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THE ACQUISITION AND PRESERVATION OF OPEN LANDS

Marvin M. Moore*

INTRODUCTION

This article seeks to establish 3 major points: that the United States is gradually losing its heritage of open land, that this unspoiled land is worth saving, and that we have available to us legal devices with which we can preserve much of it. These devices will be individually discussed.

I. THE INCESSANT LOSS OF OPEN LANDS

At the present time developers in the United States are consuming an average of over 3000 acres of suburban and rural lands per day,\(^1\) and the rate of consumption is gradually increasing. The principal causes of this phenomenon are the rapid rate of population growth, increasing urbanization, and developers' common practice of using land wastefully.

The population of the United States has mushroomed since World War II. In the 10-year period from 1950 to 1960 the nation's population expanded by 18.2%,\(^2\) and its present population of 196 million is increasing at the rate of one person every 11 seconds.\(^3\) If this rate of growth continues unchanged, our population in 1970 will be 215 million, and in 1980, 260 million.\(^4\)

Rapid population expansion necessitates the building of many new homes, and in the last 25 years most home construction in the United States has taken place in Metropolitan areas—especially in the suburbs surrounding our large and middle-size cities.\(^5\) The 1950 census revealed that the central cities experienced a population increase of 5,700,000 (13%) during the preceding decade, and that the suburbs in-

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\(^2\)Fairfax County, Virginia Planning Division, The Vanishing Land 16 (1962).


\(^4\)Hauser, Our Population Crisis Is Here and Now, Reader's Digest, Feb., 1962, p. 147.

creased by 9 million (35%). The trend toward urbanization became even more pronounced during the 5-year span following 1950. During that period rural areas gained only 300,000 people (0.05%), but the central cities added 2 million persons (4%). As a result of this influx into metropolitan areas, by 1963 the population of the United States had become 63% urban, as compared to only 45.7% urban in 1910.

Although our municipalities have been growing rapidly for the past 2 decades, they are expected to balloon even more during the next 25 years. Demographers believe that 95% of our anticipated additional population will dwell in areas where a city or town now exists. A writer in the American Bar Association Journal says:

[T]he projected metropolitan growth for the next 25 years is roughly equal to the 1950 populations of the metropolitan areas (not central cities alone) of New York-Northeastern New Jersey, Chicago, Los Angeles, Philadelphia, Detroit, Boston, San Francisco, Oakland, Pittsburgh, St. Louis, Cleveland, Washington, Baltimore, Minneapolis-St. Paul and Buffalo plus 15 million more persons. If this pattern of growth follows the 6 years, 1950-56, 41.5 per cent of this urban explosion will occur in the fringe areas.

One gets an inkling of the impact that this expansion will have on the countryside surrounding these cities from the prediction that in the area surrounding Chicago alone one million acres of land will shift from rural to urban in the next 30 years.

The already difficult problem of finding room for the bulk of an expanding population on the periphery of our metropolitan areas has been aggravated by the wasteful practices of developers. Subdivision and shopping center developments typically proceed with little regard for the preservation of open spaces and aesthetic features and with even less regard for the question whether the specific project under construction is consistent with any rational plan for the region's development. Subdividers typically leapfrog over parcels of open land lying just outside the city in order to obtain land at cheaper prices farther out. The result is that many acres of undeveloped land are left behind in the form of isolated chunks and strips that are too small or grotesquely shaped or poorly situated for development and too

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6Ibid.
7Haar, op. cit. supra note 5, at 347.
9Fairfax County, Virginia Planning Division, op. cit. supra note 2, at 15.
11Ibid.
dispersed or poorly located to constitute effective open space. A primary cause of the disappearance of usable open space is the inefficient manner in which land is being developed. "It is not the growth itself [which creates the shortage], but the pattern of growth." 

In summary, the 3 factors of population growth, urban immigration, and wasteful land use have combined to threaten our country's supply of open lands and to render such lands least plentiful in those regions where the population is densest.

II. THE VALUE OF OPEN LANDS

One may reasonably inquire why a shortage of open spaces should be a cause for concern. After all, most of the lands being absorbed are put to constructive use. The answer is that open spaces serve a number of very important functions. They constitute water reservoirs and flood inhibitors, timber preserves, recreational sites, agricultural areas, buffer zones between municipalities, and game preserves. The first 5 of these functions merit individual treatment.

A substantial portion of our country's open lands are stream and river valleys and coastal lowlands. These lands are extremely useful. Since they have not been covered with buildings and asphalt, they act like a great sponge, and this phenomenon produces double benefits: By retaining most of the rainwater in the ground, these lands constitute a huge storage tank, making water available for the future needs of those who dwell in the region, and by minimizing the amount of runoff, such lands prevent floods. Concerning the latter benefit, the writer, William H. Whyte, Jr., declares:

Quite aside from any of the other benefits produced by an open space plan, it could be justified on the basis of watershed protection. . . . [W]hen there is a heavy rainfall, the streams and the creeks that flow into a natural storm sewer system are far better accommodated than [they could be] by anything constructed by man.

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13Ibid. Even in our most heavily populated cities, such as New York and Chicago, over 10% of the land is left vacant. This land is usually unsuitable for park or recreational purposes because of its size, shape, or location, or occasionally because the tide is clouded. Id. at 563.
14Encyclopedia Americana, United States—Hydrography 307-08 (1939).
Forty-three per cent of the forests in North America are in private ownership and therefore subject to commercial exploitation. A few states exercise some control over the forest management practices of private owners, and some of the corporate owners with extensive timber holdings follow exemplary conservation practices, but no state prohibits an owner from selling his forest land to a subdivider or shopping center builder, and there is no federal legislation dealing with this problem. That our forest resources are not being adequately protected is revealed by this prediction of the United States Forest Service: Assuming the continuation of current forestry practices and the present rate of consumption of private forest lands by subdividers and others, by 1975 we will be cutting annually approximately 14% more timber than we are growing.

A major value of open spaces is the fact that they provide a site for outdoor recreation. National, state, and municipal parks and forests have long served as a retreat for cooped-in urbanites, and these sanctuaries will attract much greater numbers of people in the future.

The demand for all forms of outdoor recreation will increase at an unprecedented pace during the next 25 years. . . . [T]he impact on the need for parks and other open spaces becomes a major challenge of our time.

The basis for the quoted prediction is that there will be a rise in each of the factors which most affect the demand for recreation: population, per-capita income, leisure time, and ease of travel. An increase of any one of these would be significant. When gains in all 4 categories are combined, the result to be anticipated is obvious.

A considerable part of our country's prime agricultural land is located near metropolitan areas. Hence the problem created by the constant absorption of this land is more serious than is generally realized. Admittedly, United States farmers are currently producing more food than our population is consuming, and they should be able to con-

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17 Id. at 620. Among these jurisdictions are California, Idaho, Maryland, Massachusetts, Minnesota, Oregon, Vermont, and Washington. See Note, 1952 Wis. L. Rev. 186 (1952).
21 Fairfax County, Virginia Planning Division, op. cit. supra note 2, at 16.
22 Ibid.
continue doing so throughout the foreseeable future. However, the United States has assumed the burden of feeding much of the underdeveloped world. The magnitude of this undertaking is partially revealed by the fact that 80% of the 500 million new mouths the world has acquired during the past 10 years are in the underdeveloped nations. Since 1954 the United States has shipped $12 billion worth of surplus foodstuffs overseas, and at the present time our country is providing some form of daily supplementary food ration to more than 100 million persons abroad. Even if our country's existing agricultural acreage remains intact and our population becomes stabilized, our agricultural wealth will not be inexhaustible, for not all of the nutrients in the soil are replaceable by fertilization. As evidence of this, it has been estimated that the agricultural value of Iowa farmland is deteriorating at the rate of 1% a year in relation to its original inherent productivity. It is, of course, possible that some of the foreign peoples now being fed by the United States will eventually be able to feed themselves, and it is likewise possible, though unlikely, that we may someday decide to reduce our food shipments regardless of whether the need for them decreases. But until one of these developments occurs it seems prudent for us to conserve our existing farmland, particularly acreage of prime quality.

Finally, whatever other functions may be ascribed to open lands, equally important is the role they can play in channeling the growth and improving the environment of urban areas. In many sections of the country the boom in suburban development has nearly exhausted the open spaces between cities. If the cities and towns affected wish to prevent a complete merger and preserve some semblance of individual identity, they will obviously have to find some means of curbing urban sprawl. Open spaces taking the form of greenbelts can readily serve as checks to urban sprawl and stabilizers of suburban property values.

Planners, city officials, attorneys, and interested citizens must find new ways of encouraging developers to set aside [or refrain from purchasing] more open spaces, particularly in rapidly expanding metropolitan areas. If this is not done, few natural amenities will remain in these urban complexes and many citizens may live in a

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25Id. at 214.
26Cook, supra note 24, at 213.
27Cook, supra note 24, at 214.
suburbia characterized by all-pervasive pavement and the monotonous development of every square inch of property.28

Thus it is evident that open spaces contribute some very tangible and valuable benefits to our society, and the constant consumption of these lands is something to be deplored.

III. DEVICES FOR PRESERVING OPEN LANDS

Fortunately, some effective devices are available for restraining the absorption of our open spaces. These devices, which may be used individually or in combination, are: (A) acquisition of land by right of eminent domain; (B) acquisition of conservation easements; (C) compensable regulation of land use; (D) exclusive use zoning; (E) imposition of minimum lot sizes; (F) compelling of subdividers to dedicate a percentage of their land to parks, playgrounds, or similar uses; and (G) employment of property taxes to encourage nondevelopmental land uses. Each of these approaches will be discussed individually.

A. CONDEMnation THROUGH EMINENT DOMAIN

Although this tool is very commonly used, its usefulness is somewhat limited by two unrelated factors: the constitutional requirement that land be taken only for public purpose,29 and the costliness of condemnation.

In a state with no special legislation on the subject it is not certain that the courts would regard the acquisition of land solely to preserve it as an open space or greenbelt as satisfying the "public use" requirement.30 However, a number of states have legislation expressly authorizing the purchase of land for open space purposes,31 and even in states lacking such enactments land can unquestionably be taken for certain kinds of open space uses. For example, it has long been established that the government can take land to create a park or play-

29U.S. Const. amend. V, which reads in part: "[N]or shall private property be taken for public use, without just compensation." Although this wording does not directly forbid a taking for a non-public use, the implication is clear, and the courts have interpreted the Amendment as prohibiting such a taking. See Beuscher, Land Use Controls—Cases and Materials 528 (1964). The Constitutions of Alabama, Arizona, Colorado, Missouri, Oklahoma, South Carolina, Washington, and Wyoming expressly disallow the taking of property for a non-public purpose. Ibid.
30Ibid., op. cit. supra note 15, at 54.
31Ibid.
ground or to promote irrigation or flood control. More recently it has been decided that when land is condemned to eliminate an undesirable condition such as a slum or blighted area this serves a public purpose even though the property is not subsequently devoted to a use traditionally considered public. Many decisions have found a public purpose present where more land was condemned than was needed for a particular public project in order to protect the improvement by surrounding it with open land. For example, the courts have ruled that bluffs above the Hudson River may be condemned to preserve the beauty along a parkway and that land around a library may be taken to enhance the beauty of the building. It therefore appears that while the public use requirement may be a restraining influence, it does not prevent states and municipalities from accomplishing many open space objectives through the use of the eminent domain power.

The great expense of condemnation is a more serious restraint. Because of this, it is unrealistic to suppose that communities could ever obtain enough open lands solely through purchase of the fee simple title. Three developments have rendered the expense problem somewhat less formidable than it was:

1. in 1961 Congress passed a statute authorizing federal grants of up to 30% to help defray the cost of urban and suburban land usable for park, recreation, historical, or conservation purposes. Several states have obtained additional money for land acquisition through the issuance of bonds.

2. in recent years states and municipalities have come to realize that a surprising amount of land can be obtained by gifts. A Regional Plan Study of Connecticut, New Jersey, and New York found that about 25-30% of the total land acquired by the

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36 Comment, Techniques for Preserving Open Spaces, 75 Harv. L. Rev. 1622, 1633 (1962).
40 Eveleth, supra note 12, at 564.
states for parks from 1942-56 was procured through gifts. One form of gift which is now being encouraged by a number of communities is the donation of the remainder in fee simple with the retention of the life estate. However, most gifts are in the form of devises.

(3) government land-acquisition officials have recently learned that the expense of condemnation can often be significantly reduced by first regulating the use of the property as much as is consistent with the legitimate scope of the police power and then condemning and paying for the remaining uses. Since the just compensation requirement demands only that the condemnor pay for those property rights which he is taking, the payment required to condemn land already subject to controls is normally less than that needed to take land which is free from zoning regulations. This approach must be used cautiously, however, for it has often been held that a city may not zone unreasonably in order to lower the value of property prior to condemnation. An illustrative case is Grand Trunk W. Ry. v. City of Detroit. There the court invalidated an attempt to zone for exclusive multiple-dwelling use property located in an industrial area in which no prudent investor would erect multiple dwellings and which the city was contemplating condemning for redevelopment purposes.

B. CONSERVATION EASEMENTS

There is an alternative to condemning the entire fee simple in the land desired for open space. This is merely to take a "conservation easement" in the property. Under this approach the government purchases a negative easement comprising the landowner's development rights in the property. Title to the land remains in private hands, and the owner may make any use of the property not inconsistent with the rights conveyed to the government agency. Nondevelopmental uses such as farming and grazing normally remain available to the landowner. The deed granting the easement to the government agency typically contains provisions disallowing:

(a) erection of structures.
(b) removal or destruction of trees, shrubs, or other greenery.
(c) construction of private roads or drives.

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41Id. at 575.
42Comment, supra note 35, at 1638.
43Ibid.
44326 Mich. 387, 40 N.W.2d 175 (1949).
(d) uses other than residential, agricultural, and those incidental to the installation and maintenance of public utilities.
(e) display of billboards and other forms of outdoor advertising.
(f) dumping of trash, wastes, and other unsightly materials on the land.

In addition the deed usually authorizes the grantee-agency to allow any changes requested by the owner which the agency deems consistent with the purpose of the easement. The landowner's compensation is the difference between the market value of the property without the easement and its value subject to the easement.

The use of conservation easements has a number of advantages over condemnation of the entire fee simple. The easement approach:

(1) is usually less expensive.
(2) seldom injures the community's tax base.
(3) permits the government to escape maintenance costs.
(4) mitigates the pressure on farmers and others to sell to developers, since the realty taxes no longer reflect the property's value for development purposes.
(5) increases the number of gifts of open lands. Relatively few landowners are wealthy enough or public-spirited enough to donate their land outright, but there are many who can and would give a conservation easement if this led to a reduced tax valuation on the property and enabled them to deduct the value of the easement from their income tax as a charitable gift.

Since there is some controversy about the actual value of items one and two, they will be given individual attention. It is sometimes asserted that a jury is likely to award a landowner almost as much money for the taking of a conservation easement as it would for the acquisition of the fee simple; hence the government might as well take the whole fee and get the full value of what it is paying for anyway. This view is probably explained by the fact that for many years the kind of easement most commonly taken by the government has been one for a highway or railroad right of way. Here the owner has usually been awarded nearly as much money for the easement as he

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46 Of course the agency could allow such changes even in the absence of a clause so providing, but it is good psychology to expressly mention this authority in the deed, where the landowner can see it.
47 See Whyte, op. cit. supra note 15, at 36.
48 Id. at 30.
would have obtained for the land itself.\footnote{40} In this kind of fact situation such an award is understandable, for a highway or railroad easement renders the affected strip virtually useless to the owner of the servient tenement. On the other hand, a landowner who grants the government a conservation easement retains his present uses plus the right to engage in any others that do not conflict with the stipulated restrictions against improvements. Of course, under given circumstances he may still be surrendering a lot, for his property may comprise choice building sites located in the midst of suburban developments. But in many cases the value of the property will be ascribable mainly to its usefulness for farming, grazing, commercial recreation, or some other purpose not requiring improvements, and in these circumstances the landowner gives up very little by granting a conservation easement. On the average, therefore, it should be cheaper to purchase a conservation easement than to buy the fee simple, especially if the government agency is diligent about acquiring easements before the land has become ripe for development.

Those who doubt that conservation easements are usually harmless to the community's tax base point out that in instances when the value of the land is attributable mainly to its usefulness for commercial or residential development, to subject the property to a conservation easement will substantially reduce its tax valuation. This observation is true, but it overlooks 3 significant considerations:

(1) a lot of land derives its principal value from its usefulness for purposes not requiring development;
(2) whatever taxes are lost through lower valuations on property subject to conservation easements are commonly recouped through increased valuations on nearby property, which is made more valuable by the assurance that neighboring tracts will not be despoiled by development. For example, in New Jersey the Union County Park Commission reported that between 1922 and 1939 there was a 631.7% increase in assessed valuations on properties adjacent to Warinanco Park.\footnote{50} This was nearly 14 times the average increase of 46.4% for the entire city during the same period.\footnote{51} A similar increase was reported for land contiguous to a park in Elizabeth, New Jersey.\footnote{52} Property located near land subject to a conservation easement may not increase in value as

\footnote{40}Ibid.\footnote{50}Herrick, The Effect of Parks Upon Land and Real Estate Values, The Planner's Journal, Oct.-Dec., 1939, p. 89.\footnote{51}Id.\footnote{52}Id. at 90.
much as does land adjacent to a park, but one may nevertheless expect the former to rise substantially in value;

(3) property restricted by a conservation easement does not burden the community with new demand for sewer and water lines, school construction, and police and fire protection. Thus any loss of tax income from such land is to a great extent offset by a concomitant absence of expenses.

A number of states have enacted enabling legislation providing for the purchase of conservation easements.53 Such enactments typically state that governmental units have the power to condemn easements in land, as well as the fee simple, and declare that open lands are beneficial to society. It is not certain that such legislation is necessary, since power to purchase the fee simple should, logically, include the power to buy something less than the fee, and since many courts would doubtlessly deem open lands to be beneficial to the public even in the absence of a statute so stating.54 Nevertheless, since these points are not entirely free from doubt, a state desiring to promote the use of conservation easements is well advised to enact such enabling legislation.

C. COMPENSABLE REGULATIONS

An approach similar to that of purchasing a conservation easement is to zone out the right to develop and then compensate the affected landowners for any losses suffered by them. This is the substance of the compensable regulation scheme devised by Professors Jan Z. Krasnowiecki and James C. Paul of the University of Pennsylvania.55 Under this plan an area is selected for preservation, and then all of the parcels making up the area are evaluated. The values thus determined are guaranteed to the landowners by the government authority; then regulations are imposed limiting the uses of the properties to those of a nondevelopmental character. To the extent that these restrictions impair the value of the land for uses actually being made at the time the owner is allowed immediate compensation.56 To the extent that the controls merely reduce the value of the property for potential development, the owner is awarded damages if and when he

54See Whyte, op. cit. supra note 14, at 54 and Comment, supra note 35, at 1636.
56Comment, supra note 36, at 1639.
sells the land at an administratively supervised public sale. Since the compensation allowable to a landowner cannot exceed the initially determined market value of the property, it follows that subsequent increases in development value are not compensable.

This approach appears to have 3 advantages over condemnation of the fee simple or of a conservation easement:

(1) the imposition of compensable regulations does not require the expenditure of large sums at the beginning of the program, for an affected landowner is not entitled to compensation for loss of development value until he conveys his property at a public sale;

(2) this plan is likely to be less expensive overall, for any intervening increases in the market value of the regulated land reduce the amount that the government must pay at sale time;

(3) this device can facilitate more rational planning, since flexibility can be achieved by amending the regulations. A significant disadvantage of the scheme is that it is likely to get a hostile reception from some segments of the public, for notwithstanding the plan's provision for compensation, it will doubtlessly impress many as being "socialistic."

D. EXCLUSIVE USE ZONING

Since the celebrated decision in Euclid v. Ambler Realty Company in 1926 the courts have recognized that it is a legitimate exercise of the police power to enact reasonable zoning ordinances promoting those uses for which a given area is best adapted and preventing the establishment of disharmonious uses within the area. In the years following that decision communities have employed various forms of open space zoning, including flood plain, historical, scenic, recreation, and agriculture zones. Of these classifications agricultural zoning has probably received the most use. Santa Clara County in California and Lancaster County in Pennsylvania have both made extensive and effective use of agricultural zoning. One may wonder why communities resort to the expensive devices of condemnation and compensable regulation when exclusive use zoning is available. There are 2 reasons:

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57bid.

58If an amendment reduces the property's development value still further, the owner will simply be awarded additional compensation when he conveys the property at public sale.

59272 U.S. 365, 47 Sup. Ct. 114 (1926).

60See Eveleth, supra note 12, at 573.

61Whyte, op. cit. supra note 15, at 23.
(1) unless the particular property is peculiarly adapted to a given open space use such as agriculture, outdoor recreation or service as a flood plain, the courts are likely to invalidate any attempt to zone out other uses, deeming such an ordinance unreasonable and confiscatory.\textsuperscript{6} Invalidation is especially likely when nearby lands have been developed and the property in question has acquired considerable value for subdivision or shopping center purposes, for the courts are understandably loath to sanction land-use legislation that causes landowners to suffer a substantial economic detriment;

(2) even if the zoning act withstands attack in court, once the local population becomes sufficiently dense and development and tax\textsuperscript{63} pressures become intense, zoning laws commonly give way. This phenomenon generally begins with the granting of numerous variances and ends with an amendment of the zoning code.

E. Minimum-Lot-Size Zoning

The most commonly employed method of protecting open spaces is to impose large minimum lot sizes in suburban residential areas.\textsuperscript{64} The courts have invalidated ordinances implementing this approach in a few instances, but these have usually been cases where the specified minimum size was clearly too large to permit the kind of development for which the area was suited or where the restricted area covered too vast a section.\textsuperscript{65} The courts have sanctioned large-lot zoning in a distinct majority of the cases in which the question has been presented,\textsuperscript{66} and in recent years they have manifested a disposition to approve higher minimums. In \textit{Flora Realty & Investment Co. v. City of La Due},\textsuperscript{67} the court supported a 3-acre minimum:

Any intrusion of smaller lots into such an area will have the effect of impairing the value of buildings already constructed. A reduction of the minimum area restrictions on appellant's property would have a materially adverse effect on the value of all property in the


\textsuperscript{63}Land zoned for unintensive use is commonly taxed as though it were available for development, because assessors share the local public's belief that once the market demands a more intensive use, the zoning will be changed. See Hagman, \textit{Open Space Planning and Property Taxation—Some Suggestions}, 1964 Wis. L. Rev. 628, 631.

\textsuperscript{64}Eveleth, \textit{supra} note 12, at 573.


\textsuperscript{66}Whyte, \textit{op. cit. supra} note 15, at 21. At least thirty-nine states have recorded decisions on the subject. Book Review, \textit{supra} note 10, at 80.

\textsuperscript{67}362 Mo. 1025, 246 S.W.2d 771, 776 (1952).
general vicinity of appellant's land. The ordinance was intended to stabilize and preserve the value of the property in the several districts.

An ordinance changing the minimum from 2 to 4 acres was upheld in Senior v. Zoning Comm. of Town of New Canaan, mainly on the grounds that the land's most appropriate use was for a "superior residential district" and that the zoned area lacked city water and sewage facilities. And in Fischer v. Bedminster Township the court sanctioned a 5-acre minimum, stressing the desirability of large-lot zoning as a means of preserving the rural character of the community. However, ordinances specifying minimum lot sizes are not certain to withstand attack unless they in some manner promote the health, safety, morals, or general welfare of the community and are deemed reasonable in the light of the facts of the particular case.

Large-lot zoning has been criticized on the grounds that large minimums necessitate the consumption of even more land to house a given number of people, thereby contributing to urban sprawl; that big home sites render utilities and other public services more expensive, since sewer and water lines, roads, and school buses must travel farther; and that large lots—whether considered separately or together—do not produce an ideal kind of open space, for they are commonly fenced, cleared of all but a few trees, relatively devoid of wildlife, and inaccessible to all but their owners.

These criticisms are not without merit, but they are answerable. Although an area zoned for large minimums can accommodate comparatively few people, a community that wishes to adopt such zoning in one section can avoid creating a housing shortage by zoning some other section for duplexes and apartment houses. That large-lot zoning makes road and utilities cost more expensive is undeniable, but it is equally undeniable that a large-lot district is less costly to service with schools, public welfare, and police protection than is a high-density section. A recent tax-cost analysis of the residential sections of Yorktown, New York, revealed that tax revenues from Yorktown's residential property—the bulk of which is high-density—constituted 75 per cent of all revenues, but that services to this property consumed 83 per cent of the revenues; hence the owners of business and in-

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68 146 Conn. 531, 153 A.2d 415 (1959).
70 Note, supra note 65, at 510.
71 See id. at 514.
72 Id. at 515.
dustrial property were compelled to make up the deficit by paying higher taxes than would otherwise be demanded. In response to the last criticism, it is true that minimum-lot-size zoning cannot create anything akin to a wilderness, but it can provide open lands of a less primeval character, and domesticated open space would seem to be greatly preferable to none at all. Moreover, there is a type of large-lot zoning which can provide open lands of a relatively natural character, although at a sacrifice of certain advantages incident to orthodox large-lot zoning. The approach referred to is “cluster-zoning,” which has been enthusiastically received by many planning authorities. It merits individual discussion:

Cluster zoning limits the number of homes that can be built on a given acreage of land, just as large-lot zoning does, but permits the builder to reduce the individual lot sizes to a limited extent so long as he provides a corresponding amount of open space elsewhere within the tract. For example, in an area zoned for one-acre lots a developer might be able to create 100 lots on 100 acres (assuming land for streets is included in the one-acre calculation). Under cluster zoning he might be allowed to place 100 homes on 75 acres if he reserved 25 acres for permanent open space.

In addition to its ability to preserve open land in a natural state—that is, in the form of large, unbroken parcels—cluster zoning has several other advantages over orthodox minimum-lot-size zoning: The former is more economical for the homeowner, since it involves lower costs for water, sewers, road-paving, natural gas, similar utilities, and landscaping. It permits more flexibility, since lots can be tailored and located to fit the topography of the tract, thereby making possible a more interesting pattern of landscaping and architecture. Finally, where sewer facilities are unavailable it provides a large open area for the leachbeds commonly needed for septic tanks.

However, cluster zoning has 2 significant disadvantages when compared to large-lot zoning:

(1) to the extent that the individual lots are reduced in size the homeowner’s privacy is likewise reduced. There are many persons who would rather have a small parcel of open land all to themselves than have access to a large tract of such land that must be shared with their neighbors;

(2) implicit in cluster zoning is the danger that the compact open space set aside at the beginning will later be encroached

78Volpert, supra note 28, at 843.
upon if development pressures build up and efforts are made to alter the zoning law.

F. Compulsory Dedication of Land

A number of states have enabling legislation authorizing communities to require developers to dedicate a portion of their land for park purposes. New York has such a statute:

Before the approval by the [municipal] 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. . . . [T]he parks shall be of reasonable size for neighborhood playgrounds or other recreational uses. . . .

Currently the amount of land required to be set aside in the states having such legislation varies from 3%-12% of the subdivision's gross area. Some municipalities permit the subdivider to reduce his lot size below the specified minimum to a limited extent if he dedicates an equivalent amount of land to a park or similar open area.

Although there is a division of opinion among treatise and law review writers as to the validity of legislation authorizing the compulsory dedication of land, most recent cases have upheld such enactments. However, in several instances the courts have invalidated attempts by municipalities to compel developers to dedicate property for parks or schools to be used mainly by the general public, rather than principally by the inhabitants of the development.

The compulsory dedication device has been criticized on 2 grounds. The first is that it is simply unfair to require a developer to provide the locality with park land or other open space at his expense. The test used by the courts in passing judgment on questions of this kind probably accords with generally accepted notions of fairness. The courts ask whether a given rule or restriction affecting property rights is a reasonable means of promoting the public health, safety, morals, or general welfare. It would seem that compulsory dedication

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74 Note, Subdivision Control Requirement for Parkland, 12 Syracuse L. Rev. 224, 225 (1960).
75 N.Y. Town Law § 277.
76 Note, supra note 74, at 226.
78 Eveleth, supra note 12, at 583.
79 Ibid.
80 Kratovil, Real Estate Law § 545 (1958).
used with a modicum of restraint is as reasonable a means of preserving open space as the imposition of minimum lot sizes or the employment of exclusive agricultural or recreational zoning. The second criticism is that since this device permits the developer to determine which land is to remain open, the community has no assurance that the land set aside will be suitable for park, recreation, or other open space purposes. After all, the developer will typically set aside that property which is least suitable for development, such as swamp land or land containing rough terrain. This objection overlooks the fact that open lands (as indicated earlier) serve a variety of useful functions, hence the land selected for preservation is almost certain to serve some valuable purpose, regardless of its features: land characterized by rough terrain is commonly desirable for park purposes, and swamp land usually makes an ideal water basin and wildlife sanctuary.

The principal merit of compulsory dedication is that it represents a method of preserving open land in a residential area at no expense to the public.82

G. The Taxation Approach

In recent years planners have manifested a growing interest in the use of taxation as a planning device. They have become aware that a community can retard the loss of its open lands by lessening the tax burden on landowners whose property is devoted to certain open space uses such as agriculture, ranching, recreation (including golfing), flood control, the provision of airport buffer strips, or the preservation of historical landmarks.

That the system of property taxation presently employed throughout most of the United States contributes to our nation's loss of open space is obvious.83 As a result of the national phenomena of population growth and increasing urbanization, suburban communities have been facing mounting economic pressures for the past 20 years. To provide all of the needed new services such as schools, roads, sewers, water, and police protection these communities have had to obtain more money, and this problem has generally been “solved” by raising property taxes.84 But the medicine has aggravated the illness,

81 Supra, at 276-79.
82 The loss of tax revenue from the dedicated land might be regarded as a public expense.
83 See Hagman, supra note 63, at 637.
84 Whyte, op. cit. supra note 15, at 38.
for local farmers and other owners of open lands have found their tax burden so great as to render uneconomical continued unintensive use of their property, and so they have commonly sold the land to a developer or changed their use to a more intensive one, thereby creating a need for more public services.

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 the property, not limited to its current agricultural use, taxes have often forced the farmer to subdivide prematurely.\(^8\)

The result is that the tax assessor has become in effect a master planner who has contrived to gradually rid suburban areas of their open spaces.

The undesirability of this state of affairs led Maryland in 1956 to become the first state to adopt a broad-scale tax plan calculated to encourage the preservation of open land. Since 1956 8 other jurisdictions have enacted legislation implementing comparable tax schemes.\(^8\)

The approaches adopted by these jurisdictions fall into 1 of 3 classifications: a general directive to assessors, a tax preference, or a tax deferral.\(^8\)

When the general directive is employed, tax assessors are ordered to presume that a land-use control (such as zoning) currently applied to a given parcel of land is permanent in the absence of clear evidence to the contrary.\(^8\) It is presently common for the assessor to take into account the local market's assumption that an existing restriction on the use of land will be removed when the pressure for more intensive use becomes great enough.\(^8\) He therefore values the parcel as if it were free of the restriction, thereby increasing the pressure on the owner to get the restriction removed and develop the property. If a general directive is issued, the owner of such land may still be tempted by attractive offers from speculators and developers, but he

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\(^8\) Eveleth, supra note 12, at 588.


\(^8\) Hagman, supra note 63, at 638.

\(^8\) ibid.

\(^8\) Id. at 631.
will no longer be subject to the additional—and more compelling—pressure of a heavy tax burden.

The preferential assessment involves assessing land being used for a specified open space purpose at its value for its present or an allowable use. This approach differs from the general directive in that it does not apply only to selected land uses and in that it does not necessarily assume that the property favored is to be permanently restricted to its present uses. A preferential assessment statute is of doubtful validity under many state constitutions, for most of them require that all taxation be equal and uniform, thereby prohibiting unreasonable classifications and partial exemptions. In addition, a number of state constitutions require that assessments be based on "just valuation" or some similar concept. Consequently, in those jurisdictions tax statutes employing other measures of value are open to constitutional challenge. There are at least 2 ways of coping with these constitutional barriers. The first and most obvious is to amend the state constitution, assuming that enough people can be persuaded that the preservation of open lands is of sufficient importance to warrant such action. The second is to preface the open space taxation statute with a preamble presenting legislative findings that open lands are vital to the public welfare and therefore merit distinctive tax treatment. There is no certainty that a preamble of this kind will protect the act from invalidation, but apprising the court of the legislature's land-use-planning motives will normally improve the statute's chances of being sustained.

Both the preferential assessment and the general directive have been attacked on the ground that their effect is simply to increase the tax burden on everyone other than the owners of open lands:

The 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, and so demands begin to be heard for even more exemptions. . . . It seems to be part of our national psychological heritage to consider property tax exemptions as an ideal means of promoting worthwhile enter-

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90Id. at 639. California, Connecticut, Florida, Hawaii, Indiana, Maryland, and New Jersey, have preferential assessment statutes. The citations are given at note 86, supra.
92Id. at § 119.
93C.J.S. Taxation § 54 (1954). The majority of these constitutional provisions do not require that property be taxed at its full value.
prises, dispensing charitable aid, [or] furthering social reforms. . . . There is little or no recognition of the fact that many of these objectives could be 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.94

The short answer to this criticism is that all devices for preserving or acquiring open space impose a financial burden on someone95 and that it is highly debatable whether the above-discussed tax approaches are less economical or equitable than other devices.

The deferral approach involves postponing the payment of taxes on that portion of the market value of the land which exceeds the value of the property for its present use until the owner subjects the land to a more intensive use.96 Under this system the owner of open land pays a low rate as long as his property remains undeveloped, but he must pay the accumulated difference between the low taxes which he has been paying and the higher taxes which reflect the full value of the land if he ever exploits the property commercially.97 Thus deferral eventually recovers for the public the taxes temporarily forgiven. Although many commentators favor tax deferral and although it appears to be above constitutional challenge,98 the device is not free from objections. The record-keeping required by the system renders it expensive to administer, and the scheme does not benefit the owner of undeveloped land a great deal unless he plans to live on the property until his death. Landowners commonly fear the accumulation of taxes and prefer to keep their property liquid, even though they may not contemplate selling in the near future.

CONCLUSION

This article has sought to establish that our country is constantly losing portions of its open land, that this land is clearly worth preserving, and that much of it can be saved if we make diligent use of

95For example, condemnation under eminent domain is financially burdensome to the public, while exclusive use zoning and minimum-lot-size zoning impose an economic burden on the landowner, who can no longer sell his property for certain purposes or subdivide it into smaller lots.
96Hagman, supra note 63, at 639. Nevada & Oregon have deferral legislation. See note 86, supra, for statutory citations.
97Id. at 639.
98Id. at 645.
the legal devices available. On the whole, compulsory dedication, cluster zoning, and the purchase of conservation easements appear to be the 3 most promising devices. The first 2 have the merit of being cost-free to the community, and the last constitutes an ideal tool for protecting extensive tracts of unspoiled land at a minimum of expense. Which of the various devices should be used or emphasized by a given community depends on its political and economic climate. The longer a community waits to initiate an open spaces preservation program, the less satisfactory the ultimate results will be, for once a tract of open land has been developed, it is seldom feasible to restore the land to its natural condition.

99Minimum-lot-size zoning is also cost-free to the public, but, unlike the two approaches referred to, it cannot preserve open spaces in the form of large, compact parcels.