AN OPEN SPACE PROGRAM FOR VIRGINIA

by

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I. INTRODUCTION

The United States is urbanizing at a rate of more than a million acres a year. In the last fifteen years urban development has consumed approximately two thirds as much new land as it did in all the previous years in the history of our country.[1]

Unfortunately, we have ignored the implications of this trend. It has been estimated that the urbanized area of the United States will more than double by the year 2000.[2] Unless positive steps are taken soon the lands now open will become covered with a patchwork of urban development; and, once in more intensive use, will be too expensive and too difficult to re-establish as open spaces. Too much of the best farm land in the United States is rapidly being consumed by expanding urban areas.[3] Of the 465 million acres of cropland in the United States, only 72 million acres are in Class I land,[4] and over half of this highly fertile land is in urban areas where it is most highly susceptible to urban development. True, we can convert more land to cropland, but it will be neither as productive nor as close to the markets.

We have also ignored the vital necessity of preserving areas in their natural condition near urban areas. Every region needs to preserve untouched elements of its natural communities. In addition to furnishing the only reference against which we can measure the change brought about by civ-

ilization,[5] natural areas satisfy the need of all people for experiencing nature in its wild state, provide laboratories with true elements of life and dynamism for the science curriculums of our schools and universities, and offer opportunities for research.

By allowing our nonreplaceable resources of open land to fall prey to continuous urban development we have lost opportunities to rationally structure the growth of metropolitan regions, to preserve desirable features of the land, and the opportunities for study, recreation, and the continued enjoyment of the natural beauty of the landscape. We now have endless sprawl serving to compound the difficulties.

This uncoordinated development is leaving in its wake threats to farming and to wildlife, problems of floods and stream pollution, acute transportation difficulties, high tax costs, and suburban enclaves devoid of the amenities for which families fled the cities.

A policy to curb this driving force - national, state or regional - is yet to be devised. A few attempts to render it less destructive have, however, met with some measure of success: zoning in California to protect metropolitan fringe lands exclusively for agriculture; one- to three-year reservations of land for public use in Maryland and New Jersey; a bill in Massachusetts, inspired by Charles W. Elliot, to postpone taxes on land registered as open. William H. Whyte,

contributor to Fortune magazine and other publications, has advocated public acquisition of easements to forestall development. Charles Abrams of Harvard has expressed the view that the whole area in the path of urban sprawl should be publicly acquired. The Regional Plan Association has recently completed a Park, Recreation and Open Space Project - the main emphasis resting on open space preservation. Notable among the studies is Shirley Adelson Siegel's The Law of Open Space. The State of New York has recently passed a $75,000,000 bond issue for the purpose of providing assistance to local governments in the acquisition of park lands.

Although many different subjects are explored in this investigation, there is a single premise: that keeping much of the land in Virginia open and green is socially and economically desirable. This study establishes a program of open space acquisition and preservation for Virginia and is intended to stimulate both discussion and action. Although oriented primarily to the legal aspects of open space preservation, the study outlines the social, economic and psychological objectives of an open space program and establishes suggested alternative means for accomplishing it. Some of the ideas explored are time-tested. Others are at the frontiers of legal and social thought. There has been an attempt to include all proposals for acquiring or preserving open space for which there is responsible advocacy.

The first section of the study is directed toward determining the necessity for preserving low densities of land use in strategic areas of Virginia. The writer suggests that not only is it necessary to acquire and/or control undeveloped land for purposes of conservation, recreation and flood control; but also for the purposes of providing relief from chaotic urban development, and propagating a structural element to give visual and psychological identity and definition to urban Virginia.

The legal aspects of land acquisition for open space are considered next. The various means are examined: purchase, condemnation, leasing and lease-back, purchase of development rights, and gifts. Special problems are treated in the conclusion of this section. This part of the study has been accomplished with special reference to the legal and political environment of Virginia. Necessary to this, however, is the inclusion of those developments in other states which are pertinent and suggestive.

The study next moves into an exploration and appraisal of significant proposals which are not as yet clothed in legal acceptance but which offer valid approaches to the problem at hand. Some of these proposals constitute the basis of open space programs in countries outside our own, and others are on the threshold of legal acceptance.

The concluding section contains the author's suggested program of action for an open space program for Virginia.

Resources of pure open space are rapidly being dissipated, and there are no substitutes. It would appear that local governmental units are either unaware, complacent, or at a loss in preventing this phenomenon we call sprawl. This study develops a program of alternative policies to assist local governmental units and state agencies in formulating programs to alleviate this threat to Virginia and to preserve for the Virginians of future generations those amenities which we now enjoy.

II. GOALS AND OBJECTIVES

The term "open space" involves a pluralistic concept: recreation, conservation of natural resources, drainage and flood control, preservation of wildlife, spiritual and aesthetic comfort, a balanced urban-rural structure, land reserve for future public use, and control over the location and timing of development. The need for an open space program is urgent. It is urgent in the same sense today that a need for urban planning was urgent in the 19th century. This need was not met in that century, and so we today are burdened with the job of correcting the resulting dilemma - a terribly expensive necessity.

Land for open space in our regional structures is available, at least in most areas, and the legal means for obtaining it are at our disposal if we meet the challenge now.

Open Space for Recreation

The United States still has vast stretches of beautiful and untrammeled land. It also has one of the finest National and State park systems in the world - but not enough space reserves to meet our future recreational needs[6] that are growing rapidly with our increase in income, mobility, and leisure time. We are faced with the inequity that the West, with one-seventh of the population of the United States, has about four-fifths of all our publicly-owned land, while the Northeast,

with one-fourth of our population, has only one seventy-fifth of this land. Both the Midwest and the South suffer a similar disproportion of population to open land. Virginia is more fortunate than many of these states in having considerable amounts of its hinterland still undeveloped.

However, even in Virginia, we have yet really to accept the implications of our nation's predominant and rapid urbanization. Already the large majority of our people live, work, and die within the confines of a mere 20 million acres of land, out of a total of some 1.9 billion acres.

> "Recreation is a vital need in today's world. It is perhaps the greatest opportunity for self expression . . . . The very phenomena which have brought leisure and income have also brought serious tensions for everyday life . . . . Recreation under conditions of one's choosing is necessary to relieve these tensions. For many, the physical activity of outdoor recreation is vital in building and maintaining physical fitness and in discharging nervous energy. Recreation also has important values in reducing delinquency . . . . Also recreation is good business to individual firms and for the whole community."[7]

We have an obligation to meet the recreation needs of our population within a reasonable distance from their homes. If communities fail to do this in the immediate future, urban sprawl will have consumed so much of the now available land that it will approach economic impossibility to do so later.[8]

Open Space for Conservation

Conservation is not often associated with the built-up portions of our nation. Yet in this era of unbridled metropolitan expansion it is a critical urban problem. Within our nation

we have the most powerful and impressive examples of man's ability to alter the natural environment. Skyscrapers, bridges, aqueducts, expressways, dams, canals - these represent what man has carved out for himself from the raw materials which nature has provided. But we are sometimes unskilled in the use of these materials and find ourselves the victims of our own achievements. Because of man's carelessness, he often destroys valuable resources in his quest for accomplishment. Unfortunately, man's ineptitude often results in air too often polluted, floods running rampant, and even a threatened food supply.

The relationship of land to problems of water supply, and flood and water pollution control is significant in this respect. We long ago recognized the importance of watershed areas but we have yet to effectively relate them to the urban environment. We are spending considerable sums of money for drainage and the avoidance of costly flood destruction, yet we have failed to realize that to control floods adequately we must have much open land.[9] The land cannot absorb a downpour when most of it falls on roads and streets, houses and garages, sidewalks and driveways.

Urbanization makes a great and sudden impact on the natural environment. What is not sufficiently recognized is that society pays dearly for interrupting almost overnight a balance which has taken centuries to develop. Before the advent of urban settlement, about 75 percent of the

spring rains and the runoff from melting snow was absorbed by soil and vegetation.[10] There was little left to cause flooding in the lowlands.

But with the advent of urban development, a new situation develops. Houses, pavements, even lawns, do not have nearly the water-absorptive capacity of the fields and forests they replace. The proportion of runoff which is absorbed en route is insignificant compared to the earlier proportions. Furthermore, swamps and marshes are often filled or drained in the urbanization process destroying crucial natural safety reservoirs. This results in the necessity for expensive storm sewers. Water supplies suffer and floods wreak havoc.

One of the primary by-products of urban sprawl is the need for control of storm water runoff. Only through greater concentrations of development, through building at higher densities and through leaving more land in farms and forests, can the impending load on drainage basins be kept within manageable bounds. It is, even today, common practice to design storm sewers for less than the maximum load that they should accommodate. This may be false economy. Rational alternatives go unused for one reason or another.

Swamps and marshes are the safety valves of a natural drainage system, as well as living and breeding places for wildlife. They fill with rainwater during periods of peak rainfall and over a period of time feed streams and rivers

until their flow returns to normal. These areas are in effect ready-made flood control basins with enormous storage capacity, and their value for this purpose must be protected.

Conservation in Virginia must have yet another goal: the preservation of historical areas. We cannot continue to allow them to be gradually consumed by creeping urbanism. Every historical site that can be saved from exploitation gives tomorrow's generations a living museum as a link to Virginia's past.

Open Space for a Balanced Structure

Ecologists have observed in natural communities a certain harmony among the various members - an ecological balance. Whenever this equilibrium is seriously disturbed, there results a stress which, if prolonged, may threaten some of the elements of the community and, in turn, the survival of the whole. The same principle is applicable to communities of men. Urban society needs the support and balance of living things other than man. Unrelieved development and the steadily lowering density of human settlement which results from our excessive hunger for land is a violation of this principle which may have serious consequences.

It is in sheer ignorance that we do not deal with natural phenomena with the same respect as mechanical ones. Aldo Leopold, one of the nation's leading conservationists, expressed this point very succinctly:

> "We know that engines and governments are organisms that tampering with a part affects the whole. We do not yet know that this is true of soils and water. Thus men too wise to tolerate hasty tinkering with our political constitution accept without qualm the most radical amendment to our biotic constitution."[11]

If the present disordered pattern of urbanization persists, we will continue to lose not only valuable land but also the opportunities to enjoy the social benefits that our technology and economic development are producing. The nature of the modern city is such that its growth has been taking place largely at the periphery. This suburban movement has advanced on an enormous scale. It has been estimated that four thousand families a day have been moving into new suburban communities.[12] Alarmingly illustrating the rate at which open land has been consumed by suburban development is the case of Santa Clara County in California. If all the land withdrawn for urban use in Santa Clara valley since 1947 were consolidated, it would approximate twenty-six square miles; however, subdivisions have been placed in such a manner as to commit a total area of two hundred square miles.[13]

The uniformity with which this relatively low density development has been taking place, and the thousands of square miles that have been consumed by this process, coupled with the leap-frogging or by-passing of substantial tracts of vacant land in the process, has generated the term "urban sprawl" to describe this relatively unstructured suburban development. This uniformity has given rise to an apprehension of over-

standardization. It is true that the external appearance of uniformity accurately reflects the relatively uniform age, marital condition, family size, per capita income, and social status of those seeking refuge in these developments.[14] It has also been pointed out that some of the principal problems that cities face in the future will be in overcoming the deficiencies that have become increasingly apparent in suburban growth.

Dr. Leonard J. Juhl expressed this quite vividly in an address to the American Society of Planning Officials in 1955:

> "I suggest there is more you can do because one of your major concerns in the past has been dealing with blighted areas. Our own blighted areas in the field of psychiatry are our psychotic and severely mentally ill. We have had a need to refocus our concern not only on our blight but upon our resources - the total population. I suggest that you become equally concerned with the contributions you can make to the development of environment that will be conducive to optimal health."[15]

One of the most important of these problems that cities face is the failure to preserve parks or open spaces adequate to meet the needs of our present population and a future population characterized by even greater per capita income, higher educational levels, greater leisure, and substantially greater mobility. This failure to develop a structural balance in our urban environment not only contributes to continued attrition of open land but also results in serious deficiencies in the total spectrum of urban development. Dr. Juhl touched on one aspect of this when he said:

> "We have to ask ourselves more questions about what recreation is. Is it only the well planned parks and recreation centers? Or does man need more room, more wilderness, more freedom? Do children need wild open space in which to run, play, and imagine? Does the adult need wild areas in which to commune with nature, search after the birds, the flowers, and the trees? Does he need, too, the mountain tops and the wilderness areas to help express himself? I think yes."[16]

No less important is the physical structure of the community and its resulting visual effect upon the inhabitants. Some semblance of structural organization affords the individual an opportunity to create an image of his environment with a sense of orientation and community identity. Few can readily recall the location of every street in town, but most can immediately place the location of a park or open space. Too, there is a need for contrast between town and country to more firmly establish the total identity. Our towns dribble into the countryside - subdivision by subdivision. There is no sense of demarkation.

Open space acquired or controlled as a land reserve for future rational development is one means available for achieving a structural balance in our urban communities. Premature and uncoordinated development is the major contributor to the physical and sociological blight prevalent in our communities. With a positive open space program our communities, cities, counties and regions could exercise control and direction over peripheral development in such a way that a balanced relation between urban and rural land uses was maintained and could also

time development consistent with its ability to provide necessary community facilities.

Open Space - A National Goal

The Report of the President's Commission on National Goals[17] in setting forth "a broad outline of coordinated national policies and programs" and "a series of goals in various areas of national activity," strongly affirmed a needed plan for open space in accordance with long-term national needs, and the need to achieve a more desirable pattern of urbanization.

The report called for the acquisition of as much suitable wildland as possible in growing areas where chances will be lost to make the land a part of future planned development. The report saw as critical issues the control of sprawl and the achievement of a more efficient urban pattern through stronger regional planning, land use controls, and policies for control of public services and public land acquisition in areas slated for development.

III. LEGAL MEASURES AFFECTING ACQUISITION AND CONTROL OF OPEN SPACE

An open space program must necessarily proceed on the basis of public power. Public power functions on two levels. First is the reservoir of power held by the states under the constitutional system of our federal government. Second is the public power held in the particular political units or public agencies.

The principal constitutional restrictions on open space action in Virginia are those prohibiting the deprivation of property without due process of law[18] and those limiting the taking of property only for a public purpose and with just compensation.[19] Fortunately, the courts have been sympathetic to the growing needs of communities and to the enlarging concept of the appropriate role of government in our society. This sympathy has been shown in a steadily expanding definition of public purpose.[20]

The powers granted to political units and public agencies originate in the state constitution and may be effectuated in a number of ways, usually by means of statutes. These statutes will tell how much of the legislature's power has been exercised, what conditions are imposed on its exercise, and what procedures must be followed.

The powers with which an open space program is primarily concerned include the power of eminent domain, the police power, and the taxing (and spending) power. Each is a

peculiar power, wholly independent of the others; but at times the differences between eminent domain and the police power are extremely subtle. The police power affords the community the right to regulate the uses of land; but, if in regulating, the action constitutes a "taking," the land is in effect condemned and compensation must be made.

Finally, taxes may be levied and public funds expended only for purposes that are deemed "public." This concept of "public purpose" also extends to the appropriation or condemnation of property. In Virginia the authority to define public purpose is vested in the General Assembly.[20]

The principal powers of government available for effectuating an open space program - both fundamental and statutory - provide the basis for this analysis. These powers include eminent domain, the police power, and the taxing power. These powers and the spectrum of alternative approaches that each suggests are analyzed in the following discussion as they relate to a number of practical problems.

Public Use - A Judicial Question

The courts are the final arbiters in the determination of public use. This is true even in Virginia where the state constitution says that the term "public use" is to be defined by the General Assembly.[21] However, this clause has been ignored by Virginia courts.[22] The Supreme Court has said that its rule in determining if the power has been

exercised for a public purpose is a very narrow one.[23] If the State Supreme Court declares that the use is public under the state constitution and the appeal is brought on the basis of the Fourteenth Amendment,[24] the Supreme Court is reluctant to rule that the use is not public. It has never done so.[25] The Supreme Court recognizes that the scope of public use may change from state to state as conditions vary, and it defers to the finding of the state court that the use is public.[26]

This lack of action would indicate that there is no ground for anticipating Supreme Court opposition to the use of tax money or eminent domain for new open space programs.

Eminent Domain

Virginia derives the power of eminent domain by virtue of its existence as a state. The constitutional clause relating to eminent domain places limits upon this power but is not the source of the power itself. The state may exercise this power anywhere within its own boundaries and may delegate the power of eminent domain to any of its subdivisions or agencies. The area in which a subdivision or agency of the state can exercise the power is dictated by the delegation of authority from the state legislature. Unless otherwise indicated, the subdivision or agency can use the power only within its territorial limits.[27]

Local governmental units in Virginia derive their general power to acquire land for parks and open space from statutes relating to parks, recreation areas, playgrounds, swimming pools, and conservation districts.[28] The Commissioner of Game and Inland Fisheries may acquire land and waters for game and fish refuges or for hunting and fishing.[29] Counties, cities and towns may purchase or accept gifts of tracts for the growth of trees. The Director of the Department of Conservation and Economic Development has the power to acquire "by gift, purchase or eminent domain any property interest of scenic beauty, recreation utility, historical interest or unusual natural interest."[30] He may also purchase lands for state forests.

Under the Virginia Park Authorities Act,[31] one or more political subdivisions may create a park authority. The governing bodies of the subdivisions may specify parks that the authority is to acquire and maintain. If none are specified and there is no objection, the authority may acquire lands for parks of its own selection. Open space is available through urban renewal programs. There is also provision for roadside parks for recreation adjacent to state highways.[32]

It is interesting to note that those statutes which confer the power of purchase do not necessarily confer the power of eminent domain.[33] This could present serious

problems to local governments pursuing an active open space program. It is also interesting that the Director of Conservation and Economic Development possesses the broadest powers for open space acquisition.

The public purpose involved in the concept of adequate parks and recreational facilities is now so universally accepted that there is no legal issue regarding the fundamental legal power to spend money for their acquisition or to condemn land for such programs. In Virginia, however, there exists a very practical problem involving the concept of necessity.

The legislature (General Assembly), the local subdivisions, and administrative agencies determine the necessity for taking property. Many questions occur in the term "necessity." In which of the several approved public uses will the land be employed? Is a park needed? Is this tract more desirable for the park than another? Is a fee or a lesser interest needed?[34] Wouldn't less land be sufficient? Must there be resort to eminent domain? The courts insist that they interfere in these issues only if the action appears to be arbitrary. However, there is a pertinent exception to this stand for non-interference. In a court challenge to a taking by a municipality in Virginia, the political body must prove its position to the court.[35] The local government's statement that it needs the land for a park is not sufficient. It must prove that it needs the land.[36]

In a land acquisition program, such attitudes by the courts can present serious difficulties which should be anticipated. This clearly points out that a program of open space acquisition must be intimately woven with the fabric of comprehensive planning. There is hope. The broadening attitudes of some courts is encouraging. The doctrine of the United States Supreme Court in Berman v. Parker[37] suggests that there is ample range for a well conceived plan of action within constitutional limits. The decision in this case indicated that there need be "no constitutional obstacles to a sound program of community planning."[38]

The Maryland Court of Appeals has indicated that future needs may be considered to sustain legislative determination of necessity to condemn more land than can be usefully employed at one time.[39] This case involved the condemnation of land to enable an additional highway lane to be constructed when traffic flow demanded it. In a similar case,[40] one involving the acquisition of property for a national historical park several years before the government would reach the property under its improvement plan, the court stated that the United States Courts will not ordinarily review the reasonableness of the period that must elapse before the property is used.

In these cases the specific need for the property was shown and the evidence was supported by the use to which neighboring acquisitions were being put. Courts will not tolerate an indiscriminate land reserve program. But it is reasonable to assume that a well developed program of action could be successful.

1. Excess Condemnation

The principle of eminent domain, under which land is condemned, is based on the postulate that the needs of the community should take priority over the wishes or interests of the individual citizens. There is no constitutional requirement that land taken under this authority must necessarily be used for a single public use. If it is within the grant of authority to the condemnor; the condemnor may take more land than that needed for a primary purpose, provided the excess land also serves a public purpose.[41] For instance, in Virginia the State Highway Commissioner may establish recreation wayside parks adjacent to highways.[42] This allocation of authority may be unusual, but it is a matter of statutory delegation of function not constitutionality.

A review of court cases dealing with excess condemnation indicates that the primary problem involved in excess condemnation is whether the excess property has been acquired for a public purpose. This is very dramatically demonstrated

in the case of Cincinnati v. Vester,[43] decided in 1930 by the Ohio Court of Appeals. The case involved property which was being condemned for a street widening project. The Ohio constitution authorized excess condemnation, but the owners brought suit to enjoin the city. In this case, the court recognized three theories relating to excess condemnation. One it called the "remnant theory." Acquisition of property for public improvements often results in parcels of land too small for private use or illy-shaped parcels remaining which prove to be uneconomical as a real estate venture. In such a case it would appear resourceful to purchase the balance of the lots, replat and dispose of them on the real estate market. A lot rendered useless by fragmentation will often command high severance damages, sometimes commensurate with the full value of the total property. In such a case sound economy would dictate condemnation of the remnant. In Cincinnati v. Vester, the court ruled that the remnant theory did not apply.

The "protection of improvement" theory was also ruled out in Cincinnati v. Vester. On occasion it is deemed desirable or necessary to protect the improvement from encroachment by undesirable development through the purchase and control of surrounding property. Such decisions as this led in many states to constitutional amendments expressly authorizing excess condemnation.[44]

The Court of Appeals ruled that the "recoupment theory" was employed in the case of Cincinnati v. Vester. Such a

process involves the purchase of the excess property for resale in order to recoup some of the expense involved in providing the improvement. No less a park than the Bois de Boulogne was financed in this way.[45] The Ohio court held that such action did not satisfy the requirement of public purpose:

> "If it means . . . that property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid."[46]

It is encouraging that even though the lower court's ruling was upheld and is law in Ohio, it was not viewed in the same light by the United States Supreme Court. The Supreme Court's decision was based upon the argument that the city had failed to observe the statutory requirement that the purpose of the excess condemnation must be specifically defined.

The Virginia Supreme Court ruled in Richmond v. Carneal that a provision in the Virginia statutes[47] which authorized the use of eminent domain for the acquisition of land parcels whose value would be substantially reduced by fragmentation was unconstitutional. The court recognized a profit motive and objected on the ground that the excess would be put to private use upon disposal. In so ruling the court stated that the constitution required a direct public use, not incidental benefit. Cases offered in argument to support the propriety of aesthetic purposes were

dismissed as irrelevant. The statute was subsequently amended to allow only for acquisition by purchase or gift.

Excess property may, however, be acquired in connection with park and other public purpose projects[48] and disposed of "in whole or in part" as the city or town "may see fit." Section 15-703 of the Code of Virginia allows that any city or town may acquire by means, including condemnation, property adjacent to or in the vicinity of public property which might impair the "beauty, usefulness or efficiency" of that property. This suggests that the power exists, for there is nothing in the Virginia constitution which denies the power to condemn excess lands in situations not enumerated. It should be noted, however, that the courts are more likely to construe the grants of excess condemnation power as a limitation.

2. Public Easements and Development Rights

Formerly the "taking of property" was restricted to the physical appropriation of property. Today, however, it is generally held that property is taken if a person is deprived of certain rights to property even though title and possession are not disturbed.

Acquiring less than a fee (the whole bundle of property rights) has been common practice by governments for centuries, and there has been no objection to it in principle. Development right acquisition has been practiced by govern-

ment in connection with many programs. It is fairly common for highway departments to buy or condemn scenic easements adjacent to rights of way. With such a program it is possible to control advertising billboards and preserve the natural character of the land viewed from the highway.

Park commissions likewise may acquire scenic easements to protect the view from the parks and to prevent undesirable encroachment about the peripheries. Historic monuments and public facilities also have similar rights.

Only limited property interests are acquired when hunting and fishing rights are obtained over private property. Railroads, highways and public utility programs proceed similarly. Public acquisition of development rights over lands adjacent to airports so as to control the height of buildings within the airport approach lanes is common practice.

In addition to being precedents for the acquisition of development rights, the foregoing instances are useful in predicting compensation for development rights. The method used in the determination is similar to that used for determining severance damages when only a part of a lot is taken: the dimunition in value of the remaining land measured by the fair market value before and after taking.[47] The determination of fair market value will be arrived at through a consideration of the best possible use to which the property could have been put had it been

left unobstructed. The zoning of the property will also bear on this determination. However, the zoning might not be considered conclusive. Courts are cognizant of the fluid nature of zoning.

A recent Maryland statute offers encouragement for such a program in Virginia. This statute expresses the objectives of development rights acquisition and outlines the purposes of such a program.

> "The acquiring of interests in property to preserve open space constitutes a public purpose for which public funds may be spent. Counties, cities and the state department of parks may acquire by purchase, gift, or lease the fee, development rights, or easements needed to achieve this end. These government bodies can also buy the fee and lease the property with restrictions upon future use. Open spaces are either areas of great scenic beauty or areas that - so long as their openness is preserved - enhance the value of surrounding urban development or enhance the conservation of national resources."[48]

Although the statute does not authorize condemnation, it does state specifically that the legislature has declared that the property acquired would be for public use. This provision is necessary because public funds may only be spent for a public use. The legislature apparently hopes that the courts will defer to this declaration; they are not bound by it.

Another interesting provision in the statute is the lease-back arrangement. This arrangement would allow the governmental units to purchase the fees and subsequently lease the property to the original or a new owner while retaining control over the development of the property.

The term "development rights" might possibly imply to some persons that the condemnor acquires the right to develop the property. Confusion of this kind should be avoided at all costs. If the term suggests such connotations, it would be well to allude to the term preferred by William H. Whyte - "conservation easements" - since this interpretation implies an affirmative purpose.[49]

The most difficult problem in a development rights program will very probably be the justification of its public use to a court. So long as the public is prohibited from enjoying the land in conventional ways (such as a park), it will be difficult to demonstrate the public use.

The unusual nature of the interest will not defeat the program however. Any right upon which a value can be placed may be taken through condemnation.[50] Easements need not necessarily be of a type known at common law but may consist of any interest appropriate to the use for which they are taken.[51] Easements include the strip of land acquired by a public utility to lay its wires or pipes and the right to enter the property to maintain the facilities. The restrictions that a subdivider may place on the future use of his lots and which run to his benefit, or to the benefit of other lot owners, are also easements.[52] But as unusual interests are increasingly acquired, the common conception of an easement will change. It is unnecessary to despair at the narrow view of public purpose.

A use can benefit the public without their being able to enter the property. Slum clearance cases reveal a broader theory of public use, though they are distinguishable in that they directly benefit at least a segment of the population.

The Maryland case holding that public funds could be spent to acquire a site to contribute to construction of a building to be used by a privately owned manufacturing firm offers some encouragement.[53] Relief of unemployment and vitalization of the economy were held to be legitimate public purposes.

In Virginia, a public use was found in the fact that the public would receive electricity as the result of eminent domain by a power company.[54] Though the public is excluded from entrance to the property, it should be sufficient that demonstrable benefits will accrue to the public from development rights acquisition.

Depending on the character of the use of the land over which development rights are sought under an open space program, additional grounds may be advanced to the court in support of finding a use public. For example, where farms are involved, the importance of farming to the local economy would be relevant; where golf clubs are involved, the importance of recreational opportunities.

All of the open space that a community needs or wants will not necessarily be in public ownership. Such a condition is neither financially possible nor socially desirable.

Some of this space is provided by private estates, farms and private country clubs. Preservation of these forms of open space contributes to a wholesome balance in the urban structure.

It is anticipated under open space programs that some owners will cede their rights as a gift.[55] Others might sell development rights for a nominal amount. Scenic easements for highways in rural locations have been purchased at very modest figures.[56] Similarly, easements in rural areas near airports in California cost only $15 an acre.[57]

The use of development rights acquisition for the preservation of open space is relatively new. It is, however, a practice which displays great practical promise.

3. Development Rights and Public Uses

To achieve legal acceptance for acquiring development rights in an open space program, every established precedent and every possible interpretation of the law will have to be employed. In establishing the public use of development rights acquisition there is nothing dictating reliance on a single basis. It is possible for the program to serve several public uses, and all should be advanced in support of it. In fact, in establishing a public use or purpose for the acquisition of open space it is normal procedure, and incidentally very helpful to the court, to

establish that several purposes are being served concurrently. A court is not averse to examining the evidence to be assured that the ostensible purpose of the condemnor is the most valid basis for the condemnation.[58]

a. Conservation Purposes

Acquisition of development rights may serve the conventional purposes of watershed protection, flood control, prevention of erosion and other similar conservation measures. But it is possible, with some imagination, to expand this conventional concept of conservation to include a broader spectrum of less obvious, but equally as important, uses. The element conserved might be the agricultural industry of a region. The acquisition of development rights, either by gift, purchase, or condemnation, could sufficiently alter the value of the property in a way that would relieve the farmer of undue tax pressures. Steadily expanding urban growth often creates increased land values which are reflected in the taxes on adjacent farm property. Tax reduction through such a procedure is a novel way of helping an industry; conventional cases usually involve empowering private companies to acquire easements.

Related cases might prove to be extremely useful to communities desiring to pursue a program of development rights acquisition. The Maryland Court of Appeals found a public use in the reduction of employment and the attrac-

tion of industry.[59] The Supreme Court of the United States sustained the exercise of eminent domain by and for private industries important to the local economy.[60]

Subsequent cases involving acquisition of rights of way by utility companies have stretched the concept of public enjoyment of the property by finding the requirement satisfied by the factors of public regulation of the industry and the availability of the public utility to the public at large.[61]

This kind of speculation should not, however, obscure the fact that conventional conservation purposes insure the greatest likelihood of court approval. Moreover, to the extent that a development rights program can be integrated with existing conservation programs, new legislation is not even necessary. Statutes authorizing condemnation for conservation purposes invariably speak of "interests" in property.[62] It is not even essential that this word appear, for an agency given power to condemn a fee can condemn less than a fee. It is for the agency to decide the interest that it needs.[63]

b. Structural Purposes

The structural purpose of directing urban growth is likely to meet with resistance in Virginia's courts. There are apparently no cases of the use of eminent domain as precedents for this purpose. However, some lessons can be learned from zoning cases. Use zoning is prospective

in operation and in essence serves to channel development in desirable directions. While sustaining use zoning in principle, the courts have objected when a use has been assigned to land more in consideration of its benefit to other land than in light of its own potential values.

Buffer zone cases illustrate this requirement. The only time that the Supreme Court invalidated a particular zoning ordinance after having approved zoning in principle involved the designation of a strip of land as a buffer zone between an industrial development and a residential zone. The area was zoned for residential use when it was obviously improper for anything but industrial use.[64] A similar case was decided in Maryland.[65] The Virginia Supreme Court invalidated large lot zoning in two thirds of Fairfax County after agreeing with the trial court that the purpose of the zoning classification was to channel development into the eastern one-third of the county where the costs of government operation were cheaper.[66]

The foregoing cases were zoning cases administered under the police power; compensation may validate such restrictions. Development rights acquisition has not been extensively employed in Virginia; therefore no test cases have been uncovered. But, as with new movements on all frontiers, action is necessary to establish legal acceptability.

c. Aesthetic Purposes

Preserving the natural beauty of the countryside can be advanced as a complementary public purpose. Standing by itself, the case law does not insure the success of a program of this nature. Historically there seems to be inconsistency between what the courts say and what the courts do about aesthetics. It is perhaps wise to accept at face value the reasons that the courts have given for their decisions in assessing the likelihood of approval of development rights programs designed for aesthetic purposes only.

Early cases stating that permits could not be denied for buildings on the ground that they offended the aesthetic senses of the neighbors were striking both at the concept of authority necessary to effect detailed use controls and at aesthetic controls.[67] When use zoning was eventually sustained, it was done on the basis of its relationship to respected state powers.[68] Use zoning keeps more than the unsightly aspects of the industry out of residential areas; it also bars the noise, smoke and delivery trucks. The billboard cases rested on the tendency of billboards to create nuisances.[69]

A review of cases dealing with aesthetic considerations indicates that a program primarily oriented toward preserving the status quo would have little chance of success in

the courts. Aesthetic considerations applied where they do not remedy an obviously unsatisfactory situation will not be sufficient. In a police power case, the Virginia Supreme Court said that aesthetic considerations should be considered but were not enough to justify the exercise of power.[70] It would be reasonable to assume that the same attitude of the courts would apply to eminent domain.

Reconciliation of purposes in a comprehensive program would appear to be the answer to this problem. Justice Douglas in Berman v. Parker[71] recognized this possibility when he stated:

> "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

In legal terminology, "as well as" can mean "or." It may also mean "in addition to."[72] A logical interpretation of the Berman ruling would indicate that so long as utilitarian objectives are advanced, beauty and spaciousness can get a free ride.

This legal attitude should not, however, breed discouragement. Courts continue to recognize an expanding concept of public purpose, especially in their attitudes toward slum clearance. In time, and with proper encouragement from interested parties, this concept should expand to include the visual aspects of the environment as a vital element of the health of the community.

The Police Power

The most comprehensive and pervasive of all powers of government is the police power. As commonly used today, the term assumes a narrower meaning than "the inherent power of every sovereignty to govern men and things." In its more limited sense, it is the power to establish the social order, to protect the life and health of persons, to secure their existence and comfort, and to safeguard them in the enjoyment of private and social life and the beneficial use of their property. It includes the power of government to regulate the conduct of individuals subject to its jurisdiction in their relations toward each other and the manner in which each shall use his property when regulation becomes necessary in the public interest. The police power embraces regulations designed to promote the public convenience and general prosperity as well as the public health, morals, and safety.

Although the nature of the police power is easily understood, it is not susceptible to exact definition. For this power is not something that is rigid and definitely fixed. By its nature it must be flexible and elastic in order to meet new conditions resulting from shifts of population and changes in our economic and social order. Justice Douglas in Berman v. Parker said that:

> "An attempt to define its reach or trace its outer limits is fruitless . . . . The definition is essen-

> tially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.[73]

The police power is not unlimited. It is subject to the constitutional limitations of due process of law, the equal protection of the laws, and other constitutional restraints upon the arbitrary exercise of powers of government. Demands for reasonableness are imposed on police power regulation and provide the opening for court review. One such demand is that the regulation must be reasonably necessary for the protection of health, safety, morals and general convenience and prosperity. Another demand is that the remedy chosen must be reasonable in correcting the evil. The role of the courts in this regard is to inquire whether it is a reasonable conclusion from the evidence that there is some evil warranting regulation and that the regulation chosen is an effective one.

An unreasonable exercise of the police power amounts to a deprivation of life, liberty, or property without due process of law. Sometimes this deprivation is arrived at in a roundabout way. The regulation may be excessive in the court's view in that it constitutes a "taking." Recall that just compensation for a taking is a postulate of due process. Since the legislation would have no provision for compensation, it would in effect deprive an owner of his property without due process of law.

Four elements of the police power may assist in preserving open space: zoning, official mapping, subdivision regulations, and the withholding of public services.

Zoning

From the standpoint of its limited range under constitutional law, zoning is one of the most useful tools in an open space preservation program. To control the future course of development of private land no other tool has had quite the impact of zoning. It is economical for the community and has received almost universal acceptance in the courts of law.

Stripped to its essential, zoning has historically been intimately associated with open space objectives. Setback and yard requirements in the name of health and safety, along with the provision of light and air, have been some of the primary objectives of zoning enforcement. More recently decisions dealing with "daylighting of buildings" and "open space around buildings for rest and recreation"[74] (here dealing with yard and lot coverage requirements) serve to give encouragement for the use of zoning in open space programs.

What limitations are encountered in employing zoning in an open space preservation program and what are the bounds of its application? The following discussion examines a number of specific applications to clarify the present range of the zoning power.

1. Scenic Amenity

Perhaps the least likely to survive a court test, but nonetheless a policy with precedent, is the use of zoning to preserve areas that have demonstrable values of scenic amenity holding up real estate values in residential communities. In the Massachusetts case of Raimondo v. Board of Appeals of Bedford,[75] the developer was denied the right to remove soil, loam, sod, sand or gravel from a particular residential district. The zoning regulation required a permit to make adjustments in the natural terrain. The developer sought to remove a densely wooded hill to make this portion of the land level with an adjoining highway. Evidence was introduced in the court that removal of the hill would be detrimental to the property values of the surrounding residences.

Reasonable interpretation of the decision in this case and logical application of the principles involved could prove to be extremely advantageous in an open space program.

2. Exclusive Agricultural Zoning

Exclusive agricultural zones have been used with success in some areas of the United States - notably in California.[76] Isolated municipalities in New York, New Jersey, and Connecticut have also attempted such exclusive zones where residential development which is unrelated to the needs of the farming community have been excluded.

In order to sustain exclusive agricultural zones, factual proof of the importance of farming to the community would be essential. In areas where farming constitutes a major portion of the economic base this should present a very small problem. The farmers, as William Whyte says, "are in the pivotal position: not only do they own most of the desirable open land left in and near the metropolitan areas, they happen to have a disproportionately strong voice in the legislatures of even the most urban states." With an interested farm group on the side of the planners, "there is a real possibility that for once the rural bias of state legislatures may work out to the good of the cities."

Another approach that might offer opportunity for success in an exclusive agricultural zone program involves the recognition of agriculture as an industry. Originally agriculture was conceived as an industry in zoning cases. In this respect there are several cases which could be brought to bear, at least indirectly. In the New Jersey case of Depew v. Township of Hillsborough,[77] the court recognized the desirability of preventing residential development in an industrial district:

> "We are not unmindful that in the infancy of zoning it was the general practice to permit higher uses in the less restricted district . . . (but) experience has satisfied many that . . . homes are no more appropriate in an industrial district than industry in a residential one. In both situations the baleful influences upon residences are the same. Moreover, industry

> may prefer to avoid the frictions which ensue when discordant uses are side by side. Hence, in seeking a well balanced community . . . a municipality may conclude its welfare is better served by avoiding motley activities within its districts . . . . There is no rule of lay, statutory or constitutional, which ordains that any use has an exalted position in a zoning scheme entitling it to move everywhere as of right."

There is no precedent to indicate how the Virginia court would rule on this issue. However, an Illinois court has ruled favorably on such ordinances.[78]

Once an exclusive agricultural zone has been established, however, there is no assurance that it will be maintained. Zoning ordinances are never immune to change. Pressures can be brought to bear to alter a zoning structure. If farming is once profitable but later proves not to be, release from restrictions can be forced.[79] Hence zoning is not an inviolable solution. It should be used with discretion while recognizing its limitations.

3. Residential Commons

New housing developments might come equipped with common open space for use by all the residents of the development. One method of attaining this is by requiring the subdivider to provide some open space in addition to that required by front, back and side lot regulations. Common ground might also be obtained through manipulation of the zoning laws. A developer facing a minimum lot size might be permitted or required to build upon a smaller lot and devote the sum of the remainder to a common open space.

Conventional zoning laws use the lot as the unit of control, not the entire development. Space in one lot cannot be counted toward meeting the minimum open space requirements in another lot. Neither variances nor exceptions alleviate this problem. Variances recognize only hardships. Occasions for granting exceptions are usually listed; this manipulation of open space requirements is not usually included.

Fairfax County, however, expressly permits this kind of action. Subdivision regulations cannot permit a violation of the minimum open space requirements of the zoning laws. Fairfax County has accommodated the per lot approach of the zoning law to the newer arrival of subdivision regulations. Lots in approved subdivisions satisfy the zoning law if the average size of the lots equals the minimum for the zone.[80] Areas dedicated to public use can be counted in computing the average. But very little variation in lot sizes is permitted; certain new, slightly lower minimums must still be observed.

Loudon County does not specifically provide for permissible exceptions.[81] Instead, it lists standards to govern the granting of exceptions. This approach could allow for residential commons without need to change the zoning ordinance.

Such an approach to zoning as expressed in the two counties discussed above could afford the local govern-

mental subdivisions of Virginia an excellent opportunity for gaining considerable open space without undue litigation or unnecessary capital outlay.

4. Conservation and Safety Zones

Zoning may be used to prevent development of flood plains, wetlands, and other hazardous areas not suitable for building. Limited experience with flood plain zoning has occurred in Florida, California, Wisconsin and New Hampshire.[82]

In a recent report by the TVA, Congress was advised that rapidly growing cities were creating new areas of potential flood danger faster than dams and levees could be built, and recommended that federal funds for local flood control projects be conditioned on the adoption of suitable zoning regulations.[83]

Difficulties arise in flood plain zoning. Primary among these is the problem of reconciling flood plain zoning prohibitions with the objective of encouraging the most appropriate use of land. Too often flood plain zoning is either too restrictive or prejudicial.[84]

The validity of flood plain zoning has recently been exhaustively analyzed and confirmed by Professor Allison Dunham.[85] Professor Dunham lists three objectives upon which the constitutionality of flood plain restrictions may be based:

"(a) protecting others from increased flood damage caused by someone's interfering with the natural drainage flow;
(b) protecting the owner from his own folly - a legitimate objective of public action so long as the individual is not in a position to know the danger when he acquires the property;
(c) protecting the public from flood control and flood relief expenses invited by someone's exposing himself to floods."

5. Large Lot Zoning

Large lot zoning can serve two very important objectives in an open space program. It serves the purpose of open space in and of itself, and it offers the opportunity for controlling and timing future development. Like any exercise of the police power, large lot zoning must be used with discretion if it is to succeed in the courts.

Property owners in Fairfax County succeeded in having the court invalidate a minimum lot regulation in 1959. Zoning in Fairfax County had placed most of the western two-thirds of the county in a district in which development was permitted only on lots containing two or more acres. Around two incorporated towns and four settled communities, the minimum lot size was to be one acre. The Virginia Supreme Court sustained the lower court's finding that the real purpose of the zoning was to prevent the development of the area and to channel new population into the eastern area where the cost of operating the government would be more economical. The court found that in effect the ordinance reserved the western area for those

who could afford two acre lots. Such a purpose bore no relation to health, safety, morals, prosperity and the general welfare.[86]

This case bears significant relevance to an open space program using large lot zoning as a tool of accomplishment. It reveals that courts will satisfy themselves as to the real purpose of the zoning ordinance or of any legislative action. Discretion is demanded in zoning; discrimination is not tolerated. A successful venture in large lot zoning must necessarily be interwoven with a comprehensive plan for development. Where such a policy is to be employed to control the timing of development it would be wise to introduce some measure of flexibility into the ordinance. The village of Clarkstown, New York established certain districts zoned for acreage with a bold indication that they were scheduled to be rezoned in the future as development demanded it. Under this ordinance, application may be made for a permit releasing land for more intensive development.[87]

Court tests which have taken place to date in other areas have evidenced a trend to uphold large lot zoning. One case in Connecticut upheld the zoning of four acre lots in New Canaan.[88] Another case in New Jersey upheld the zoning of five acre lots in a rural community.[89]

6. Official Mapping

Planners have long been concerned with the problem of

controlling the building of structures in the paths of proposed streets and on sites intended for other public use prior to the time that the city is in a position to acquire the land. One of the most successful devices for accomplishing this purpose has been the official map. The function of the official map is not to compel dedication of land without payment of compensation, but rather to discourage building on the areas which the city proposes to acquire at some future date. The primary purpose of the restriction upon use is to keep the municipality from having to pay excessively high acquisition costs for the land or rights of way when the city is in a position to acquire them.[90]

In many jurisdictions, the official map ordinance pertains only to streets. In some others the act also seeks to control building within the mapped areas of sites designated for parks, playgrounds, and certain other public uses. Recently proposed planning legislation for Virginia makes this provision.[91] The reservation of areas for parks and playgrounds is subject to the limitation that the municipality must purchase the land or institute condemnation proceedings for such land within one year after approval of the final plat.

Courts recognize that the filing of a map restricts the property owner's freedom of choice; it gives him an

additional limitation to consider. But the limitation does not constitute a taking.[92] Some legislatures in the past have attempted to force the issue by announcing refusal to compensate for construction accomplished subsequent to the filing of the map. Such warning deprives the property owner of any real choice. He is effectively deprived of any use of the property. Such a statute was tried and held unconstitutional over one hundred years ago in Maryland.[93] A similar statute failed again more recently in Pennsylvania.[94]

Mapping as a technique for preserving open space is applicable as a temporary measure in an open space program. It will not, under present or proposed law, guarantee success for longer than the period of time established under the law. In effect, it provides time for consideration and gives the local agency an opportunity to acquire.

7. Subdivision Regulations

Subdivision regulations present the community with more opportunities for preserving open space in areas scheduled to be developed as residential districts. At the time the acreage is subdivided into lots, the community is afforded its last clear chance to set aside sufficient areas for recreation.

a. Forced Reservation of Open Space

Localities throughout the United States are experimenting with subdivisions as a means of preserving open space. In some areas the standard, uniformly imposed by ordinance, is five percent of the gross area of the land being subdivided. This standard may vary from three to twelve percent, and usually bears a reasonable relationship to the density pattern established for the subdivision. In other localities, population density is used directly as a basis for allocating land for open space. Radnor township in the Philadelphia metropolitan area requires two acres for every one thousand estimated future population. Raleigh, North Carolina and Stockton, California have established a standard of one acre for every one hundred families.

Despite the existence of this practice, certain questions of constitutionality arise. Most important among these is the objection that forced dedication is tanta-

mount to eminent domain without compensation. This argument is countered by the argument that recording or subdividing is a privilege that the government can condition.[94] Certainly, recording can be conditioned. But the difference between a mere regulation and a "taking" is often only one of degree. How great a condition can be imposed before there is a "taking"?

A California case promises hope for the success of a program involving forced reservation of open space.[95] In this instance the dedication imposed involved the dedication of a ten foot strip for trees and bushes. The court sustained the argument of condition over the eminent domain objection. This case is important for it sustains the conditioning of subdivision itself.

Two cases have dealt expressly with dedication of park space as a condition of approval. In Oklahoma, a planning commission enforced a rule which required that five percent of the area being subdivided, in addition to streets, be dedicated to the city. The court stated that it was not its concern to determine the validity of the regulation. The subdivider had not only indicated the five per cent and recorded the plat, but had sold some of the lots before he had challenged the regulation. Since the buyers had relied on the fact that some of the neighboring land would be used as a park, the subdivider was stopped from challenging the validity of the regulation.[96]

A case decided by a lower court in New York[97] dealt directly with a condition requiring the dedication of park space as a requisite for plat approval. The condition was upheld. The plat provided for 2000 lots - a complete new summer colony. Acting pursuant to a state statute that required the plat to show, in proper cases, sufficient park and play areas, the planning board refused approval of the plat until the subdivider dedicated more open space. The court agreed that the condition was reasonable. The subdivider's purpose was to establish a summer colony. He must, therefore, dedicate sufficient space to provide for the ultimate use of the area.

Allison Dunham uses this case to illustrate his theory of the interaction of eminent domain and the police power.[98] He believes that the eminent domain power - compensation - is essential when the state takes or restricts property for the benefit of the general public. But the police power - no compensation - is sufficient to prevent the property owner from imposing a new cost on others. Subdivision brings more people into the community and increases the pressure on existing park space. The subdivider, or the buyer to whom the costs are transferred, should be held responsible for paying this cost. Imposition of a reasonable surcharge upon the development is not inconsistent with the view of the courts that some problems created

by increase in density are "mere incidents of municipal growth"[99] that must be suffered by the community. Though the community may not refuse to accommodate increased population, it may use its powers to accommodate it in a way that is equitable for new and old residents.

Dedication of land depends not only upon the subdivider, but it also requires acceptance by the community within a reasonable time. The courts do not expect communities to be able to absorb hurriedly every parcel that owners dedicate. Until accepted, the community is not responsible for the land.[100] The Virginia subdivision statutes resolve the problem of tax and tort liability by stating that recording constitutes a transfer to the public authority.[101]

The resulting tax problem will require attention. However, it should not be too difficult. Taxation on the open space can be collected in resulting higher assessments on the neighboring land that benefits directly from the improvement.[102]

b. Cash in Lieu of Land

Forced dedication of open space by subdividers is not always the most successful solution to the problem of land reservation. When effectively enforced, the plan "often results in turning over to the city areas too small to be useful, or lands too expensive to maintain."[103] To avoid these problems, cities have employed two alternative

plans: an optional type of regulation calling for land or for a cash contribution which is lumped with other contributions in a special fund for acquiring park land; or a regulation calling for cash contributions only.

Upland, California was prevented from imposing such a regulation in 1957.[104] The court, however, did not consider the constitutionality of the regulation; imposition was not within the grant of authority from the legislature. Oregon, on the other hand, upheld a similar regulation in 1958. In Haugen v. Gleason,[105] the plaintiff challenged the subdivision statute which required the subdivider to dedicate park land in the subdivision or make payment of $37.50 per lot to be used for park purposes within one-half mile of the subdivision. In the court's ruling, Judge Crawford stated:

> "There can be no question but if the imposition of land dedication or payment of $37.50 a lot is to be regarded as for revenue primarily and not for regulation in connection with reasonable exercise of the police power, it would be a tax subject to constitutional limitation in connection with its imposition. Here, however, it had and has no such incidence. Property so acquired and moneys so paid are to be used 'generally' within one-half mile of the subdivision for purposes indicated. It is intended as a control upon 'unbridled' development; is addressed to the making of provision for the public welfare, etc., when subdivisions are developed with the creating of added population concentration, children, etc., thus reasonably necessitating such action for accumulation of property or funds for park, playgrounds, etc., in the area affected. The fund is created and expended in proper police power exercise necessitated by the development and rising therefrom. In no sense is it a revenue raising measure. It is an appropriate exer-

> cise of the police power in production of parks in the vicinity necessitated by the subdivision activity. If one wishes to subdivide he subjects himself to reasonable police regulations. No more than that is here involved. The amount thereof is arrived by formula and again this is within Commission discretion. I cannot interfere with it. There is no showing it is excessive or unreasonable in amount and not reasonably addressed to proper objectives and purposes of the Commission."

Two implications of this ruling should be borne in mind. The regulation requiring payment in lieu of land must be reasonable and the amount of the payment arrived at through a method which is applied uniformly. It would appear that the favorable ruling in this case also depended upon the fact that the money would be used for acquiring open space within a reasonable distance from the subdivision affected.

A case in Suffolk County, New York forbade the retroactive application of a similar regulation. Reggs Homes, Inc. v. Dickerson[106] prevented the county from charging the plaintiff $50.00 per lot to be allocated to the park fund on a subdivision which had been recorded in 1946.

The legality of such a cash condition in the absence of specific enabling legislation has been the subject of controversy and divided opinion in the courts. Thus far, Virginia courts have not dealt with this subject.[107] The proposed planning enabling act[108] should serve to eliminate any problems of this nature that might arise. The proposed act provides that:

> ". . . if the local commission determines that a suitable park or parks or other public facilities cannot be properly located in any such subdivision or is otherwise not practical, it may require as a condition to approval of such subdivision plat payment to the county or municipality of an amount to be determined by the governing body, which amount shall be placed in a special fund and may be made available solely for the acquisition of other property for recreational, educational, or other public purposes in the general vicinity of such subdivision; . . . ."

c. Withholding Community Services

Charles Eliot suggests a method of stifling or channeling development by controlling the provision of community services. The proposal calls for providing or withholding necessary services according to a plan of community development. He analogizes to the duty imposed on public utilities to obtain a certificate of convenience and necessity before extending their services. He indicated that the issue in such applications is whether the extension will pay its way so as not to require an increased burden upon the rest of the community. Mr. Eliot asserts that:

> "No change in basic concepts is required to shift the emphasis in judging the need for extension of both utilities and Government services and improvement from just whether the investment will pay off to whether this is the time and the direction in which to encourage urban growth."[109]

The change in basic conception would necessarily have to be a radical one. A court's reaction as to whether a man can build at all on his property, assuming that he has not been compensated, has been firmly answered in the zon-

ing laws. Zoning laws are permissive as well as restrictive; permissiveness is essential to their validity. Services amounting to conveniences - such as bus service or schools - can probably be withheld in order to influence subdividers in their selection of sites for development. Necessities, however, cannot be denied lest development be prohibited indirectly in contravention of the permissiveness required of the law and the requirement of compensation upon the taking of property.

This requirement is not inflexible. Reasonable discretion permits refusal of requests for extension of service facilities. It appears that when refusal has been found to be reasonable, the extension or provision of services would have generated costs that would necessarily have been reflected in the cost of the services to other users. In this light, it is doubtful that pure planning considerations would be respected by the courts.

Taxation

The tax power as an instrument for encouraging the preservation of open space appears to be in direct conflict with the policy of a community for raising needed revenue. This is true in the short run. However, viewed as a long range plan, differential taxation may, in fact, considerably enhance values in the community and be reflected in greater taxable value.

Of course, total revenue foregone by tax concessions or tax differentials might not be recovered. This circumstance must be realized before a community embarks upon an open space program. Parks and recreation areas have seldom been regarded as revenue producing enterprises. Even in conservation programs, an adjusted system of values must necessarily be employed.

1. Assessment of Taxable Value

In order for differential taxation to be employed as a method of encouraging open space preservation, there must be constitutional provisions allowing a variety of measures for the inducement and support of programs deemed to be socially desirable. Under present constitutional interpretation, such a program would receive questionable treatment in Virginia's courts.

The Virginia Constitution provides that all assessments of real estate and tangible personalty be at fair market value.[110] Valuation of some properties at use value has been held in conflict with this constitutional requirement.[111] In effect, one particular technique for valuing property for tax purposes has been given constitutional priority.

Apparently, the drafters of the Virginia Constitution felt that compulsory fair market valuation would be the best method of effecting another constitutional provision[112] requiring a uniform burden of taxation upon the

same class of subjects within the territorial limits of the tax jurisdiction. Equality was the principal objective. It appears from past practice that in any case where the requirements of equality and fair market value are in conflict, equality is preferred.[113]

This requirement of equality should not, however, be taken literally. It has always meant a uniform burden upon the same class of subjects within the tax jurisdiction.[114] The constitution contemplates the drawing of tax district boundary lines. More important, the constitution contemplates the power to classify by objects for taxation. Power to classify has been ceded to the legislature.[115]

Classification followed by a lower assessment in Virginia might be too much in conflict with the fair market value clause of the constitution. Classification followed by a lower rate of taxation could produce a different result in the courts. The question which remains unanswered is whether Virginia's Supreme Court will recognize lands which a community desires to keep open as unique enough for separate classification and separate rates or whether they will insist upon absolute uniformity.

2. <u>The Farm Problem</u>

The pressure on farm land created by rising land values and correspondingly higher taxes is a nation-wide problem. Available statistics indicate that farm property taxes

are on the rise across the country. According to Census Bureau reports, they have been going up since 1940, and are now rising at the rate of 6% per year. Virginia shares her portion of this national burden.

The use of the differential tax technique employing a lower rate of taxation for farm land could relieve Virginia farmers from some of this financial pressure. The constitutional contemplation of tax districts could be brought into play with the boundary lines corresponding with rural areas. Such a policy would help a community to preserve, at least for a time, farm land within its jurisdiction and thus to benefit from the open space that it provides.

Lower taxes, of course, will not assure that the farmer will not at some later date yield to the temptation of a subdivider's offer. To prevent, or at least discourage, this happening, some provision must be made. It has been suggested that in the event of sale, the farmer be required to pay back taxes as a condition for sale. This is comparable to the forest yield taxes whose objective is to impose the burden at a time when the forest owner can bear it so as to avoid premature cutting. Virginia will suspend the collection of taxes on forest land suited for timber growth when it is offered to the Department of Conservation and Economic Development as a temporary game, fish and recreation reserve.[116] The same attitude might be taken toward farm land - in a less extensive sense.

Other potential open space uses could receive the same consideration: golf courses, vacant land, and private recreation uses.

3. Tax Concessions to Encourage Gifts

Virginia permits deductions or exemptions from income, gift, and estate taxes for gifts of land for open space uses. The statutes would also apply to gifts of endowment funds for cash and securities to acquire open space or to maintain such lands.[117]

A property owner can be eligible for these deductions and exemptions if he limits his gift by remaining on the land for life or by giving only the development rights of the property. The deductions and exemptions are taken at their fair market value. In this way the donor is spared the capital gains or high estate and gift taxes that would accrue if he transferred the property to private hands.

Property taxes, however, cannot be avoided by a gift that permits the donor to remain on the land. Virginia has statutes indicating that the life tenant would continue to be assessed.[118] A constitutional amendment would be necessary to relieve the life tenant of property taxation.[119] The donor of development rights will also continue to be assessed. In any case, however, the gift should greatly influence the amount of assessment. Loss of development rights will eliminate the cause of high valuation near

urban development. Knowledge that the public will enter upon the death of the donor should also serve to reduce the value of a life tenant's interests.

Statutes authorizing acquisition by condemnation also permit acquisition by gift. They also speak of "property interests" and not merely "fees." It would seem, therefore, that these statutes would authorize the acceptance of gifts of both fees and lesser interests. There are other statutes that can be construed either as complementing other statutes or limiting their generality.[119] Whatever conflicts there might appear to be in the authorizations to accept gifts, however, exist at the statutory level and not at the constitutional level.

4. Tax Inducement Considerations

An analysis of the tax implications for a donor of property to be used as public open space is useful for a community interested in pursuing an open space program. The taxes involved are primarily:

a. Property Taxes

Owners of tracts of land suitable for open space uses find that with increasing urbanization taxes constantly rise to take care of school needs and other services for the growing population.

b. Estate Tax

Estate taxes are payable on the fair market value of

property at the time of death of the owner. This is apt to represent a highly appreciated value compared to the original cost of the property.

c. Tax on Capital Gain

Under the federal income tax laws, a seller is taxed on the capital gain which is represented by the difference between the "adjusted" purchase price and the sales price.

These tax considerations represent significant advantages to a possible donor and conceivably could be used as a strong inducement to making a gift.

IV. NEW FRONTIERS

Urban expansion is continually challenging conventional measures for controlling land uses. Open spaces, historically taken for granted, are rapidly disappearing. Our future is threatened by an unbridled megalopolis, described as a continuous city stretching from Augusta, Maine to Richmond. Unhappily, the threat of megalopolis is not limited to the eastern seaboard. Urban expansions in the Midwest and in the far west are rapidly creating similar situations.

Concern over the rapidly disappearing countryside has given vent to some bold suggestions for preserving open space and structuring the urban community. The following discussion explores and appraises some of these significant proposals.

Charles Abrams' Proposal

Charles Abrams suggests that an open space program could pay for itself. He proposes the purchase of large areas of land in the path of impending urban development and resale of the land at the fair market price. Presumably, reservation of park space or simply holding the land until subdividers demand it would produce higher value at resale than at purchase.

> "State land-renewal agencies would be organized for the main function of acquiring vacant land outside city boundaries. The state agency would have

> power to acquire large areas, improve them with streets and utilities, and resell them for private development according to a prearranged plan. Land essential for schools, parks and other public uses would be preserved. The state and federal governments would contribute the essential subsidies for acquisition and improvement, and the land would be resold at market value."[120]

Precedents that would be considered in a test of this program include the two unfavorable excess condemnation cases discussed earlier.[121] Although the courts suspected profit motives in these cases, these were not the determining factors in their decisions. Such a happening would make any scheme suspect but would not necessarily kill the arrangement. That a private benefit is bestowed in a condemnation scheme is not always unfavorable in the eyes of the court. That there was no overriding public purpose in the scheme was the primary determinant of the outcome of the cases. The federal court found that the purpose was only to obtain reimbursement for the capital outlay for a public improvement. The Virginia Court did not think that replatting lots was a sufficient public purpose, and it also suspected a profit motive. Although the element of profit to the state in a program using Charles Abrams' approach would be incidental to the main purpose of the program, there still exists the possibility of legal disfavor.

Slum clearance cases, however, are more positive. In the slum clearance cases, resale to private parties

has been treated by the state court as being only incidental to the whole scheme.[122] The Supreme Court labeled it a legitimate tool for the government to employ.[123] This favorable treatment of resale, in contrast to the excess condemnation cases, followed from the courts' being satisfied that the taking was fundamentally for a public use. If the courts can be convinced that open space in any of its forms is a public use, they may treat the resale feature of an open space program similarly.[124]

1. The Urban Renewal Approach

The urban renewal experience under Title One of the federal act shows the way to a direct approach which is greatly superior to other less reliable means of open space preservation, yet is consistent with our democratic way of doing things. Land agencies could be set up under state law to operate in the path of impending urban development. The agency would acquire large parcels of land, plan their reuse, reserve land for open space and other public needs, and dispose of the balance to private developers. It would be planned in such a way as to give vent to development pressures, yet prevent urban sprawl. In the end, there would still be private ownership and control of property, but the countryside would not be despoiled; and, too, the community would be able to control the timing and development in order to reap optimum benefit for its citizens.

The urban renewal precedent is apt for many reasons:

(a) Here is a body of experience in subordinating to local democratic control a land agency having sovereign powers to acquire and redistribute landed property.

(b) Here is a mature relationship with the financial community; the open land programs could use tested formulas for loans and mortgage insurance. Subsidies would probably not even be needed.

(c) Here is a body of knowledge of the relationships between land agencies and private sponsors. The big developers who are now developing our suburbs could be offered a meaningful plan.

(d) Here is constitutional law on which to rely. It is assumed that such a program would be adopted by the legislature only following hearings which established the evils of urban sprawl and the related problems of open space and urban development which the program would be designed to meet.

There still would exist the problem of scale. On what level should a program of this nature operate: state, regional or local. It will be possible to make this decision only when the full facts of a particular situation are available.

2. Use of the Purchasing Technique

Purchase of open land has been used more broadly in countries other than our own. However, to point up a

domestic example, the Borough of Mountain Lakes, New Jersey, bought up all the vacant land in the Borough a few years ago. Land was then sold to developers in small parcels in order to keep the rate of development within reasonable bounds. It is not altogether clear whether this practice is constitutional in New Jersey, but so far it has not been tested in the courts.

Another approach was used by the Western Pennsylvania Conservancy. This nonprofit organization, with funds raised by private subscription, has purchased approximately 3,500 acres of land near Pittsburgh for recreational purposes and has given much of this land to the state for park development.

a. Sweden

Stockholm, Sweden, several years ago purchased all the land in the metropolitan area of that city. The purpose of this purchase was to both preserve some land in permanent open use and to control development. A goodly portion of the open land was rented (or leased) to farmers. Quite often these farmers were the owners from whom the land had been purchased (lease back). Income from the rentals paid the costs of acquisition, and, in addition, provided a source of income.

b. Netherlands

In the Netherlands as long ago as 1950, the "Society

for the Protection of National Monuments" was organized to buy and retain important open spaces. This was intended originally to apply only to those open spaces of historical significance; later, any that might contribute to public enjoyment. The society raised its funds through the public sale of shares and by 1956 owned more than 36,000 acres.

In addition to the national society, each province in the Netherlands now has a similar private organization. The provincial organizations are called "Landscape." Both levels of societies now receive some government aid, but the primary source of income is from the sale of timber from the lands that they own.

Another technique employed by the Dutch is what might be termed "not quite purchase." Under the National Beauty Act tax concessions are granted to estate owners who are willing to preserve the wooded character of their estates, with increased concessions for owners who open their estates to the public. This is somewhat similar to the development rights program and the idea of tax concessions discussed earlier in this paper.

c. Canada

A program designed to purchase a greenbelt of 59 square miles around Ottawa, the capital of Canada, has recently been requested by the Prime Minister. The Prime Minister asked the national legislature for laws and funds to enable

the government to undertake the project. Most of the land is to be leased to private owners, with the expectation that rental payments will cover purchase costs and operating costs.

This action is of special interest because three years ago the Prime Minister attempted to accomplish the same objective without purchase. He asked the City and Province to preserve the open space by regulations prohibiting development. To insure the program he offered financial help from the national government to compensate owners for the loss of development rights. He also promised that agencies of the national government would cooperate by refusing to underwrite development in the area. However, this approach failed and it was necessary to resort to purchase.

The California Statute

The direct approach to the problem of our vanishing open space is involved in the recent California statute.[125] This statute authorizes cities and counties to acquire open space "by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds." These agencies are authorized to secure fees or lesser rights in real property for the purpose of preserving, through limitation of their future use, open space for public use and enjoyment. The statute is limited. It should probably extend to the state and to other pol-

itical subdivisions, and the open space definition could profitably be broadened. But the statute is a beginning.

Open spaces identifiable as worthy of preservation in their natural condition would lend themselves to the use of this technique. A question of constitutionality is involved but should not present any real difficulty if the test case is a good one. The real problem is how the cost would be financed. This would severely limit the general usefulness of such a program.

Special Zones

A recent proposal by Charles Eliot in a report to the National Capital Planning Commission recommends the use of special zones for the purpose of preserving in their present use certain categories of low density use. Not only would this apply to exclusive agricultural districts where appropriate, but in addition to "'O' zones applied to existing parks and public open spaces, stream valleys and flood plains, watershed protection areas, and golf and country clubs where such open spaces are shown on the master plan as desirable and permanent."

Such an approach would not necessarily distend the present conception of the police power. Objections may well be raised if the application becomes discriminatory. But a broad category such as the one Eliot proposes might well be developed within the framework of existing zoning ordinances and, while limiting, need not necessarily be confiscatory.

A precedent which might be used in support of such a program is a case in the California courts dealing with exclusive recreational districts. Manhattan Beach, California succeeded in enforcing the zoning of certain ocean frontage for recreation purposes only, even to the exclusion of a home for owner occupancy.[126]

However, exclusive zones for other than non-residential uses have in the past met with some disfavor in the courts. In the case of Vernon Park Realty v. City of Mount Vernon, the New York Court of Appeals held invalid the zoning of a parcel of land near the railroad station for use as a parking lot only. The court held that:

> "However compelling and acute the community traffic problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose."[127]

Varied opinions exist in the courts in the matter of special district zoning. The legality of these zones will continue to be determined case by case. Validity would appear to rest on the basis of an overall program of public purpose.

Regardless of these attitudes, zoning is being used to keep land out of development altogether in some areas of the country. In California, cities have zoned their entire land area exclusively for agriculture.[128] In Wisconsin, large areas in the state are zoned exclusively for forest and recreational use.[129] Even farming is not permitted.

In Denmark, zoning is carried even further as a means of preserving open space. National law requires the development of a regional plan around each major city. In the region which surrounds Copenhagen, land is divided into three broad zones: the first is land available for immediate development; the second is land which should not be developed for 15 years; and the third is land to be preserved indefinitely for agriculture and other open space. Land owners in these areas who are deprived of their property rights are compensated for their loss by the national government; compensation damages are determined by a special commission established by the government.

The Maryland - Massachusetts Approach

Both Maryland and Massachusetts have considered admirable approaches to the problem of reserving open space through tax concessions. In Maryland, a statute which extends to all owners some compensation for their forbearance has been adopted.[130] Under the Maryland statute, it is possible to designate certain areas on the master plan as reserved for public purposes. The owner is prohibited from improving the property which has been so reserved for a period of three years. As a consideration for this restriction, the owner is exempted from real estate taxes for a period of the same length. After this period, some other arrangement must be made; either the local government must purchase, release, or perhaps renew the arrangement.

In Virginia, such an approach might be blocked by the current attitude toward uniformity and equality of tax assessment.

Massachusetts is currently considering a proposal by Charles Eliot which would defer property taxes on land registered as open and available for public use. Similar in concept to the Maryland statute, this approach would receive the same type of scrutiny in Virginia courts.

The British Experiment

Perhaps the boldest of all approaches to land development control was instituted by the British in the Town and Country Planning Act of 1947. This measure provided new procedures to facilitate prompt land acquisition by local authorities in England and Wales. In addition to broad new measures affecting housing and industrial development, the act authorized the establishment of national parks and encouraged local nature reserves.

The act created a new framework for planning in Great Britain. Among other new and broad planning measures, it provided for:

1. the preparation of comprehensive development plans by 1951 for all planning districts;

2. the transferring of all development rights to the community, making all development subject to permission of the local planning authority or of the central government;

3. the establishment of a fund of three hundred million pounds for owners who incurred hardships under this legislation.

The last two of these provisions were repealed in 1953 by the Conservative government. However, during the six-year interval, the local governments were able to direct and control development of the land under their jurisdiction through exercising control of development rights.

Of course such a bold measure of condemnation would be inconsistent with our constitutional way of dealing with property rights. However, the underlying approach in controlling land through the development rights is essentially sound and is possible under our own constitutional law as has been discussed earlier.

V. SUMMARY - A PROGRAM OF ACTION

The value of open space for recreation, conservation, peace of mind, and a structural element in the building of communities has been established. Most local subdivisions would like to be able to pursue such a program, but the threatening maze of legal entanglements is too often the reason for failure to even undertake an open space program. This study presents a number of existing laws and legal interpretations which will permit without undue stress on local officials, a variety of approaches to an open space program. It is hoped that this analysis will also suggest new and imaginative possibilities to those persons interested in pursuing an open space project.

Acquiring Open Space

Of course the most direct and efficient way of acquiring open space for whatever the need is through outright purchase. Such purchases may be made on the open market or through the exercise of the eminent domain power. Local subdivisions in Virginia do not possess broad powers of acquisition. Courts insist upon proof of public purpose, which is as it should be. The difficulty exists in the limited definition of public purpose.

We have now, however, the opportunity of dealing with a progressive program dedicated to our objectives. In the summer of 1959, the State of California enacted a law giv-

ing cities and towns the authority to acquire land, or an interest in land, in order to preserve open space. The law has not yet been tested in the courts, but from all indications it would appear that when and if it is contested, the courts will look favorably upon its intentions.

Similar enabling legislation in Virginia would open the door for progressive and positive open space programs.

Acquisition of complete interest in property need not necessarily deprive the community of any income from the property such as it would have received from property tax. A lease back arrangement with the present occupant is one way a community may preserve open space and continue to receive income. The California statute expressly permits cities and counties to acquire land and lease it back to the occupant.

1. Acquisition of Development Rights to Control Development

A community need not necessarily acquire land in fee simple and take public possession of the land in order to preserve open space. Complete ownership is only one of the many legal ways of accomplishing this objective. The possibility of acquiring public easements in the form of development rights has been proposed by some as a feasible means of preserving the necessary open space and also at the same time controlling future urban expansion.

Property is described as a bundle of rights, and one of those rights is the right to develop the land. Statutes authorizing the purchase of land usually mention lesser rights in addition. Even when this is not the case, it follows that an agency having the power to acquire land would also have the power to acquire this lesser right of development. In many instances this would be adequate to accomplish open space objectives.

2. Excess Condemnation

Excess condemnation means condemning more land than is absolutely necessary for the initial project for purposes of rounding out the site and enhancing and protecting the principal improvement. This approach offers great possibilities for an open space program. In this way, recreation and park sites could be acquired as excess to a non-recreation project.

Although there might be some legal difficulty in acquiring land to be later resold to private developers, the possibility of this type of program exists.[131] Legal advice should be secured when such a program is undertaken and the intent must be clearly a public purpose.

3. The Land Bank

Although constitutionality of this matter is by no means clear, (and certainly it is not uniform from state

to state) the idea of a municipal land bank offers a community an excellent opportunity for acquiring and locating parks and recreation areas within its boundaries. Tax delinquent property is a very fertile source. Lands so acquired might form the basis for a park scheme or may be made the subject of barter for other lands which are more suitable for the purpose.

If it can be shown that the purpose of such a bank is the provision for future necessary public facilities in the most efficient manner for the public good, the scheme should have very little difficulty in the courts. Lands could be traded, if the demand arose, to subdividers or other developers and any profit accrued would be purely incidental to the primary objectives of the program.

4. Gifts

Purchase and foreclosure are by no means the only methods at a community's disposal for acquiring open space. Gifts constitute a remarkable proportion of the land which is at present in park and recreational use. More than likely, the primary reason for the failure of a community to receive gifts of land for public uses is lack of communication. It requires a certain amount of effort and imagination on the part of the local agency to secure gifts. Owners of estates and large land holdings quite possibly would be willing, and perhaps eager, to give to the community

the development rights to their property in return for the assurance of protection from undesirable encroachment. Many of them do not even know that such an arrangement is possible.

This approach to open space acquisition and/or control could open up many new avenues for local governmental agencies.

Controlling Open Space

Short of purchase or condemnation, there exists the spectrum of powers included in the police power held by all communities which can be used in an open space program. Through imaginative use of these powers, a community can go a long way toward realizing open space objectives without the necessity of a paralyzing capital outlay.

1. Zoning

The ability to control the use of land through zoning should be more enthusiastically applied toward realizing the objectives of an open space program. True, this may require imaginative interpretation of the laws regarding zoning and perhaps it will even require that the courts be convinced - in some instances, but the final result will be worth the effort.

Zoning should be employed in suitable instances to prevent building in flood plains and other areas of natural

hazards, and to protect areas of natural scenic beauty. Of course, courts will not permit confiscation, but, used judiciously, this authority can contribute considerably to the objectives of an open space program.

Exclusive farming districts have been used effectively in some parts of the country. Large lot zoning has also received favorable recognition by some courts; although not in Virginia. Nonetheless, this by no means precludes its use, if properly done with an acceptable public purpose as the basis. In this way, communities would be able to preserve their valuable farm lands and at the same time realize open space objectives.

The limited ability of zoning to maintain a level of security should be realized. The tendency of zoning to yield to changing conditions and market pressures makes it a poor risk in the long run as a primary measure for realizing permanent open space.

2. Subdivision Regulations

New subdivisions present local agencies with a variety of possibilities for open space. Required dedication of land and cash contributions in lieu of land for parks and playgrounds are but two of the possibilities. Standards should be formulated for the compulsory contributions that would apply to all developers, including commercial and industrial.

There are also other ways of accomplishing open space dedication. Through the encouragement of cluster type housing developments and flexible minimum lot requirements open space bonuses can be realized. A recent development in Montgomery County, Maryland testifies to this fact. Montgomery County recently passed a new zoning regulation which will permit variations in lot sizes in subdivisions; the size of an individual lot can be below the average specified for the zoning district provided other lots or land left vacant by the subdivider average out to the minimum lot size requirement for the district. Such flexible provisions are one way of encouraging open space development without involving compulsory dedication. Fairfax County has similar legislation.[132]

Tax Policies

Under present Virginia Tax Laws, little can be realized in the form of concessions or encouragements for open space dedications. It would seem that legislative reappraisals are not only desirable but necessary in order to insure the success of a state wide effort toward these valuable objectives.

The following suggestions would seem to be logical initial first steps:

1. Legislative action which would make it possible for local governmental agencies to exempt from property taxa-

tion all land which has been ceded to the public as a gift, and upon which the owner is granted the right to remain for a mutually agreed period of occupancy.

2. Legislative action which would enable a community to abate taxes on lands which the owner agrees to grant the general public privileges of use, and upon lands which the community wishes to reserve for possible future acquisition.

3. Legislative action which would enable a community to relate property tax assessments to the usability of the land when the use has been influenced by either a comprehensive plan of development or by topography or other natural determinants.

The Massachusetts Legislature now has under study a proposal by Charles W. Eliot. Under this proposal, anyone with open land who chooses to register it as open with the tax authorities and allows it to be the master plan as proposed open space may realize certain tax benefits. In event the land is sold to someone who chooses not to retain it in open use, all the tax savings which have accrued become payable. Such a measure could relieve farmers in Virginia from high tax pressures, and the obligation payable upon transfer would reduce the temptation of an owner to yield to development pressures.

Conclusion

The timeliness of a program to preserve open space in

Virginia is not only apparent, but urgent. Thus it is concluded that if we are to preserve for the future larger generations of Virginians those natural amenities which are rightfully theirs, bold steps are necessary. The power of public agencies to preserve land or water in their natural state must be confirmed. Moreover, it is necessary to expand this to include the power to control future development commensurate with the ideals that Virginians have historically set for themselves but which seem to have been lost in the shuffle to maturity.

Confirmation by the General Assembly in the form of enabling legislation recognizing the problems toward which this study is directed is urgently needed. "Only bold measures are equal to the task."[133]

> "Woe unto them that join house to house, that lay field to field till there be no place."
>
> (Isiah 5:8)

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92. Bauman v. Ross, 167 U.S. 548, 596-597 (1897).

93. Moale v. Baltimore, 5 Md. 322 (1854).

94. Miller v. City of Beaver Falls, 368 Pa. 169, 82A. 2d 34 (1951).

95. Ayres v. City Council, 34 Cal. 2d. 31, 207 P. 2d 1, (1949).

96. Forston Inv. Co. v. Oklahoma City, 179 Okla. 473, 66 P. 2d 96, (1937).

97. In Re Lake Secor Development Co., Inc., 141 Misc 913, N.Y. Supp. 809, (1931).

98. Allison Dunham, "A Legal and Economic Basis for City Planning," Columbia Law Review, 650, (1958).

99. Mansfield and Swett v. Town of West Orange, 120 N.J. 145, 198 A. 225, 234, (1938). It is interesting to compare the attitude of the New Jersey court with that of the Virginia court in Board of County Supervisors v. Carper. The Virginia court invalidated large lot zoning of two-thirds of Fairfax County after finding that its purpose was to channel development into the other one-third where cost of supplying services was cheaper.

100. See Cox v. Board of County Commissioners, 181 Md. 428, 31 A. 2d 179, (1943).

101. Code of Virginia, Annotated, Title 15, Sec. 807-818, (1956).

102. Land benefiting from its location adjacent to or near a public facility, such as a park, generally experiences an increase in value. This increase in value could be reflected in the tax assessments of it and similar properties and thus make up the tax deficit.

103. John Reps, "Control of Land Subdivision by Municipal Planning Boards," 40 Cornell Law Quarterly 258, (1955) pp. 269-276.

104. Kebler v. City of Upland, 155 Cal. 2d 631, 318 P. 2d 561, (1957).

105. Haugen v. Gleason, as noted in W. H. Blucher's "Planning Legal Notes" in ASPO Newsletter, (April, 1959).

106. Reggs Homes, Inc. v. Dickerson, 197 N.Y.S. 2d 771, (1958).

107. At least as far as the writer has been able to discern, no cases have been uncovered dealing with forced contribution of cash in lieu of land.

108. House Document No. 12, (Richmond, Dept. of Purchases and Supply, 1959), p. 58.

109. Charles Elliot, "Open Spaces: Ways and Means," Open Spaces for the National Capital Region, Part III, (1960), p. 28.

110. Virginia Constitution, Sec. 169.

111. Tackahoe Womans Club v. City of Richmond, 199 Va. 734, 101 S.E. 2d 511, (1958).

112. Virginia Constitution, Sec. 168.

113. Griffin v. Norfolk County, 170 Va. 370, 196 S.E. 693, 700, (1938).

114. Virginia Constitution, Sec. 168.

115. East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E. 2d 283, (1953).

116. Code of Virginia, Annotated, Title 10, Secs. 22-31, (1956).

117. Code of Virginia, Annotated, Title 58, Sec. 220(1), (1959).

118. Virginia Constitution, Sec. 183.

119. The Director of Virginia's Department of Conservation and Economic Development may accept gifts of land of scenic beauty, recreational utility or historical interest. He may permit the donors to remain on the land for ninety-nine years subject to restrictions on use. Code of Virginia, Annotated, Title 10, Sec. 21 (4), (1956). He is also authorized to accept gifts of land for forest purposes. Here, the donors may reserve mineral rights. Virginia Code, Annotated, Title 10, Sec. 33, (1956).

120. Charles Abrams, "U. S. Housing: A New Program," (New York: Tamiment Institute, 1957). Based on a speech delivered to the National Housing Conference in June, 1957.

121. Cincinnati v. Vester and City of Richmond v. Carneal, op. cit.

122. Hunter v. Norfolk Redevelopment and Housing Authority, 195 Va. 326, 78 S.E. 2d 893, (1953).

123. Berman v. Parker, op. cit. at 33-34.

124. An open space program embodied in a comprehensive plan, constituting an essential element of the total spectrum of community development would receive much more favorable reception in the courts than spontaneous, sporadic attempts.

125. Siegel, op. cit., p. 52.

126. McCarthy v. Manhattan Beach, 41 Calif. 2d 879, 264 Pac. 2d 932, (1953), cert. den 348 U.S. 817, (1954).

127. Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 121 N.E. 2d 517, (1954) at 498.

128. Morton Lustig, "Early Reservation of Open Land," Land Economics, (Madison, Wisconsin; November, 1959), Vol. 35, No. 4, p. 314.

129. Ibid., p. 314.

130. Md. Laws of 1943, Ch. 992, as am. by laws of 1955, Ch. 671 See also Siegel, op. cit., p. 15.

131. TVA v. Welch, op. cit.; and Code of Virginia, Annotated, Title 33, Sec. 133.

132. Fairfax County Zoning Ordinance, op. cit.

133. Siegel, op. cit., p. 58.

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VITA

Edward E. McClure, son of Ivie Ellis and Lemma Parker McClure, was born in Lacoochee, Florida, August 21, 1931. He attended the public schools of Pasco County, Florida and was graduated in June, 1948. In September, 1948, he entered the University of Florida at Gainesville, Florida. He was graduated with the degree of Bachelor of Architecture in January, 1953. He then entered the United States Air Force and served as an intelligence offer in the Pacific Theater of Operations, attaining the rank of Captain, USAFR.

After being separated from the Air Force, he entered the employment of Kemp, Bunch and Jackson, Architects, Jacksonville, Florida. In September, 1955, he joined the faculty of the Department of Architecture, College of Architecture and Fine Arts, University of Florida and entered the graduate school. In December, 1955, he married the former Anne Johnson Futch of Dade City, Florida. In March, 1958, Melissa Kathryn and Melinda Carol, twin daughters, were born. In June, 1958, Edward E. McClure received the degree of Master of Arts in Architecture from the University of Florida.

In September, 1959, he joined the faculty of the Department of Architecture at Virginia Polytechnic Institute and has served in that capacity, teaching both undergraduate and graduate courses in the Department of Architecture.

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ABSTRACT

Open land has historically been considered an expendable resource. This concept has abetted the sprawl which occurs in all urbanizing areas of our country. With the United States urbanizing at a rate of more than a million acres a year, this concept can no longer be tolerated. In the last fifteen years urban development has consumed approximately two thirds as much new land as it did in all the previous years in the history of our country. Virginia has not been an innocent bystander in this process.

This thesis points up the necessity for immediate action to preserve open space in the State of Virginia. It examines the human as well as the economic values that can be derived from open space through an analysis of both the active and passive uses to which open space or low density use lands can be put. This is accomplished through the establishment and critical analysis of the goals and objectives of an open space program for Virginia.

The law on open space in Virginia is a mass of detail buried in traditional legal categories developed for other purposes. This thesis has examined the existing constitutional and statutory powers available to local governmental subdivisions for developing an open space program.

In addition it examines and appraises significant proposals for acquiring and controlling open space. From this analysis, alternative programs for open space acquisition and control are presented including: the acquisition of development rights, the land bank, fresh concepts of zoning and subdivision regulations, and expanded concepts in the use of the taxing power.