolitan centers estimated a cost of $1.86 billion to acquire slightly more than a quarter of a million acres in fee, compared with a cost of $1.10 billion to acquire less-than-fee interests in nearly half a million acres. \textit{Joint Comm. Report, supra} note 10, at 32-33.

\textsuperscript{13} Eminent domain is doubtless a valid technique to protect open space even if the public is not granted the use of or access to the land. \textit{See Open Space and the Law, supra} note 8, at 36-40. And cf. \textit{Berman v. Parker}, 348 U.S. 26 (1954) upholding condemnation under an urban renewal statute for the purpose of creating a more attractive and balanced community. But, like fee purchase, condemnation requires massive financial commitment. \textit{See note 12, supra}. \textit{See also text accompanying notes 79-81 infra} regarding use of the eminent domain power in conjunction with open space easements.

\textsuperscript{14} California authorizes cities and counties to enforce subdivision exactions for park and recreation purposes. \textit{Cal. Bus. & Prof. Code} \textsection 11546 (West Supp. 1971). The California Supreme Court recently upheld the constitutionality of the statute, and a city ordinance thereunder, even though there is no requirement that the new subdivision create the need for the additional park space. \textit{Associated Home Builders v. Walnut Creek}, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971). \textit{But see Pioneer Trust & S. Bank v. Village of Mount Prospect}, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) holding that the need for the recreational facilities must be specifically attributable to the new development, 176 N.E.2d at 802. In any event it is doubtful that this technique will preserve a significant amount of open space, since it preserves only a fraction as much land as is developed.

\textsuperscript{15} California cities and counties are authorized to acquire open space land by gift (as well as other means) by \textit{Cal. Gov't Code} \textsection 6953 (West 1966). However perpetual preservation as open space cannot be guaranteed, even if included as a condition of the grant. \textit{See Open Space and the Law, supra} note 8, at 46-50.


\textsuperscript{17} The local government must first designate an "agricultural preserve" (usually of 100 acres or more). \textit{Id.} \textsection 51230. The entity may then contract with any or all landowners within the preserve to restrict use of their land to agricultural, recreational, open space, or other compatible uses. \textit{Id.} \textsections 51201, 51240-43. The minimum initial term of the contract is ten years, with automatic one-year extensions occurring each year unless either party gives prior notice of nonrenewal. Land within the preserve but not subject to contract must be restricted by zoning or other means to uses compatible with the uses of the contract lands. \textit{Id.} \textsection 51230. Although there is provision for cancellation of contracts at the landowner's request, such cancellation must be found to be in the public interest, and not inconsistent with the purposes of the Act. Neither the opportunity for more profitable use of the land, nor the uneconomic character of the present restricted use will normally be sufficient reasons for cancellation. \textit{Id.} \textsections 51281-82.
which values the land only on the basis of its restricted uses, eliminating increases in the assessed valuation caused by nearby land development and speculative real estate purchasers. Since the Williamson Act's primary impact has been upon land located far from the expanding suburban fringe and not immediately threatened by development, it is doubtful that a significant amount of land has been "saved" from development by the Act. The second approach, open space easements, gives local government a tool almost as effective as fee purchase, but usually costing much less. Part I of this Comment will assess the advantages of easements over other devices to control land development. Part II will discuss the reasons for the present reluctance of local governments to use easements, and will then suggest steps that might be taken to maximize the effectiveness of the easement as a tool to protect open space.

Although much of this Comment focuses on the California statutory program for easement acquisition, all programs using the easement to preserve open space will employ essentially the same legal principles.

I

USING EASEMENTS TO PRESERVE OPEN SPACE

Generally, open space easements give local government a non-possessory, less-than-fee interest in the subject land. The easement may be either positive, giving the public certain rights to use the land for a particular purpose such as hiking or general recreation, or negative, limiting the uses to which the landowner may put his land.

Open space preservation normally utilizes negative easements restricting development of land. Such negative open space easements may be further conceptually divided into two groups, according to the purposes they serve. First, conservation easements are directly oriented toward actual resource and wildlife protection. They may be

18. As of March, 1969, only 6.4% of all land under Williamson Act contracts was located within three miles of the boundaries of any city. JOINT COMM. REPORT, supra note 10, at 116. It is hardly surprising that landowners near the expanding fringes of the city are reluctant to give up or even postpone the potential profits which are expected to accrue from sale to a developer.


20. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OPEN SPACE FOR URBAN AMERICA 49 (1965) [hereinafter cited as OPEN SPACE FOR URBAN AMERICA].

acquired for flood control, wildlife preserves, soil erosion control, or for any general objective of preservation of the natural state of land. Second, scenic easements are designed to preserve the aesthetic attractiveness of a particular piece of land by restricting, for example, the erection of billboards, the removal of trees, and any development incompatible with the preservation of the scenic beauty of the land. Scenic and conservation easements obviously tend to overlap in their effect, each serving many of the purposes of the other.

A. Acquisition of Open Space Easements by Local Governments in California

City and county governments in California may acquire easements under authority of either of two statutes, the Open Space and Scenic Land Acquisition Act of 1959 and the Open-Space Easements Act of 1969. While the statutes are substantially similar, there are certain differences which require their separate consideration.

1. The Open Space and Scenic Land Acquisition Act of 1959

The 1959 Act gives legislative authority to cities and counties to acquire, through purchase or otherwise, the fee or lesser interest "in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions." The Act specifically declares that acquisition of such interests in land to preserve open space is a public purpose for which public funds may be spent. The shaping of urban growth and the preservation of scenic and conservation areas are both regarded as

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22. Id. at 8-9.
27. This Comment will refer to the Open Space and Scenic Land Acquisition Act of 1959 as the 1959 Act.
29. Id. § 6952.
30. 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 . . . 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.

Id.
31. [A]n "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
proper purposes for open space easement acquisition. Easements acquired pursuant to the 1959 Act run for a minimum initial period of ten years. The parties may provide for extension by mutual agreement or automatic yearly extensions.\textsuperscript{32}

2. \textit{The Open-Space Easements Act of 1969}

The second source of statutory authority for open space easement acquisition by local governments is the Open-Space Easements Act of 1969.\textsuperscript{33} The 1969 Act specifically empowers those cities and counties having general plans to accept grants of open space easements in private lands lying within the jurisdiction of the particular city or county.\textsuperscript{34} Under the Act, the fee owner relinquishes all development rights except those specifically reserved in the easement grant instrument.\textsuperscript{35} Such reservations are limited to those uses which “shall not permit any action which will materially impair the open-space character of the potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources. \textit{Id.} § 6954.

32. The 1959 Act itself says nothing regarding the term or renewal of easements. The minimum initial term and renewal provisions are required if preferential tax treatment is desired for the encumbered land. \textit{Cal. Rev. & Tax. Code} § 421(d) (West 1970) (a part of the Assessment of Open-Space Lands Act of 1967). Since property owners will doubtless desire the favorable tax treatment, the minimum term and renewal requirements will be close to universal.

The Assessment Act provides that the automatic one-year extensions are to be made in accordance with the provisions for contract extensions in the Williamson Act, \textit{Cal. Gov't Code} §§ 51244, 51244.5, 51246 (West 1966), \textit{as amended} (West Supp. 1971). Similarly, the Act provides that no cancellation of easements acquired under the 1959 Act is to be permitted prior to the expiration of the initial term or extensions thereof except in accordance with the provisions for contract cancellation in the Williamson Act, \textit{Cal. Gov't Code} §§ 51281-83.3 (West 1966), \textit{as amended} (West Supp. 1971). See note 17 \textit{supra}. The applicable Williamson Act sections provide for cancellation upon petition of the landowner, if the governing body deems such cancellation in the public interest, subject to the condition that the cancellation not be inconsistent with the open space purposes of the Williamson Act. At present, no provision exists for public hearings prior to cancellation of easements acquired under the 1959 Act, although public hearings are mandatory prior to Williamson Act contract cancellations. \textit{Cal. Gov't Code} §§ 51284-85 (West 1966), \textit{as amended} (West Supp. 1971). Public hearings for easement cancellations could thus be provided by amending \textit{Cal. Rev. & Tax. Code} § 421(d) (West 1970) to make the Williamson Act sections, §§ 51284-85, applicable to easement cancellations.

33. See note 26 \textit{supra}.

This Article will refer to the Open-Space Easements Act of 1969 as the 1969 Act.

34. \textit{Cal. Gov't Code} § 51050 (West Supp. 1971). Thus, insofar as it addresses itself to the acceptance of grants of easements by cities and counties having general plans, the 1969 Act is narrower than the 1959 Act. The 1969 Act, however, explicitly declines to limit any local government authority granted by the 1959 Act to purchase or otherwise acquire open space easements. \textit{Id.} § 51065.

35. \textit{Id.} § 51051. The easement shall either be in perpetuity or for a term not less than twenty years. \textit{Id.} §§ 51051, 51053.
The 1969 Act prescribes the conditions under which the city or county may accept a grant of an easement. Generally, easements may be accepted if preservation of the open space character of the land is consistent with the general plan of the city and county, and if the local governing body deems the preservation of the open space to be "in the best interest of the state, county, or city." The specific objectives which may be deemed public purposes for accepting the grant are quite broad, including the preservation of scenic beauty, the use of natural resources, and recreation, agriculture, and grazing.

The 1969 Act provides complete procedural machinery for the approval and acceptance of easements. It also gives the local governing body injunctive powers to enforce the restrictions of any accepted easements, and provides that property owners or residents within the city or county have similar rights if the city or county fails to enforce the easement or itself violates the easement restrictions. The Act specifies procedures for abandonment of the easement by the city or county if the governing body determines that the statutory public purposes are no longer being served by the easement.

36. Id. § 51051.
37. Id. § 51056.
38. Id.
The governing body must find that one of the following conditions exists:
(1) It is likely that at some time the public may acquire the land for a park or other public use.
(2) The land is unimproved and has scenic value to the public as viewed from a public highway or from public or private buildings.
(3) The retention of the land as open space will add to the amenities of living in adjoining or neighboring urbanized areas.
(4) The land lies in an area which in the public interest should remain rural in character and the retention of the land as open space will help preserve the rural character of the area.
(5) It is in the public interest that the land remain in its natural state, including the trees and other natural growth, as a means of preventing floods or because of its value as watershed.
(6) The land lies within an established scenic highway corridor.
(7) The land is valuable to the public as a wildlife preserve or sanctuary and the instrument contains appropriate covenants to that end.
(8) The public interest will otherwise be served in a manner recited in the resolution and consistent with the purposes of this subdivision and Article XXVIII of the Constitution of the State of California.

Id.

Article XXVIII of the California Constitution states, in part, that it is in the best interest of the state to maintain, preserve, conserve and otherwise continue in existence open space lands for the production of food and fiber and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens.

CAL. CONST. art. XXVIII, § 1.
40. Id. § 51058.
41. Id. § 51061. This section provides that no easement acquired under the Act may be abandoned unless the governing body determines that no public purpose, as defined in § 51056 of the Act, is any longer being served by the easement.
The 1969 Act has been more successful than the 1959 Act in encouraging local governments to use the easement device. While the language of the 1959 Act permits the acquisition of easements, without specifically mentioning them, it provides no procedural machinery, and thus no guidelines, to the local governments. As a result, only three California counties have proceeded under the 1959 Act, acquiring a total of five easements. The 1969 Act's clear endorsement of open space easements and the Act's provision of procedural guidance have alleviated much of the local governments' timidity: six counties have acquired a total of twenty-two easements under the Act. Even these figures betray the continued general disuse of the open space easement instrument. This is especially dismaying, given its advantages over more traditional preservation devices.

B. Peculiar Advantages of Easements Over Purchase of the Fee to Preserve Open Space

Easements acquired under the statutory authority of the 1959 and 1969 Acts are in many ways superior to purchases of the entire fee interest in protecting the open space character of land.

The local government will frequently find easements comparatively economical. First, where easements are purchased, as under the 1959 Act, the price of a less-than-fee interest may be considerably less than the price of the entire fee. Second, all easements leave the encumbered land on the local property tax rolls because the fee subject to the easement remains in the hands of the owner. If the entire fee were purchased by the public, this tax revenue would be lost. Third,

See notes 37-38 supra and accompanying text.

Public hearings regarding the proposed abandonment are required, both before the city or county planning commission and before the local governing body. Cal. Gov't Code § 51061 (West Supp. 1971). Any attack on the governing body's decision to abandon an easement would have to allege an abuse of the government's discretion in deciding that a statutorily-defined public purpose for the open space preservation no longer existed.

42. Fifty of California's fifty-eight counties responded to the author's April, 1971, questionnaire, furnishing the above statistics regarding easement use.

43. The Wisconsin Highway Commission has been acquiring scenic easements along the Great River Road since 1952, under the authority of 1939 legislation now contained in modified form in Wis. Stat. § 84.105 (1965). By 1961 the Commission had purchased easements adjacent to fifty-five miles of the highway, at an average cost of $20.66 per acre. This cost compares favorably with the $41.29 average per-acre cost for fee-simple acquisition of land for roadway purposes. Jordahl, Conservation and Scenic Easements: An Experience Resumé, 39 Land Economics 343, 354 (1963).

The easement cost may approach the fee cost, however, depending upon the development potential of the land and the severity of the restrictions imposed. See text accompanying notes 75-78 infra.

44. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, A HUD GUIDE: GRANTS FOR OPEN SPACE LAND 9 (1970) [hereinafter cited as HUD GUIDE]. Land
the expense of maintaining the land remains with the fee owner, although the use restrictions in the easement may allow for private productive uses of the land—such as farming or grazing—compatible with the public open space objectives. Fourth, the easement may serve as an inexpensive interim device to preserve open land that the public may wish eventually to purchase for a park or other recreational purpose.

The property owner also normally finds the sale of an easement preferable to sale of the fee. He will be able to remain on the land and, depending on the terms of the easement instrument, make some use of the land. There are also important tax advantages in giving or selling an easement to the public. The gift of an easement to the governing body will probably qualify as a deduction from the landowner's taxable income—a deduction equal to the fair market value of the property rights donated. Land encumbered by an open space easement receives preferential property tax treatment to the extent that the easement reduces the value of the land. Thus, in the absence of an open space easement, the property tax rate is applied to an assessed value based on the fair market value of the fee interest in the land, which, in turn, reflects development potential and any present permitted use of the land. The same tax rate, when levied on land subject to an easement, is applied to an assessment which reflects only present or reasonably estimated or imputed income. The difference in assessments can lead to a considerable tax saving for the owner of a working farm with great development potential. Tax pressures, which often hasten development, can thus provide an incentive for gifts of easements, and allow a farmer to continue his farm activities.

subject to restrictions under the 1959, 1969, and Williamson Acts, however, produces reduced property tax revenues because the encumbrance reduces the assessed valuation of the remaining fee interest held by the owner. See text accompanying notes 48-49 infra.

45. HUD GUIDE, supra note 44, at 9.
46. COMMUNITY ACTION, supra note 10, at 16.
47. See Rev. Rul. 64-205, 1964-2 CUM. BULL. 62-63. The Ruling dealt with a Federal highway scenic easement given to the United States. A deduction for an easement given to a local government can be expected to follow from this because the Ruling was based on the definition of a charitable contribution to a public body: "a contribution or gift to or for the use of a state . . . or any political subdivision [thereof] for exclusively public purposes." INT. REV. CODE of 1954, § 170(c)(1).
48. CAL. REV. & TAX. CODE §§ 421-31 (West 1970) (the Assessment Act) provides that assessment for tax purposes of lands subject to enforceable restrictions such as easements shall be based upon the present, potential, or imputed rental income of the land, rather than upon sales data. Where sufficient rental information is not available, or where the land is not capable of, or is not used for, producing income, a reasonable amount shall be imputed as income to serve as the basis for the tax assessment. Id.
In addition to the tax advantages, a landowner interested only in development may find that if he encumbers a scenic part of his land with an easement, the value of his remaining land may rise because of the guarantee of a scenic view. This increment, coupled with the tax deductibility of the gift, at least encourages some open space preservation within developed areas.

A landowner may thus find that the grant or sale of an easement is the only way he can retain his undeveloped land and refrain from developing it. Without the easement, the property tax pressures and the promise of profits in development may prove irresistible to a farmer or other landowner who would otherwise avoid development. This is especially true of land on the urban fringe, where intense development pressures most inflate land values.

II

IMPEDIMENTS TO THE USE OF OPEN SPACE EASEMENTS: SUGGESTED SOLUTIONS

Despite the advantages of the easement as a device to preserve open space, the use of easements for this purpose is not widespread. There are two basic impediments to more effective use of easements. Initially, the public and local governing body are unfamiliar with the easement as an open space instrument. Moreover, even though easement acquisition is usually less expensive than fee purchase, it can still impose a financial burden on local communities.

A. Unfamiliarity with Terms and Restrictions of the Easement

Greater familiarity with the open space easement, and the form it must take, would diminish part of the public’s reluctance to use it. The easement terms must be explicit in order to give the landowner sufficient notice of what rights he has relinquished. This notice is crucial if government is to avoid the expense of later renegotiation concerning permissible uses should the fee owner desire to initiate any new activity on his land. Clarity is also essential to avoid the expense of litigation that might be caused by the owner’s misunderstanding of, or disputing, the easement terms. In addition, precise defini-

50. Id. at 81.
51. See notes 75-78 infra and accompanying text.
52. See note 42 supra and accompanying text.
54. Open Space for Urban America, supra note 20, at 124.
tion is necessary to determine the value of the easement if it is to be purchased.\(^\text{67}\)

Because individual parcels of land vary and because the public objectives may vary with the variety of lands encumbered, each easement must be individually tailored.\(^\text{58}\) The instrument creating an easement should contain two elements: it should state both the positive rights that the owner conveys to the government body, and the uses and rights that the owner himself relinquishes.

Rights conveyed to the government body are generally those that facilitate public enforcement of the easement and implement its objectives. They may include the right to enter the land to inspect for violations of easement restrictions and to remove any billboards, rubbish, or other matter whose presence may constitute such violations. If a scenic easement is involved, it may allow the government body to plant, prune, or cut trees or plants as is necessary to preserve the scenic view. The right to enter the land to prevent plant disease may also be conveyed.\(^\text{59}\) To ensure clarity, the easement instrument should state that, except for the specific positive rights conveyed, the governing body shall have no right of entry. A similar statement should be made regarding the public's right of entry—if, for example, entry for hiking or horseback riding is to be permitted by the easement. Such statements may be essential to the owner's agreement to the easement.\(^\text{60}\)

The typical easement should require the owner to relinquish all rights and uses of his land except those specifically reserved to him in the instrument. Where the land is used for crop or livestock farming, for example, the easement may permit only present uses, allowing only normal construction and improvements necessary to those uses.\(^\text{61}\) The permitted-use provisions are necessary to allow the owner to continue his present productive use of the land and yet ensure the owner's coop-

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The National Park Service experienced difficulty in enforcing scenic easements along the Blue Ridge and Natchez Trace Parkways; the difficulty arose when successors to the grantees of scenic easements violated the easement restrictions by felling timber. The easement instruments were unclear as to which timber was to be saved; the court, in deciding United States v. Bedsaul, Civil No. 138 W, M.D.N.C., Dec. 19, 1951, issued detailed instructions on the farming practices to be followed. These problems, which eventually caused the National Park Service to return to a fee purchase program, could have been avoided by clear easement terms. \(\text{D. SUTTE} \& \text{R. CUNNINGHAM, supra} \text{note 24, at 10-11.}\)

\(\text{57.} \text{OPEN SPACE FOR URBAN AMERICA, supra} \text{note 20, at 124. See also text accompanying notes 84-91 infra.}\)

\(\text{58.} \text{D. SUTTE} \& \text{R. CUNNINGHAM, supra} \text{note 24, at 19; see also B. MULLEN, supra} \text{note 55, at 9.}\)

\(\text{59.} \text{B. MULLEN, supra} \text{note 55, at 7.}\)

\(\text{60.} \text{See D. SUTTE} \& \text{R. CUNNINGHAM, supra} \text{note 24, at 19.}\)

\(\text{61.} \text{See, e.g., Sample Wisconsin Scenic Easement, in OPEN SPACE FOR URBAN AMERICA, supra} \text{note 20, at 139.}\)
eration in not converting it to a more intensive use that might harm its open-space character. Where the easement is to preserve the land as a wilderness area or wildlife preserve, the easement instrument may prohibit all the owner's uses of the land except hiking, riding, or camping. If the easement is to conserve a wetland, it would prohibit the owner from filling in or diking his land. More frequently, where scenic value is paramount, the easement should restrict the erection and compel the removal of billboards or other signs. The dumping of trash or other unsightly material should also be proscribed, as should the cutting or removal of plants and trees. The terms may additionally prohibit the owner from making any topographical changes on his land such as excavating.

A city or county may be obliged to insert a provision for granting variances from the easement restrictions in order to induce the landowner to grant or sell an easement, but these provisions should be narrow in scope, and the granting of variances should be infrequent in practice, so as to prevent emasculation of the easement as a tool to protect open space.

An easement may run in perpetuity or for a term of years. Easements running in perpetuity, of course, are of greatest benefit to the public, because not only is the administrative expense of renewing an expiring easement avoided, but an easement in perpetuity more effectively fulfills the public purpose of preserving open space. A ten- or twenty-year term may serve, in effect, as only an incubatory term for the development potential of the land, while a term of perpetuity will more adequately assure that the easement will be aban-

62. B. Mullen, supra note 55, at 8.
64. See, e.g., Sample Wisconsin Scenic Easement, in Open Space for Urban America, supra note 20, at 139.
66. If variances are too readily granted, not only will the original purpose of the easement be frustrated, but the mere possibility that variances will be easily granted will mean that the assessed valuation of the land will not be lowered significantly, resulting in only small tax benefits to the owner. Experiences with zoning bear out this prediction. See Comment, Preserving Rural Land Resources, 1 Ecology L.Q. 330, 364 (1971).
67. The minimum initial term is set by statute. The Assessment of Open-Space Lands Act of 1967, Cal. Rev. & Tax. Code § 421(d) (West 1970), requires a minimum initial period of ten years for easements purchased under the 1959 Act, if preferential tax treatment is to be given. Easements accepted under the 1969 Act have a minimum initial period of twenty years. Cal. Gov't Code § 51053 (West Supp. 1971).
68. W. Whyte, supra note 49, at 83.

The renewal expense may be considerable. See text accompanying notes 73-74 infra.
doned only if a public open space purpose no longer exists. Furthermore, given the increasing development value of most land, renegotiation of an easement twenty years hence could well result in a higher price for the easement.

B. Surmounting the Financial Obstacles

1. Financial Impediments to Easement Acquisition

In addition to a reduction in present property tax revenues, there is a loss of potential revenue in that intensive land development would increase the future tax base of the community. These almost certain losses in tax revenue comprise an important factor in the local government's decision regarding easement acquisition.

The administrative expenses of acquiring and enforcing easements may be considerable. Such expenses include the cost of surveying, title examination, valuation fees (if the easement is purchased), and negotiation. Policing the restrictions once the easement is in force will present additional expenses, possibly including litigation expenses.

Where the easement is purchased, the consideration actually paid to the landowner will in most cases be the greatest expense borne by the local government. This is especially true in or near urban areas where there exists a foreseeably high development potential for the land. In such a situation, the consideration for an easement severely restricting development will be measured in large part by the benefit that the owner would have received from development or from sale for development. The easement cost then may approach the cost of the fee interest, in which case the fee might as well be purchased.

69. See notes 32, 17, supra regarding cancellation of easements acquired pursuant to the 1959 Act. See note 41 supra and accompanying text regarding abandonment of easements acquired pursuant to the 1969 Act.

70. Since lands subject to open space easement restrictions are assessed on the basis of permitted land uses, instead of on the basis of fair market value, property tax revenues from encumbered lands decrease. See text accompanying notes 48-49 supra.

71. But see note 93 infra and accompanying text regarding development expenses to the public.

72. E.g., Monterey County's "guidelines adopted for review and acceptance of scenic easements" include as a factor for consideration the "impact of reduced tax revenues on the immediate community." Letter from Monterey County Planning Commission to the author, Feb. 10, 1971, on file with Ecology Law Quarterly.


74. See D. SUTTE & R. CUNNINGHAM, supra note 24, at 20.

75. COMMUNITY ACTION, supra note 10, at 17.

76. See OPEN SPACE FOR URBAN AMERICA, supra note 20, at 124.

While Monterey County has accepted grants of six easements under the 1969 Act, it has purchased no easements under the 1959 Act. Cost is cited as the crucial
The crucial point here, and with regard to acquiring easements by gift as well, is that effective use of the easement device depends upon anticipating development pressure. Once that pressure exists, the landowner will very often either be unwilling to encumber his land with an easement, or, if he is willing to sell on easement, the landowner may demand a price that will render the easement too expensive for the local government.\(^77\)

Ironically, society's need for open space is usually greatest in the urban fringe area where development pressure is greatest and land values are highest. Unfortunately, the present California easement statutes under discussion do not provide the local governments with an eminent domain power to condemn and compensate for the easement. Such a power would allow the public affirmatively to prohibit development, and is essential to the success of an aggressive easement program. The public probably would rarely need to exercise the power, because the very threat of an eminent domain taking, with the government unilaterally determining the compensation, would induce landowners to negotiate the sale of an easement at a reasonable, but mutually agreed-upon price.\(^78\)

*Kamrowski v. State of Wisconsin*\(^79\) is the leading case upholding the constitutionality of using the eminent domain power for scenic easements. The Wisconsin Supreme Court upheld the State Highway Commission's power to use the power to compel scenic easements in perpetuity. The court found the public enjoyment of the scenic area

reason for failure to purchase. Interview with Melvin Bakeman, of the Monterey County Scenic Easement Committee, in Salinas, California, Feb. 4, 1971.


A.B. 2140, Cal. Reg. Sess. (1972), would amend the 1959 Act to add condemnation to the list of devices that may be used to acquire interests in open space, and would permit the state, as well as cities and counties, to acquire open space interests.

Much of the Wisconsin Highway Commission's success in acquiring scenic easements along the Great River Road is attributed to the fact that the Commission had such an eminent domain power to condemn the land whenever an agreement as to price of the easement could not be reached between the owner and the Highway Commission. Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECONOMICS 343, 354 (1963).

The California State Division of Highways does have such an eminent domain power for use in conjunction with its scenic easement program along federal highways. CAL. STR. & H. CODE § 895 (West 1969).

The California Department of Parks and Recreation also has eminent domain powers at its disposal to acquire scenic easements along parkways [CAL. STR. & H. CODE §§ 885-887.5 (West 1969)] and adjacent to park lands [CAL. PUB. RES. CODE § 5006 (West 1956)].

79. 31 Wis. 2d 256, 142 N.W.2d 793 (1966).
to be a public use of the land, and held that visual occupancy satisfied the public purpose test as well as did physical occupancy. 80

Even where land is highly likely to be developed, many developers will give a scenic easement covering a portion of their property, often the most scenic portion, in order to increase the value of their surrounding property, or in return for local approval of cluster development. 81

Where the development potential is relatively low, as is often the case in rural areas, easements are inexpensive. For example, Wisconsin purchased many of its scenic easements along the Great River Road at approximately $22.00 per acre. 82 Zoning, restricting use to agriculture or grazing, may help to inhibit development potential, and thus keep down the cost of easements.

Uncertainty over valuation of the rights that the owner relinquishes is one of the greatest hindrances to the purchase of open space easements. 83 One should note that the government's valuation, however well-reasoned, is still subject to negotiation with the landowner.

The basic valuation formula equates the consideration paid the landowner with the difference between the value of the land given its highest and best use before the imposition of restrictions (the "before-value") and the value of the land given its highest and best use after the easement restrictions are in effect (the "after-value"). 84 The two crucial variables are the present or potential uses of the land and the severity of the restrictions imposed upon the land. There is a compensable loss in property value wherever restrictions impinge upon present or potential uses. 85

80. Id.
82. Community Action, supra note 10, at 17.
83. Open Space for Urban America, supra note 20, at 124.

An official of the California Department of Parks and Recreation, which has authority to acquire scenic easements for park purposes [Cal. Pub. Res. Code § 5006 (West 1956)] has said that the Department has "found that the problems of valuation are so great as to be unworkable." Letter from Earl P. Hanson, Chief, Division of Beaches and Parks, to Roger Cunningham, Aug. 10, 1967, cited in D. Sutte & R. Cunningham, supra note 24, at 23.

84. D. Sutte & R. Cunningham, supra note 24, at 79.

The American Institute of Real Estate Appraisers defines "highest and best use" as the "most profitable likely use to which a property can be put." Id.

This "before-value-less-after-value" formula is in line with the Fifth Amendment requirement of compensation for interferences with the use and enjoyment of land. The requirement was articulated in cases involving lands subject to low aircraft overflights restricting plaintiffs' use of their land and diminishing its value. United States v. Causby, 328 U.S. 256 (1946) (poultry business ruined); Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961) (use of land as a residence destroyed).


Highest and best use changes caused by easement restrictions occur, for example,
Only those potential uses which are reasonably foreseeable are relevant to determining before-value. Highest and best use does not include speculative uses. Market data is helpful in making the distinction here: potential value not already reflected in the present fair market value of the land should not be included in determining the before-value of the land.

The general data usually relevant to determining before- and after-value based upon highest and best use of a particular piece of property include neighborhood data regarding growth patterns, location, availability of utilities, topography, access, and real estate tax rates. Negotiators should also consider the zoning classification applicable to the land, and any reasonable probability of a change in that zoning, in determining the loss of value caused by an easement. Thus, where land is zoned agricultural, an easement restricting the land to agricultural uses will provide the greater permanence of an easement without requiring a large payment reflecting great loss in potential uses. However, where the zoning of the neighborhood seems likely to change in the near future to permit more intensive development, the before-value of the land may be greater, reflecting the potential increase in the uses of the land. Although an easement may be especially necessary here, its cost will be higher, reflecting the contemplated relaxation of the zoning classification.

where land suitable for homesites is restricted to agricultural uses, or where an easement prohibiting or limiting the right to cut trees is taken in a piece of land covered by highly-marketable timber. D. SUTTE & R. CUNNINGHAM, supra note 24, at 79-80.

Where an open space easement is taken in rural farm land, the highest and best use value may change very little, reflecting perhaps only such minor restrictions as those on billboard erection. Id. at 80.


This exclusion of speculative value when determining market value is well-established in eminent domain law. See Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979 (1909).

87. Interview with Clyde Ongaro, supra note 87.

Generally, the usual methods of appraising real estate are applicable to appraising land encumbered by open space easements.

[The prescribed methods of valuation . . . as indicated by the American Institute of Real Estate Appraisers, the Society of Real Estate Appraisers, the American Society of Appraisers, and the American Right-of-Way Association are germane to the valuation of the property encumbered with scenic easements.

Id. at 76.
89. Id. at 79.

Such an approach is suggested by Long Beach High School District of Los Angeles County v. Stewart, 30 Cal. 2d 763, 185 P.2d 585 (1947), a case involving valuation of property taken by eminent domain:
Despite general guidelines, valuation of purchased easements is essentially a case-by-case process. As the number of sales of properties encumbered by open space easements increases, more information regarding the loss in value caused by easement restrictions will be available to those negotiating easement purchases.

2. Financing the Acquisition of Easements

Whether by gift or by purchase, the acquisition of easements will cost money. There are, however, distinct economic benefits that may accrue to the public as a result of open space preservation. More intensively developed land will often call for public expenditures that would not be necessary were the land left undeveloped. Such expenditures include funds for public utilities, schools, and streets. In addition, property values of nearby land often rise as a result of the preservation of encumbered land as open space. Such rise in property values will lead to higher tax assessments on those parcels and consequently to increased tax revenues.

(a) Local financing. On balance, however, a program of easement acquisition, especially if purchases are involved, usually imposes a financial burden on the local government. This burden is a crucial impediment to easement acquisition. Local financing usually comes from two principal sources: current municipal or county revenues and special bond issues. The major problem with funding from the current revenues is one of priorities. The local government may find it difficult to spend its money on such abstract and long-range benefits as open space when there is a need for a new hospital or school, even

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[T]he general rule is that present market value must ordinarily be determined by consideration only of the uses for which the land "is adapted and for which it is available." The exception to this general rule is that if the land is not presently available for a particular use by reason of a zoning ordinance . . ., but the evidence tends to show a "reasonable probability" of a change "in the near future" in the zoning ordinance . . ., then the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value.

*Id.* at 768-69, 185 P.2d at 588.

90. See notes 70-83 *supra* and accompanying text.


Of the 22 different development patterns studied, except in a few years, none yielded a positive net cash flow to the City. The cost of municipal facilities and services generally exceeded revenues from property tax, sales tax, utilities (gas and electricity) sales, and other sources. Not surprisingly, cash flow to the School District was consistently negative; and because its budget is substantially larger than the City's, there proved to be a total net cost to the taxpayer in all years.

*Id.* at 4.

92. See *Open Space for Urban America, supra* note 20, at 53.
given the California Legislature's expression that the expenditure of funds for open space is in the public interest.93

In most cases, where the contemplated expenditures are at all substantial, a special bond issue may be necessary. The likelihood of obtaining voter approval for such financing depends on the level of public concern for environmental quality at the time of any bond issue election.94

Since the benefits of open land are not strictly local, but accrue to the state and nation as well, the financial burden should not fall solely on the local government, but should be shared by all levels of government.

(b) State financing. The most logical source of assistance is state funding. The California Legislature's Joint Committee on Open Space Land concluded that much of the financial burden of open space protection must be assumed by the state since the benefits of an open space program are going to be shared by all residents of the state.95 Although it studied the question of fund sources, the Committee was unable to recommend specific sources, but concluded only that "the commitment of a substantial amount of money on a regular annual basis is vital if any long-range program of preserving open space land is to be realized."96

The Committee did recommend as a possible approach that a general obligation bond issue be submitted to the electorate for approval. Such a bond issue would finance a ten-year program of open space acquisition and maintenance. The Committee recommended that the amount of the band issue be approximately $1,000,000,000.97 Grants of such funds on a matching basis could then be made to the local governments for the purchase of open space easements.

Other states have evolved different solutions. For example, Wisconsin funds its highway program for scenic and conservation easements through a special one-cent tax on cigarettes.98

State involvement, however, should extend beyond financial support. A statewide open space program with the ultimate administrative

94. A successful bond issue will require a full public explanation and a vigorous campaign. COMMUNITY ACTION, supra note 10, at 17. If the bond issue is to finance the purchase of easements, the local government must be certain that the price of the easement is secured so as to prevent an artificial inflation of the cost during the course of the campaign. OPEN SPACE FOR URBAN AMERICA, supra note 20, at 52.
95. JOINT COMM. REPORT, supra note 10, at 33.
96. Id. at 32.
97. Id. at 34.
98. WIS. STAT. ANN. § 139.50(2)(b) (1963); Note, Progress and Problems in Wisconsin's Scenic and Conservation Program, 1965 Wis. L. REV. 352, 357.
and political, as well as financial, responsibility at the state level will be necessary to sustain any vigorous and comprehensive program of open space protection.\textsuperscript{99} For too long the crucial decisions have been made at the local level with local economic interests playing a key role. State and regional programs, clearly expressing the statewide interest in open space, could facilitate the use of easements through financing, open space inventories and plans for future needs, and through the impetus provided to local governments by state and regional direction.\textsuperscript{100}

(c) Federal financing. The principal source of funding assistance from the federal government is a grant program, the Open Space Land Program of the Department of Housing and Urban Development.\textsuperscript{101} Since its inception in 1961, the Program has provided $350 million in matching grants to state and local governments for the acquisition of 350,000 acres of land for conservation, recreation, and historic preservation purposes.\textsuperscript{102} Open space easements may be acquired with the use of these HUD funds.\textsuperscript{103} Any easements acquired, however, must be in perpetuity to qualify for HUD funding,\textsuperscript{104} although the Program provides that, in certain circumstances, open space land protected by such easements may be converted to other uses.\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{99} See Joint Comm. Report, supra note 10, at 9, 10.
\item \textsuperscript{100} A good vehicle for statewide planning and a basis for allocation of state funds will be provided by the local plans for open space preservation required by Cal. Gov't Code §§ 65560-68 (West Supp. 1971). The code requires the adoption by June 30, 1972, of local plans including "specific programs which the legislative body intends to pursue in implementing its open-space plan." Id. § 65564. Easements can play a major part in this implementation.
\item See also the excellent regional approach to conservation and open space suggested by Assemblyman John Knox's A.B. 1057 (coauthor: Senator Marks), introduced into the California Assembly on March 22, 1971. Although it passed the Assembly, the bill was defeated in the California Senate on December 1, 1971, amid objections that its passage would create a regional government and pre-empt powers of local government. San Francisco Chronicle, Dec. 2, 1971, at 1, col. 1.
\item \textsuperscript{101} HUD Guide, supra note 44, at 14. The Program is authorized under Title VII of the Housing Act of 1961, 42 U.S.C. §§ 1500-1500d-1 (1970). For detailed information on the implementation of the Program, see generally HUD Guide, supra note 44.
\item \textsuperscript{102} 1970 Environmental Quality Report, supra note 1, at 196.
\item \textsuperscript{103} HUD Guide, supra note 44, at 1, 8-9.
\item \textsuperscript{104} Id. at 1.
\item \textsuperscript{105} Recognizing that land uses may change over the years, the Program provides that land preserved as open space with the assistance of HUD funds may be converted from its open space use (through the cancellation of the easement, where an easement is the preservation device), if the conversion is approved by the Secretary of HUD. 42 U.S.C. § 1500c (1970). The Secretary may not give his approval unless he finds that
\begin{enumerate}
\item there is adequate assurance of the substitution of other open-space land of as nearly as feasible equivalent usefulness, location, and fair market value at the time of the conversion; (2) the conversion and substitution are needed for orderly growth and development; and (3) the proposed uses of the converted and substituted land are in accord with the then applicable
\end{enumerate}
\end{itemize}
Any city or county authorized by the 1959 or 1969 Act to acquire easements in open space is eligible for assistance. HUD also requires that the city or county show comprehensive land use planning for the area in which the proposed open space project is to be located.

HUD must approve the open space easement proposal in advance of the acquisition if the local government is to qualify for assistance. The easement restrictions and the fair market value of the interest in the property are both subject to approval. HUD, in some cases, will fund up to fifty percent of the administrative costs, including negotiation expenses and real estate services such as title and appraisal reports.

Open space easements acquired with the aid of HUD funds may be for the preservation of open spaces located within urban areas. Under the statute, the term "urban area" is broadly defined to mean any area which is urban in character, including those surrounding areas which, in the judgment of the Secretary, form an economic and socially related region, taking into consideration such factors as present and future population trends and patterns of urban growth, location of transportation facilities and systems, and distribution of industrial, commercial, residential, governmental, institutional, and other activities.

Easements in lands outside of urban areas must be in undeveloped or predominantly undeveloped land which, if withheld from commercial, industrial, and residential development, would have special significance in helping to shape economic and desirable patterns of urban growth (including growth outside of existing urban areas which is directly related to the development of new communities or the expansion and revitalization of existing communities).

HUD's Funding Analysis procedure, which allocates the available funds among competing applications, defines the required benefits to urban areas. They include the shaping of urban development, provi-
sion of open space opportunities in low-income neighborhoods, general recreation areas, and scenic and conservation areas.114

HUD's Open Space Land Program may thus have great potential as a source of financing for easement acquisition programs.

CONCLUSION

Most important to the success of open space preservation through the easement device is anticipatory action by the public to provide for the study, planning, and implementation of easement programs. Early action is crucial because, unlike many other fields of environmental deterioration such as air and water pollution, the loss of open space is usually irreversible.115

All discussion of the advantages and use of open space easements is academic unless local governments have the means to embark on an aggressive easement acquisition program. Local governments, however, rarely have the money or the impetus to use the easement. Its efficacy depends not only on greater state funding, but also on a more comprehensive state governmental approach to the entire spectrum of open space protection problems. The benefit is statewide; the burden should be similarly shared. The eminent domain power should also be expanded to allow local governments to compel the sale of open space easements.

Finally, a redefinition of "public benefit" is needed to eliminate distorted economic incentives for development. In open space, as in all areas of environmental protection, the solution lies not primarily in the free market place, but in affirmative governmental action, through the use of devices such as the easement, to counter the otherwise irresistible pressures for development.

Clyn Smith, III

114. See the HUD GUIDE, supra note 44, at 35-40, for a detailed description of the Funding Analysis procedure.
115. See notes 4-6 supra and accompanying text.