

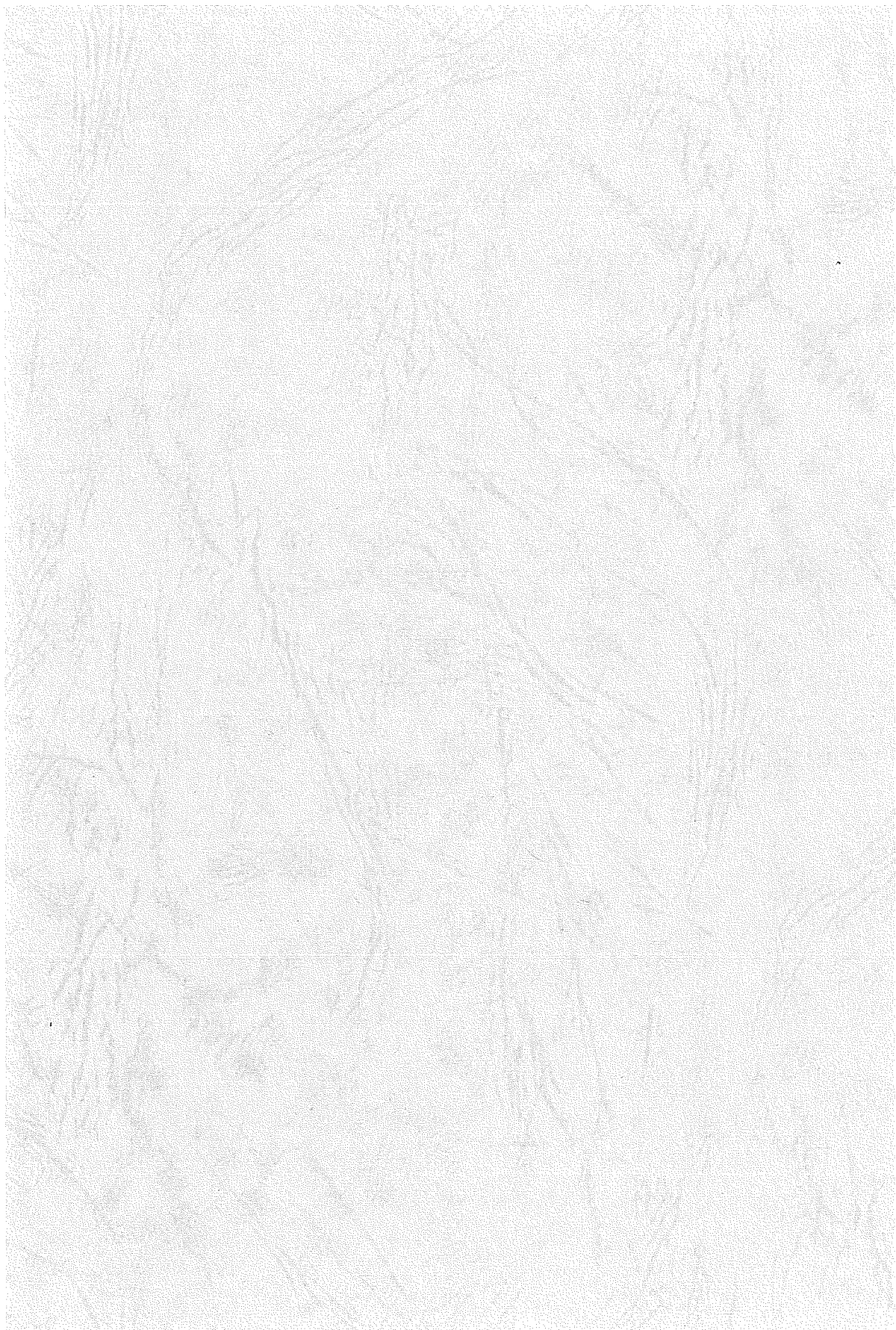
THE EASEMENT AS A CONSERVATION TECHNIQUE

DAVID D. GREGORY

With the collaboration of
A. Diot (French Appendix)
H. J. Dietrich (German Appendix)



International Union
for Conservation of Nature and Natural Resources,
1110 Morges, Switzerland
1972



The International Union for Conservation of Nature and Natural Resources (IUCN) is an independent international body, formed in 1948, which has its headquarters in Morges, Switzerland. It is a Union of sovereign states, government agencies and non-governmental organizations concerned with the initiation and promotion of scientifically-based action that will ensure perpetuation of the living world -- man's natural environment -- and the natural resources on which all living things depend, not only for their intrinsic cultural or scientific values but also for the long-term economic and social welfare of mankind.

This objective can be achieved through active conservation programmes for the wise use of natural resources based on scientific principles. IUCN believes that its aims can be achieved most effectively by international effort in co-operation with other international agencies, such as Unesco and FAO.

The World Wildlife Fund (WWF) is an international charitable organization dedicated to saving the world's wildlife and wild places, carrying out the wide variety of programmes and actions that this entails. WWF was established in 1961 under Swiss law, with headquarters also in Morges.

Since 1961, IUCN has enjoyed a symbiotic relationship with its sister organization, the World Wildlife Fund, with which it works closely throughout the world on projects of mutual interest. IUCN and WWF now jointly operate the various projects originated by, or submitted to them.

The projects cover a very wide range from environmental policy and planning, environmental law, education, ecological studies and surveys, to the establishment and management of areas as national parks and reserves and emergency programmes for the safeguarding of animal and plant species threatened with extinction as well as support for certain key international conservation bodies.

WWF fund-raising and publicity activities are mainly carried out by National Appeals in a number of countries, and its international governing body is made up of prominent personalities in many fields.

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FOREWORD

As part of its general concern with maintaining environmental quality, IUCN has established in Bonn an Environmental Law Centre. Over a period of years, the Centre has gathered legislative and regulatory texts relating to the environment and this documentation is now probably the largest collection of its kind existing anywhere.

The staff of the Centre is analyzing the material in its possession for a variety of purposes, and legally-trained personnel from various jurisdictions have been invited to participate in this programme. The present series of reports has been instituted as a medium for publication of the results of such analytical work and related studies in environmental law.

The initial paper in the series will be concerned with new concepts and procedures that might have application in jurisdictions other than those in which they originated. It is hoped that these studies may stimulate action to adapt the new ideas for use in other legal regimes.

The project concerned with the preparation of this present paper has been funded by the World Wildlife Fund German Appeal.

THE AUTHOR

David D. Gregory received a B.A. in 1964 from Duke University and attended Princeton Theological Seminary for one year thereafter. In 1968, Mr. Gregory received an LL.B. from the University of Maine Law School, where he was a research assistant to Professor O.E. DeLogu, as well as being the Editor-in-Chief of the Maine Law Review. In these capacities Mr. Gregory had the opportunity to write and coauthor numerous articles for publication, including several on land-use controls. In 1968, David Gregory joined the Civil Rights Division of the United States Department of Justice, where he was appointed Director of the Office of Planning and Special Appeals in 1970. Mr. Gregory is presently working on an LL.M. degree at the Harvard University Law School.

CHAPTER 1

INTRODUCTION

How can one ensure that open spaces remain undeveloped, and that attractive views remain unobstructed and available for public enjoyment? What means are available to prevent development or destruction of wetlands and wildlands keeping them in their natural state for the preservation of nature? Can private organizations devoted to conservation, environmental, and recreational causes take effective steps to accomplish these goals without purchasing full title to the affected property? At the heart of these and similar questions now being considered by both public and private environmental agencies is the perennial problem of how to make the best possible use of limited available funds.

IUCN has seen a need to acquaint Europeans who are concerned with these questions with the literature of one technique now in use in the United States: purchase and, in the case of governmental agencies, expropriation of less-than-fee interests in property, known as scenic and conservation easements. It should not, of course, be assumed that a legal device such as the conservation easement can simply be transplanted from one legal system to another or, indeed, that the needs of various countries for new legal approaches will be identical. Some nations have a much more keenly developed sense than the United States of the public duties inhering in private ownership of land, and governmental powers of noncompensable regulation are accordingly more extensive; but even here there may be a need to enable or facilitate private organizations to supplement government's conservation efforts. Elsewhere regulatory powers are more limited, and a technique resembling conservation easements may be useful to both public and private agencies.

This paper is designed for those who may be unfamiliar with the easement technique as an introduction to what has been written about and accomplished with conservation easements in the United States. (The most significant American literature on the subject has been collected by the library of the IUCN Environmental Law Documentation Centre in Bonn.) We shall here review generally the contours of this device, some legal problems in the American system which gave rise to its adoption and others which promise to impede its usefulness unless cured by appropriate legislation, and some of the more prominently noted advantages and disadvantages. We also undertake to explain briefly analogues to the easement device in the French and German legal systems. In view of the influence of Roman Law on the French, German and American legal systems (although with great variation in each case), it is not surprising to

find that each system has one or more legal devices resembling the Roman praedial servitude. Praedial servitudes required both a dominant and a servient tenement (known as master and slave estates); in character they could be either negative, requiring the owner to refrain from doing something on his land, or positive, permitting the holder of the dominant tenement to use the burdened land, but affirmative duties could not, for the most part, be placed on the servient-tenement holder.¹ Similar limitations, as we shall note, will pose difficulties, although perhaps not insurmountable, to adapting the American easement, the French servitude, and the German Dienstbarkeit to conservation purposes.

CHAPTER 2

THE NEED FOR CONSERVATION EASEMENTS IN THE UNITED STATES

- A. The Need to Regulate. Broadly speaking, the need for an approach like that permitted by conservation easements is occasioned by limited objectives of land-use control, the achievement of which does not require assumption of full proprietary ownership of the land. This need arises for governmental agencies when the objectives are beyond their power to impose sufficient restrictions on property without compensation and in all cases for private organizations having no regulatory authority. In many nations, only private organizations will feel this need. In the United States it is the governmental need that is particularly acute because traditionally a choice must be made between a limited regulation, which may not be sufficient to the purpose, and acquisition of full title to land, which may not be necessary.

The United States federal and state constitutions require "just compensation" to be paid to a landowner whose property has been expropriated or condemned for public purposes.² The cost to the government of paying the full value of land (particularly in areas most critically in need of preserving for scenic purposes, namely, agricultural or undeveloped land located in prime areas for development) can be prohibitive; and, in addition to the high cost of acquiring full title, full acquisition may clearly not be needed to accomplish the governmental objective of preserving the land in its present state. On the other hand, if land is so situated as to be at once both ripe for development and in need of preservation for scenic or conservation purposes, the government may well be precluded from simply enacting a law to prohibit changing its natural state. This, as we shall see, is because the courts have held that "[t]he general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³ This rule perhaps reflects the strong disposition of American law toward development and economic exploitation of land.⁴ Because the rule is premised on considering the value of land in the commercial market, it focuses on potential, not actual, land uses. It is therefore possible, for example, that a regulation forbidding construction could be invalidated even as applied to land that had never before been built upon.⁵

In applying the rule, the courts fairly consistently hold that a regulation depriving "property of its most beneficial use [i.e., the use giving the land its highest market value] does not render it unconstitutional"⁶ but that to "deprive the owner of all or most of his interest in the subject matter,"⁷

i.e., to prohibit all or most of the land uses promising a reasonable economic return, would constitute expropriation. Beyond this, there is very little uniformity among courts, or even among the decisions of the same court, as to be the point at which regulation becomes so onerous as to be the practical equivalent of a taking; and it may well be impossible to derive any reliable principle by analyzing the court decisions. While in theory attempting to place a regulation within some spectrum gauging the degree to which it burdens the land, courts in practice view taking and permissible police-power regulation as distinct categories. This result is attributable to an oddity of American legal procedure. The issue presented to the American courts in these cases is whether a regulation so reduces the market value by limiting possible land uses as to be unconstitutional as applied. The either or, all-or-nothing formulation of this issue never requires the courts to draw with precision the line between permissible police-power regulation and taking requiring compensation. Uniform practice suggests that a litigant who succeeds in convincing a court that over-regulation has amounted to a taking of his property is entitled to a decree that the regulations as applied are unconstitutional, not to a decree requiring payment. In result, therefore, the relief granted prohibits enforcement of the challenged regulations, and the government is left in the position of having no enforceable control over the use of this property unless it condemns and purchases the entire fee at market value. In such an event, Professor Mandelker has observed that "[i]naction usually follows an unfavourable decision."⁸

If, on the other hand, the appropriate inquiries were (i) to determine whether a taking had been accomplished and (ii) to evaluate the property owner's compensable interest, the analysis and result of this kind of litigation could be quite different. Under this approach (commencing with the present premises that, first, prohibiting some uses, including the one with the highest economic value, does not per se constitute a taking and, second, elimination of all economically feasible uses does constitute a taking) courts would be required to distinguish between those regulations requiring and those not requiring compensation. Accordingly, the value of the land at the uses which could be properly prohibited through the police power would have to be subtracted from the total value of the land. In result, the court decisions would be required to separate three aspects of the total property rights and to place a value on each: (1) the value of those land-use rights which can permissibly be prohibited through the police power, (2) the extent to which the regulation has exceeded that limit and the value of those use rights, and (3) the value of the rights retained by the property owner. If a taking had been effected, the landowner would be compensated only for category two because the first category, under present doctrine, imposes no obligation on the government to give just compensation, and the landowner has not been deprived of the rights described in the final category.

It may be that such fine distinctions are practically impossible, and it would obviously be an enormous task to devise a workable formula by which they might be made within the present system. But in any case, the either/or approach of present practice substantially accounts for the proliferation of proposals to enable the government to exceed, in restricting land use, the present limitations on its regulatory powers and yet to avoid having to pay market value for land which ought to be preserved. Among the techniques proposed or in present use in the United States to open some middle course are purchase and lease-back or resale on condition, compensable regulation, and purchase (or condemnation of scenic and conservation easements.⁹

- B. The Need to be Regulated. While the legal practice described accounts for the public need for a legal device like scenic easements, there is a similar need from the point of view of some owners of undeveloped, natural-state, or agricultural lands. This need is occasioned in part by a strongly entrepreneurial, frontier-oriented reliance on market value in property taxation schemes.

The law of most states provides that real property shall be assessed for tax purposes at market value.¹⁰ This phrase is interpreted by tax assessors to mean the value of the land when devoted to a use promising the greatest economic return according to current market standards, the so-called highest and best use.¹¹ Owners of open land in regions of development thus often find that they must pay real-property taxes, not according to the value of their property in its open state, but rather at its development value. The result of this failure to recognize the land-use consequences of the taxing power is an abdication to the open market of the authority to determine land-use development: "This practice raises the tax burden substantially and often forces subdivision, simply to pay the tax when both the owner of the land and the local planning agency may have desired to retain the area in its open or agricultural state."¹²

Corrective measures within the tax structure have been initiated in several states, but generally they have not been adequate to the task of open-space and scenic preservation. Requiring that tax assessment of open land be based solely on its present use can simply provide a windfall to land holders (including speculators) while they await appreciation in the market value of their properties with an eye toward future subdivision or selling for development; and tax-deferral systems can operate as interest-free loans for as long or short a term as the owner may select.¹³

If a landowner is sufficiently confident in his resolve to retain the open nature of his land but is at the same time threatened by rising taxes based upon other potential, marketable uses, it may be desirable to bind himself, his successors in interest, and his land to some form of undeveloped

or low-development use. Having done so in an enforceable and permanent way, he may remove his land or part of it in fact from the development market, also eliminating its development potential for tax purposes.¹⁴ Experience with the scenic-easement technique suggests that some landowners, if given an appropriate opportunity, would so bind their land not only for its tax advantages, but also for their mutual protection. Owners of adjacent land who will foreseeably be subject to development pressures may find it advantageous to enter mutually an agreement limiting the manner and extent to which the natural characteristics of their land will be altered or eliminated; thereby each can be protected against the possibility that a neighbour will submit his land to a use inconsistent with the natural landscape. It is not surprising, then, to find both official and private organizations taking steps to educate landowners on the advantages to them of the easement approach.

CHAPTER 3

THE EASEMENT DEVICE

What, then, is an easement in American law? A succinct legal definition ought perhaps always to be regarded with some suspicion, for an accurate definition must consist of all of the rules and exceptions surrounding the subject; and of easements in particular it has been said that "[n]o precise definition seems possible."¹⁵ We might appropriately resort in these circumstances, and in view of the objectives of this paper, to one abiding simile for explaining private property rights in American law: that property rights are like a cable of three strands, one strand called "rights", another "power", and the third "privileges to use".¹⁶

[A landowner's] rights are principally to keep others off, to have exclusive possession of his land. His powers refer to his legally authorized ability to sell, give, mortgage, transfer all or part of his property interest. His privileges to use are many, and in the absence of zoning or other legislative limitations, he can make any use of his land which he wants, so long as he doesn't run afoul of the law of nuisance by too substantially interfering with others in the use of their land or in the carrying out of their legitimate activities.

The scenic easement involves acquisition from the owner of some of these privileges to use. The privileges that are given up by a grant of easement depend, of course, upon the particular terms of the grant.¹⁷

Through this device, then, the government can acquire and pay for those interests in real property specifically needed for the governmental objective, which would be beyond the reach of its purely regulatory authority and which could be achieved by purchase of the entire land only at a substantially higher price.¹⁸

To be sure, the easement concept was not originally designed to solve environmental problems of industrialized societies in the 20th century. Rather it is a product, for the United States, of the common law with "a very hoary history in Anglo-American law."¹⁹ It is bound in as one might expect by a typically common-law constellation of rules and limitations distinguished by a long-standing judicial hostility to easements arising principally from their tendency to complicate deciphering titles.²⁰ These limitations, the most notable of

which we shall mention very briefly and generally, are similar to those which may be encountered in examining analogues to the easement device in other legal systems.

Two basic classes of easements are known as easements appurtenant and easements in gross. Easements appurtenant burden one owner's land, called the servient tenement, for the benefit of another owner's land, called the dominant tenement. Both the burden and benefit run with the land. An easement in gross involves no dominant tenement. It is said that, with one exception, easements in gross were not recognized at common law.²¹ Traditionally, easements could be either positive or negative²² but, for the most part, could not impose affirmative duties on the possessor of the servient tenement.²³ Common-law courts expressed in various ways the notion that the purposes for which easements could be created were limited, that easements could not be created to satisfy just any whim.²⁴

The astringency of rules concerning easements suggests a policy which is also related to the limitations on government's regulatory authority and the problems of real-property taxation in the American system: "an ingrained view of our law that land interests should be made freely available for commercial development, that 'encumbrances upon title' should be generally frowned upon, and that the long tying up of realty and consequent removal of it from the market should be prevented."²⁵ Inasmuch as few policies could be more contrary to the conservation of nature than this one, the marriage of easements to conservation is bound to encounter hazards.

For example, at common law it was said that "nothing can amount to a valid easement unless the subject matter of the claim is capable of being referred to one or the other of six different heads -- air, light, support, water, ways and fences."²⁶ Some environmental purposes might well be arguably included within these categories, but early precedent spelled difficulties for scenic and other open-space easements. "[I]n England it was held at an early date that, although there can be an easement of light where a defined window received a defined amount of light, there can be no easement of prospect (i.e., the right to a view) . . . 'for . . . prospect, which is a matter only of delight, and not of necessity, no action lies for the stopping thereof . . . [T]he law does not give an action for such things of delight'."²⁷ Another difficulty which, without superseding legislation, might plague both public and private conservation-easement programmes is the distinction drawn between easements in gross and easements appurtenant. A major barrier to using easements for conservation purposes would be presented if easements in gross were not recognized or in the event that they were recognized, if they were still susceptible to easy destruction by a transfer of the burdened land or a purported transfer of the easement benefits. Inasmuch as private

environmental groups are unlikely to be limited in their concern solely to protecting the scenic and conservation values of land immediately adjacent to their own land-holdings, if indeed they have any, common-law restrictions on easements in gross could effectively preclude the potential utility of privately held conservation easements. The same problem would have to be faced by the government whenever it does not own land, such as a highway or park, which could be said to be the dominant tenement.²⁸ A further question for the government would be whether easements could be expropriated.

As it happened, the use of easements for public purposes by American governmental and quasi-governmental agencies was established in a relatively favourable judicial climate by such necessary enterprises as laying networks of railroad tracks, highways, communication lines, and the like. Easements in gross came to be generally recognized although substantial problems concerning their assignability and extinguishment persisted.²⁹ Courts also held that "the power to condemn easements is included within the power to condemn fees in land, and is subject to the limitations of the power."³⁰ The variety of public purposes served by the easement device includes

easements to conserve future rights of way and scenic easements for highway purposes, easements to prevent the erection of buildings or billboards in the vicinity of parks, easements for highway "sight corners", easements for paths and trails to scenic places, easements to plant and maintain shrubs and trees along rivers and ponds, "avigation" easements to assure an unobstructed path for the entry and exit of air traffic, and easements for pipelines.³¹

Moreover, the enactment of recording statutes in the United States diminished the difficulties foreseen by the common-law courts in invoking easements for new and untested purposes. And, in any event, environmental law-reform advocates, somewhat to the chagrin of traditionalists in property law, have perhaps not been as hampered as others by a strict attentiveness to seemingly outmoded property-law precedents;³² and experience is commencing to bear out the view that easements could be adapted to a wide range of purposes in response to modern needs.

The key, of course, is that legislation can supersede common-law precedents by substituting modern rules attuned to present needs for common-law rules based largely on moribund considerations.³³ While easements (and, to some extent the related devices known as restrictive covenants and equitable servitudes) will be models for acquiring less-than-fee property interests for conservation purposes, environmental lawyers have recommended that new enabling legislation speak in terms

of some new device with its own rules of purpose, creation, transferability, enforcement, extinguishment, and so on.³⁴ By this tact, inheritance of the old easement rules might be avoided except to the extent that they are pertinent and included in the statute.³⁵ For this legislation to include wholly private agreements is a simple exercise, and the advantages of facilitating private environmental easements should be clear enough. Even though government funds may be conserved by a technique which permits purchasing limited land-use rights, tax revenues are always painfully finite. Moreover, experience suggests that some landowners may have more confidence in and, thus, be more willing to donate easements to private environmental organizations, which are thought to be more resolutely devoted to environmental concerns and free of the vicissitudes of local politics, than to governmental units.

CHAPTER 4

THE VARIETY OF CONSERVATION EASEMENTS

Several publications are of particular importance to the adaptation of easements to conservation and scenic purposes in the United States. The most aggressive advocacy of using easements to achieve conservation goals is found in William H. Whyte's monograph, Securing Open Space for Urban America: Conservation Easements,³⁶ a publication to which much of the conservation-easement development may rightfully be attributed. (Less detailed but periodically updated statements of Whyte's views are contained in a second monograph³⁷ and a recent book.³⁸) Norman Williams, Jr., wrote a basic study of the legal considerations which must be taken into account for conservation-easement programmes in the United States: Land Acquisition for Outdoor Recreation -- Analysis of Selected Legal Problems.³⁹ Harold C. Jordahl's "Conservation and Scenic Easements: An Experience Resume"⁴⁰ and James A. Olson's "Progress and Problems in Wisconsin's Scenic and Conservation Easement Program"⁴¹ together constitute the best available case study of a large-scale effort to employ easements for conservation and related purposes. Finally, a comprehensive consideration of acquiring scenic easements in conjunction with highway construction, coordinating the findings of several previous publications, is "Scenic Easements in the Highway Beautification Program"⁴² by Professor Roger A. Cunningham of the University of Michigan Law School.

The basic idea of conservation easements is very simple and has the characteristics of a negative easement in gross. The private property owner relinquishes his right to use his land or a portion of it in a certain specified manner which, it is thought, would derogate from its natural qualities. The holder of the easement, who ordinarily would not own nearby land, does not, of course, acquire the right relinquished but instead obtains the power to enforce the restriction against the landowner, subsequent title-holders, and even strangers. The transfer of an easement can be accomplished by gift, negotiated sale, or expropriation. While the principal hope of this arrangement has been directed toward preserving open space, the possible variants of the basic idea may well be innumerable. William H. Whyte describes the promise of easements for retaining open space in the midst of developing areas:

Let us take a stream valley as an example. It is a beautiful valley on the edge of suburbia, still unspoiled, with most of the land in farms and small estates. The meadows on either side of the stream are a flood plain; and quite properly they have

been zoned against development. The rest of the valley is zoned as low-density residential, with minimum lots specified at two acres. There are not subdivisions yet and landowners are still assuring each other that they would not dream of selling out. Most of them believe it.

Obviously, the place is ripe for development. Technically speaking, the upland meadows and hills are quite suitable for housing, with excellent soil percolation characteristics for septic tanks and good drainage. We know development is going to come, whether we like it or not. But there is still some time to work with. We would like to use it to secure the key spaces in the heart of the valley, the network of streams that run down to it and, perhaps, several wooded ridges on the rim of the valley.

We have, the, three kinds of land: the flood plain that can be kept open by zoning, [⁴³] the highly developable land that probably cannot be kept open, and the in-between land where there is a fighting chance. Here is where the easements can be most useful. No one landowner has to give up very much. He is not asked to give an easement on all his property, but only on that part of it which falls within the conservation zone along the streams.⁴⁴

Where there is a need for a cost-minimizing device like conservation easements (as there will inevitably be in the case of private environmental organizations), it is important that it be adaptable to a variety of specific purposes. The American experience with easements suggests their flexibility.

The State of Wisconsin has undertaken extensive easement-acquisition programmes for fish and game management and for preserving scenic beauty along state highways. "[F]ishing easements . . . granted in perpetuity to the State of Wisconsin the public fishing right and the right of the State to protect and improve fish habitat by stream channel and bank devices . . . [The easement] applies to a strip of land 66 feet from the bank of the stream or lake. Most easements include both sides of a stream."⁴⁵ "[G]lame easements . . . granted in perpetuity to the State of Wisconsin the drainage, filling and burning rights to wetland areas. In addition, public fishing, hunting and trapping rights were acquired."⁴⁶ In appropriate circumstances, short-term easements might be useful; one such acquisition by the Wisconsin Conservation Department indicates the variety of purposes which might be achieved through the easement device:

This easement permitted public use of an entire island in Lake Michigan . . . and cost \$5,000. The island contains 775 acres and has 23,760 feet of lake shore frontage. The easement had a duration of five years and contained an option to purchase at an agreed price. The Conservation Commission [thereafter] exercised the option and purchased the island. The \$5,000 easement price was applied to the purchase of the island in fee.⁴⁷

Harold C. Jordahl has reported on a federal programme to protect migratory waterfowl by coordinating fee simple and easement purchases. This programme was conducted by the Bureau of Sports, Fisheries and Wildlife in the United States Department of Interior. Jordahl reports that in 1959 the Bureau "began to become greatly concerned about what was happening to the Pot Hole production areas in North and South Dakota, western Minnesota and northern Nebraska. With a good deal of push on the part of conservationists throughout the country" Congress authorized and appropriated federal funds for "wetland acquisition in this great duck producing area":

In 1961, the Bureau biologist land acquisition people . . . were planning largely in terms of leasing on a twenty year basis some of the important duck production areas. They quickly found that landowners were just as willing to sell them an easement in perpetuity. (This was a time preference, in effect, for cash, on the part of the prairie farmer). The Bureau abandoned its twenty year lease program in favor of acquiring easements in perpetuity.

Along with easements, they employed fee simple acquisition. To date, the statistics are as follows: they have acquired about 16,000 acres in 1,600 different cases through fee simple acquisition, 46 percent of which are wetland duck areas. This has cost them about \$55 an acre. That cost, of course, is for marsh, pot hole, and some of the upland that goes with it.

. . . [I]n just a few years they have taken easements on 7,000 farms in that area, covering . . . 5 million acres, of which roughly ten percent are wetland acres. . . . [T]he cost has been \$11.50 an acre . . .

The easement documents provide that you are not to drain the land, burn it or do anything that will destroy it as a wetland area. The only violation that gives them a little trouble is the practice, which is historical in this region, to set a match to the marsh, perhaps in late fall or early spring.⁴⁸

Most prominently, easements have been used to preserve the scenic attractiveness of privately owned land, particularly in conjunction with highway construction. The first substantial scenic easement programme was a massive undertaking by the federal government, begun in the 1930's, to construct highways especially designed for scenic attractiveness along the Blue Ridge and the Natchez Trace in the South.⁴⁹ Inexperience with the easement device and perhaps even hostility to it on the part of government agencies⁵⁰ created many difficulties at first.⁵¹ But, while it is true that the experience of these initial efforts has been a major impediment to a wider-scale adoption of scenic easements as an instrument of land-use control,⁵² that experience has also proven to be a source of valuable knowledge suggesting what practical problems might be expected and how best to deal with them.

The Wisconsin Highway Commission has been acquiring easements along the Great River Road in western Wisconsin adjacent to the Mississippi River since 1952 . . .

. . . By 1961 Wisconsin had acquired easements adjacent to 55 miles of highway at an average cost of \$650.64 per mile. The average cost per acre had been \$20.66 in contrast to a fee simple cost of lands acquired for roadway purposes at the same time of \$41.29. The scenic easement, which is negative, prohibits dumping of any refuse, erection of billboards, destruction of trees and shrubs, fur farms, erection of or alteration of buildings, and commercial and industrial uses of lands and buildings . . . Of the 234 parcels acquired, only 43 were condemned.⁵³

Many of the goals to be achieved through acquiring easements could, of course, also be achieved through outright acquisition of the land, and in some circumstances it may still be advantageous to purchase the entire fee. But, for the most part, these goals are thought to be beyond the government's purely regulatory authority, and full-fee acquisition is not necessary to the purpose. Thus, while the government is required to pay something, easements provide a means for limiting the compensation due only to the particular rights relinquished by the landowner.⁵⁴ Moreover, private environmental organizations also have the capacity to purchase limited property rights in furtherance of their conservation purposes undertaken on behalf of the public.

In addition to the cost factor, there are other potential advantages of less-than-fee acquisition. These are described by William H. Whyte⁵⁵ and many others.⁵⁶ Principally, the landowner still remains in possession of the land and may ordinarily go on using it as he has in the past, for the most usual easement consists essentially in his promise not to make new uses of his land in derogation of the public

interest; and of course the landowner is compensated by agreement or in due-process proceedings for the use rights he has promised not to exercise. Through appropriate legislation, the landowner can be assured that his property is evaluated for property-tax purposes only on the basis of his retained rights, and the compensation received for the easement may be taxed according to the relatively low rates applicable to transfer of real property. At the same time, because the land remains in private ownership, it continues to generate local taxes even though diminished; it can be kept in its previous productive use for agricultural, timber, or other purposes; and it is maintained by the private owner.

CHAPTER 5

THE MASSACHUSETTS CONSERVATION RESTRICTION ACT

Perhaps the most comprehensive legislation enabling creation of conservation easements is the Massachusetts Conservation Restriction Act, signed into law by the governor of the state in August 1969. The Act does not use the term "easement" for the reasons discussed in Chapter 3. Instead, a wholly new device is created, called a "conservation restriction"; in this manner new rules can be created which avoid the traditional limitations on easements and yet permit those limitations to continue to govern more conventional forms of easements. A conservation restriction is defined as

. . . a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking i.e., an expropriation order, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to forbid or limit any or all (a) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purpose or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (g) other acts or uses detrimental to such retention of land or water areas.

The Act provides that

[s]uch conservation restrictions are interests in land and may be acquired by any governmental body or such charitable corporation or trust which has the power to acquire interests in land [i.e., where the articles of incorporation or terms of the trust so provide], in the same manner as it may acquire other interests

in land. Such a restriction may be enforced by injunction or proceeding in equity, and shall entitle representatives of the holder of it to enter the land in a reasonable manner and at a reasonable time to assure compliance.

The Act is principally designed to facilitate voluntary sales and donations of conservation easements or restrictions to local governments and private conservation organizations; and the Massachusetts Department of Natural Resources has commenced a campaign to educate private property owners on the advantages of so restricting their land. They have simplified the technical definition of the statute by describing a conservation restriction as "a legally enforceable agreement between an owner of real property and a governmental body or charitable corporation by which the owner promises to keep his land in essentially the same state as it is at the time of the agreement."⁵⁷ They emphasize that the owner may remain in full possession of the land and that the public would not be entitled to enter upon it unless the conservation restriction so provided.⁵⁸ "The restrictions, however, will be binding upon the lessees, grantees, heirs or any other future owners of the land."⁵⁹ Even the perpetual aspect of the restriction may itself be attractive to the property owner. "A person agreeing to a conservation restriction also insures that the integrity of his property will be maintained after his death, rather than be sold to a developer by unwise heirs or executors."⁶⁰ The tax advantages of conservation restrictions figure prominently in the Department's explanations of the device.⁶¹

The following are a few examples of how conservation restrictions might be used:

- a. to preserve a scenic view e g , a "window to the sea";
- b. to prevent filling of a flood plain or destruction of an estuarine marsh;
- c. to insure that land remains in farming, forestry, or outdoor recreation (e.g. golf course) use;
- d. to prevent development of the "open space" in a cluster zoning area;
- e. to protect a trail or shorelines;
- f. to prevent the cutting of ancient trees;
- g. to limit or prevent construction on land of natural resource value, such as potential future reservoir sites.⁶²

CHAPTER 6

CONCLUSION

One obviously cannot determine from any exposition of a legal device in one legal system the extent to which there may be a need for a similar device in another system. We do know, however, that there are countries in which the governments are purchasing or expropriating full proprietary rights in land in order to achieve relatively limited purposes of land-use controls; and we also know that private organizations concerned with our deteriorating environment are often unable to achieve any measure of effective control of the use of land except by becoming its proprietary owner. To this extent, it seems fair to project a need for a legal approach by which limited powers to restrict the use of land may be acquired.

We have illustrated throughout this paper how American conservation easements are peculiar to the American legal system. First, the need for an easement-like device in land-use controls is occasioned by the unique way in which private property owners may, through litigation, invalidate governmental regulations restricting the use of property. Second, easements were chosen to remedy this need probably because they were familiar, and no significant departure from precedent need be made in order to employ easements for conservation purposes. Third, in order most effectively to pursue those goals, a new device is necessary which, although drawing to a great extent on the easement model, would be rid of the restrictive rules surrounding the traditional easement concept. Fourth, that device must be flexible and capable of being adapted to a wide range of pressing environmental problems. Because the American conservation easement arose in the context of that country's own legal system, it has no technical legal significance apart from the peculiarities of that legal system. Accordingly, it has not been our concern to suggest that conservation easements simply be incorporated into other legal systems in which it would be a foreign and perhaps incompatible element. Rather, it is our hope that an introduction to the American conservation easement will stimulate others to look solely at their own systems of land-use control with the following questions in mind: Is there a need for an approach like that permitted in the United States by conservation easements? Would such an approach be feasible within the present legal structure? And, if not, what changes in the law would be desirable?

NOTES

Chapter 1

1. See generally M. Radin, *Roman Law* 370-79 (1927); W. Buckland, *A Manual of Roman Private Law* 153-71 (1925); W. Buckland & A. McNair, *Roman Law and Common Law* 98-110 (1936); Reno, *the Enforcement of Equitable Servitudes in Land: Part I*, 28 *Va. L. Rev.* 951, 953-56 (1942).

Chapter 2

2. The Fifth Amendment to the Federal Constitution provides, in part: "nor shall private property be taken for public use without just compensation."
3. *Morris City Land Improv. Co. v. Parsippany - Troy Hills*, 40 N. J. 539, 556, 193 A. 2d 233, 242 (1963). The development of this principle has been definitively analyzed by Professor Sax of Michigan in *Sax, Takings and the Police Power*, 74 *Yale L. J.* 36 (1964).
4. See generally, J. Delafons, *Land-Use Controls in the United States* (2d ed. 1969).
5. A recent example is *Bartlett v. Zoning Commission*, 32 *Conn. L. J.* 4, 1 *E.L.R.* 20177 (1971).
6. *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962).
7. *United States v. Causby*, 328 U.S. 256 n. 7 (1946).
8. Mandelker, *Notes from the English: Compensation in Town and Country Planning*, 49 *Calif. L. Rev.* 699, 708 (1961).
9. Purchase and lease-back and purchase and resale on condition consist, as the names imply, in acquiring full title to the land either by purchase or condemnation and then leasing the land (perhaps even to the former owner) accompanied by restrictions designed to achieve a desired land-use result or selling the property while retaining an interest similar to a scenic or conservation easement. Purchase and resale on condition is basically the approach taken in American urban renewal projects. See Cunningham, *Land-Use Control -- the State and Local Programs*, 50 *Iowa L. Rev.* 367, 443 (1965). William H. Whyte reports that the National Park Service has used a variant of purchase and lease-back in combination with full expropriation of land and acquisition of scenic easements. The Service acquired, in fee simple, land needed for a scenic highway and scenic easements on

adjacent property. Lease-back was applied to grassy areas held in fee simple within the right of way:

Along the Blue Ridge Parkway there are some 177 scenic easements totalling 1,468 acres, most in grassland. Maintaining the grassland within the regular right of way costs the Park Service about \$4.50 a year per acre . . . [F]or right of way it owns, it often gives a "special use permit" so neighboring farmers can use it for grazing or crops or such - they pay a small fee for the privilege, as well as relieve the Park Service of the \$4.50 per acre maintenance cost . . .

- Whyte, *Securing Open Space for Urban America: Conservation Easements* 12 (Urban Land Institute, tech, bul. 36, 1959). A system of compensable regulation was suggested in Kasnowiecki & Paul, *The Preservation of Open Spaces in Metropolitan Areas*, 110 U. Pa. L. Rev. 179 (1961), which remains the definitive exposition of the subject for the United States. Additional discussions may be found in Note, *Techniques for Preserving Open Spaces*, 75 Harv. L. Rev. 1622, 1638-41 (1962); Moore, *The Acquisition and Preservation of Open Lands*, 23 Wash. & Lee L. Rev. 274, 284-85 (1966); Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 Vill. L. Rev. 559, 570-72 (1964). C. Mandelker, *supra* note 6; Snyder, *Toward Land Use Stability Through Contracts*, 6 Natural Res. J. 406 (1966).
10. See Hagman, *Open Space Planning and Property Taxation*, Wis. L. Rev. 628, 640-45 (1964).
 11. E. g., Delogu, *The Taxing Power as a Land-Use Control Device*, 45 Denver L. J. 279, 280 (1968); Krueger, *The Rural-Urban Fringe Taxation Problem*, 33 Land Econ. 264 (1957); Note, *Techniques for Preserving Open Spaces*, 75 Harv. L. Rev. 1622, 1641, (1962).
 12. Delogu, *supra* at 280-81; see McCloskey, *Preservation of America's Open Space: Proposal for a National Land-Use Commission*, 68 Mich. L. Rev. 1167, 1170 (1970).
 13. Various possible reforms of the anomalous relationship between real-property taxation and preservation of open-space are discussed in Delogu, *supra*; Eveleth, *An Appraisal of Techniques to Preserve Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 Stan. L. Rev. 638, 649-52 (1960); Moore, *The Acquisition and Preservation of Open Lands*, 23 Wash. & Lee L. Rev. 274, 290-93 (1966); Note, *Techniques for Preserving Open Spaces*, 75 Harv. L. Rev. 1622, 1641-42 (1962); W. Whyte, *The Last Landscape* 117-34 (1968). See also Note,

Taxation Affecting Agricultural Land Use , 50 Iowa L. Rev. 600 (1965); Huber, Allocation of Rights in Land: Preliminary Considerations, 50 Iowa L. Rev. 279 (1965).

14. The potential tax advantages to binding one's land through an open-space easement, as well as the statutory reforms necessary to realize them, are discussed in Note, Progress and Problems in Wisconsin's Scenic and Conservation Easement Program, 1965 Wis. L. Rev. 352, 357-72.

Chapter 3

15. Gale on Easements 5 (M. Bowles ed., 13th ed. 1959).
16. Beuscher, Some Legal Aspects of Scenic Easements in Conference Proceedings, Scenic Easements in Action 49 (Dec. 16-17, 1966).
17. Id. at 49-50.
18. But see note 41, infra.
19. Beuscher, Some Legal Aspects of Scenic Easements in Conference Proceedings, Scenic Easements in Action 49, 51 (Dec. 16-17, 1966).
20. C. Clark, Real Covenants and Other Interests Which "Run with Land" 7, 58-59, 62 (1929). This hostility may also be attributable to the failure of the common law to develop separate rules for easements acquired by prescription or presumed grant and easements created by contract. While there may be substantial reasons for strictly circumscribing the former class, those reasons may be inapplicable to the latter class. Compare, e.g., cases cited in Gale on Easements, supra note 15 at 22-23, with C. Clark, supra at 7.
21. E.g., Gale on Easements, supra note 15 at 7, 37-38 (exception for "ways in gross"). But see C. Clark, supra note 20, at 55 (limiting the common-law rule to a restriction on assignment).
22. See Gale on Easements, supra note 15 at 19-22, 31-33.
23. Id. at 33-34. Exceptions are for party-walls and the like, which Gale says are not easements at all and others have called "spurious easements". See, e.g., Reno, The Enforcement of Equitable Servitudes in Land: Part I, 28 Va. L. Rev. 951, 958-60 (1942).
24. See, e.g., Gale on Easements, supra note 15 at 13; Conrad, Easement Novelties, 30 Calif. L. Rev. 125 (1942).

25. Clark, *The Assignability of Easements, Profits and Equitable Restrictions*, 38 Yale L. J. 139, 143 (1928).
26. Behan, *Covenants Affecting Land* 45 (1925).
27. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 Denver L. J. 167, 175 (1968), quoting the notorious *William Aldred's Case*, 9 Co. Rep. 57b, 77 Engl. Rep. 816 (K.B. 1610); See Gale on Easements, *supra* note 15 at 23; cf. *id.* at 24-26 (public rights of wandering at will, recreation, and amusement). As to the subject generally, see Conrad, *Easement Novelties*, 30 Calif. L. Re. 125 (1942).
28. These problems are discussed in Cunningham, *supra* note 27 at 256-63.
29. See C. Clark, *supra* note 20, ch. 3.
30. 75 Harv. L. Rev. 1622, 1636. Most importantly those limitations are that the expropriated property must be necessary for a public use and that the owner be paid just compensation. Generally, courts have held that the question of necessity was for the legislature to decide and is not reviewable, see N. Williams, *Land Acquisition for Outdoor Recreation - Analysis of Selected Legal Problems* 14-15 (ORRRC Rep. 16, 1962), and the public use of scenic easements has been sustained, see *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W. 2d 793 (1966).
31. 75 Harv. L. Rev. 1622, 1636 (footnotes omitted).
32. See, e.g., W. Whyte, *The Last Landscape* 94 (1968).
33. For example, Clark assigns the following rationale to disallowing transfer of the benefit of easements in gross, while allowing transfer of the benefit of easements appurtenant and profits à prendre in gross: An easement in gross is "usually of small value, and easily forgotten by the holder thereof"; if it is forgotten, the holder will be difficult to trace. An easement appurtenant is less likely to be forgotten because it benefits the enjoyment of definite land, and, in the event that it is forgotten, the holder can be easily located because of his interest in nearby land. C. Clark, *supra* note 20, at 59; Clark, *The Assignability of Easements, Profits and Equitable Restrictions*, 38 Yale L. J. 139, 144 (1928). Similarly profits in gross usually confer a more economically valuable right than easements (the right to remove something, such as minerals, oil, or gas, from the servient tenement). Because the rights conferred will, accordingly, be regularly asserted, the beneficiary will be ascertainable. C. Clark, *supra* at 59-60. One could

properly question whether these considerations apply to conservation easements in gross in view of current notions of environment protection, especially when easements are held by the kind of activist environmental organizations which abound today or by governmental agencies whose principal functions would include administration of easements.

34. N. Williams, supra note 30 at 54-55; Beuscher, Scenic Easements and the Law in Conference Proceedings, Scenic Easements in Action 49, 51 (Dec. 16-17, 1966).
35. See the Massachusetts Conservation Restriction Act, discussed infra.

Chapter 4

36. W. Whyte, Securing Open Space for Urban America: Conservation Easements (Urban Land Inst. tech. bul. 36, 1959).
37. W. Whyte, Open Space Action 17-20 (ORRRC rep. 15, 1962).
38. W. Whyte, The Last Landscape 89-115 (1968).
39. N. Williams, Land Acquisition for Outdoor Recreation -- Analysis of Selected Legal Problems (ORRRC rep. 16, 1962). As to this subject, see also Plimpton, Conservation Easements: Legal Analysis of "Conservation Easements" as a Method of Privately Conserving and Preserving Land (The Nature Conservancy, undated).
40. Jordahl, Conservation and Scenic Easements: An Experience Resume, 39 Land Economics 343 (1963).
41. Note, Progress and Problems in Wisconsin's Scenic and Conservation Easement Program, Wis. L. Rev. 352 (1965), this paper also analyses the tax issue involved in easement acquisition.
42. Cunningham, Scenic Easements in the Highway Beautification Program, 45 Denver L. J. 167 (1968).
43. See Note, Flood Plain Zoning for Flood Loss Control, 50 Iowa L. Rev. 552 (1965).
44. W. Whyte, The Last Landscape 91-92 (1968).
45. Jordahl, Conservation and Scenic Easements: An Experience Resume, 39 Land Economics 343, 345 (1963). As to New York's program of purchasing fishing-rights easements, see Proceedings, Open Space Preservation Methods 10-14 (Open Space Action Committee, May 21-22, 1967) (remarks of Carl Parker, New York State Department of Conserva-

tion). For a discussion of the state's power to secure such rights without compensation, see Note, Fishing and Recreational Rights in Iowa Lakes and Streams, 53 Iowa L. Rev. 1322 (1968).

46. Id. at 348. Jordahl summarizes the state's acquisition of game-management easements:

[D]uring the period September 1, 1961, through June 14, 1963, 34 easements were taken for game management purposes on six game projects in four geographical areas of Wisconsin which included in one combination or another, hunting, fishing, trapping, drainage and flowage rights on 3,774 acres at a total cost of \$20,558 or \$5.45 per acre. The appraised value of these lands, exclusive of improvement, for fee simple acquisition was \$156,489 or \$42 per acre.

Id. at 354.

47. Note, Progress and Problems in Wisconsin's Scenic and Conservation Easement, 1965 Wis. L. Rev. 352, 356 n. 18.
48. Proceedings, Open Space Preservation Methods 6-7 (Open Space Action Committee, May 21-22, 1967). See Jordahl, Conservation and Scenic Easements: An Experience Resume, 39 Land Economics 343, 356-59, 360, 362 (1968).
49. See Cunningham, Scenic Easements in the Highway Beautification Program, 45 Denver L. J. 167, 181-85 (1968); W. Whyte, Securing Open Space for Urban America: Conservation Easements 12-13 (Urban Land Institute tech. bul. 36, 1959).
50. W. Whyte, The Last Landscape 95-96 n. (1968).
51. Cunningham, supra note 49, at 186.
52. See W. Whyte, Open Space Action 18 (ORRRC rep. 15, 1962).
53. Jordahl, Conservation and Scenic Easements: An Experience Resume, 39 Land Economics 342, 354 (1963).
54. This cost-saving consideration, of critical importance to the whole scheme of employing easements as a land-use control device, promises to be reliable only as long as awards in condemnation proceedings are based on a standard which incorporates the notion that fair market

value of an easement, because it represents only a part of the owner's property rights, must necessarily be less than the value of the full fee, the whole of his rights. The difficulty is that the interest of which a landowner is divested by a scenic or conservation easement may not be as fungible as fee-simple title to the land itself (which, our equity tradition teaches, is in some contexts presumed not to be fungible at all). If the state condemns land in fee simple, the owner (involuntarily ousted, to be sure) can presumably purchase with his award a comparable amount of land of comparable value. His options may be somewhat different if, let us say, the state condemns a scenic easement on his agricultural land prohibiting all residential, commercial, and industrial development. Of course, the state does not acquire the right to develop the property, but it is precisely that right, in perpetuity, which the owner is forced to relinquish. Can the landowner reasonably be expected to be able to purchase with his award a comparable property right, viz., the right in perpetuity to develop someone else's land? If I purchased from you the right to enter your land at any time in the future, to develop it, and to use it for development purposes in perpetuity, who would say that a fair price would necessarily be less than the market value of the land in fee simple at the time of purchase? And would you not be well-advised, in some circumstances, to insist on a periodic tenancy to enable re-evaluation of my consideration at appropriate intervals?

55. W. Whyte, *Open Space Action* 17-18 (ORRRC rep. 16, 1962).
56. E.g., Moore, *The Acquisition and Preservation of Open Lands*, 23 Wash. & Lee L. Rev. 274, 282-84 (1966).

Chapter 5

57. *The Conservation Leader*, Vol. V, no. 5, at 1 (May 1970).
58. Ibid.
59. Ibid.
60. Ibid.
61. Id. at 2
62. Id. at 2-3.

APPENDIX I

FRENCH "SERVITUDES"

Servitudes are based on articles 637 and 639 of the Civil Code which provide:

A servitude is a charge imposed on real property (land and permanent structures) for the use and utility of real property belonging to another owner. (637)

They derive from the natural situation of the places¹ or from the obligations imposed by law,² or by contracts between landowners. (639)

Although article 637 emphasizes the concepts of benefit and burden in the relation of two lands, article 649 provides:

Servitudes established by law have for their object public or community (communale) utility or the utility of private persons (649; emphasis added).

These conflicting statements have led commentators to the conclusion that the Civil Code has confused two concepts, which for convenience we may call private servitude and administrative servitude, the first one involving a relation between two real properties and the second involving a burdened land only.³ Private law, then, permits the creation by contract of only one form of servitude roughly corresponding to the American easement appurtenant and the German Grunddienstbarkeit;

[Private] servitudes always constitute real rights inasmuch as they may not be established except on real property . . . [C]onsidered as charges or benefits, they are essentially incorporeal, without existence apart from the two lands, dominant and servient.⁴

Article 686 provides:

The proprietors are allowed to establish on or for the benefit of their tenements any servitude they like, as long as the provided benefits are imposed neither on the person, nor for his benefit, but only to and for a tenement, and only when these utilities do not contain any measure against public order.

As a consequence, private servitude is, in principle,⁵ perpetual⁶ and will run with both the dominant and servient tenements.⁷ In the event of a violation, the possessor of the dominant tenement has available coercive remedies as well as damages.⁸ The link between administrative servitude and the Civil Code is tenuous: Article 650, from which the concept of administrative servitude is derived, simply provides that everything concerning public-utility servitudes is determined by particular laws and regulations. The concept of administrative servitude is not further defined in the Civil Code. Great use has been made of the concept, nonetheless, and a vast amount of administrative servitudes has been created "by particular laws" or by "particular regulations". The legal characteristics of the charges imposed by these various texts confirm the autonomy of the concept of administrative servitude.

They constitute a real obligation restricting the use of land but for public benefit rather than for the benefit of a dominant tenement. Courts have held that they may be "created" only by statute,⁹ but such a statute may be very general, and the administration then has the authority to apply the text in concrete circumstances and give it an appropriate construction.¹⁰ In practice, the concept of administrative servitude is the source of very broad governmental powers to impose land-use controls; it constitutes the kind of regulatory authority with a possibility of compensation which has been urged in the United States.¹¹

As a general principle, administrative servitudes are considered to be limitations on private ownership, not deprivations of property, and, thus no compensation is required. For example, courts have held that laws prohibiting billboards are simply imposing a servitude, which constitutes no reason for indemnity.¹² Statutes creating servitudes may, and often do, specify the circumstances under which an indemnity will be paid. Some statutes use a formula by which, if the value of land is reduced by fifty percent, the landowner can require the administration to elect between expropriation of the land at full value or relinquishment of the servitude.¹³ The town-planning code provides that servitudes concerning the use of land, height of building, prohibited construction, and so on shall bring no compensation unless a land use has already been undertaken which is henceforth forbidden.¹⁴ This echoes the general rule applied by the courts: When a statute is silent on the question of compensation, courts apply the rule that "any act of public power gives right to an indemnity when a direct, material, and special damage results."¹⁵ This rule is always construed to preclude compensation where a landowner is forbidden to use his land in a manner in which he has not used it in the past. Accordingly, it is fair to say that all purposes to be achieved in the United States through negative conservation easements, such as prohibiting new construction and new land uses, can be achieved in France through the device of administrative servitudes with no compensation.¹⁶

The authority described by the term administrative servitude may be invoked for conservation purposes in many instances. In addition to the texts relating to town planning,¹⁷ the law on natural reserves,¹⁸ and the law on national parks,¹⁹ numerous other texts are also important for conservation purposes.²⁰ The prescriptions relating to the protection of monuments and sites, although dating back to the early thirties, remain the classic example of texts creating conservation oriented servitudes: appropriate areas may be designated as protected sites. This function is performed by the Minister of Environment and the various local prefects. Under the authority of the Minister, prefects may prepare protection zones proposing the form of administrative servitude to be imposed, and, once a servitude is established, they have the authority to proceed against any infringement of its terms. While the law does not give a precise definition of "site", the notion is quite comprehensive; the law of 2 May 1930, for example, contemplates protection of

natural monuments and sites the conservation or preservation of which presents a general interest from an artistic, historic, scientific, legendary, or picturesque point of view.

Besides expropriation, there are three ways of protecting sites: l'inscription sur l'inventaire des sites, le classement, and l'établissement d'une zone de protection. Each of these techniques consists essentially in the imposition of land-use restrictions in the form of administrative servitudes. By site-inscription,²¹ it can be specified that only ordinary rural and agricultural uses be made of rural property.²² A change in land use is possible, but if the administration disagrees with the change, it may use the procedure of classification to enforce the protection. Classification²³ contemplates somewhat more extensive regulation, and indemnity can be provided. But the open-space purposes of conservation easements can be achieved without compensation by simply imposing a servitude non aedificandi on a classified site, specifying that the actual activity of the owner on his land may not be modified. Article 8 of the law of 2 May 1930, as modified on 28 December 1967, provides indemnity for a classification decree only if it "causes a modification of the state or use of the classified places, producing a direct, material, and certain damage". Finally, protection zones are principally intended to provide buffer zones, with limited restrictions between classified sites and non-classified areas.

The problem in France, then, is not a lack of official power. Insofar as existing powers are not invoked for the effective preservation of nature, it may be helpful to enable private organizations to complement governmental activities. But is it possible for a private organization which is interested in preserving land in its natural character to

acquire environment-protecting servitudes?

Two types of private organizations are pertinent to our inquiry: organizations created pursuant to the law of 1 July 1901 and groups invested with public-power prerogatives (whose legal status lies somewhere between private and public law).

In view of their purpose and activities, a private organization can, through special texts, be invested with prerogatives normally reserved for administrative agencies. Their purpose must be some form of public service. Most special texts confer a right to institute proceedings for a declaration that a planned project is of public utility as a prelude to expropriation. Examples of such organizations include owners of public works, mining organizations, owners of thermal sources, etc. An association for the protection of nature could be invested by a special-law text with prerogatives of public power, specifically including the capacity to acquire real property and droits réels.²⁴ Nothing would prevent such an association, like the administration itself, from acquiring servitudes by contract. They will, however, also face the requirements of a dominant tenement,²⁵ and their position in this respect will be similar to the one of the associations regulated by the law of 1 July 1901.

Article 1 of this law prescribes that an association may be established by persons permanently joining their knowledge or activities for a common purpose other than for sharing benefits. (This is accomplished simply by making a declaration to the department-prefecture where the association will have its seat.) Article 6 says, "Any association regularly declared . . . can acquire . . . the real property which is strictly necessary to accomplish its purpose" (emphasis added). A second type of association is contemplated by Article 10. "[A]ssociations can be acknowledged to be of public utility by means of decrees given in the form of public administration regulations. They are not allowed to acquire other real property except that which is necessary for their purpose" (emphasis added). The law of 2 July 1913 nevertheless makes clear that they have the capacity to "acquire woods, forests or areas to afforest . . ."

Several impediments immediately appear to the ability of such organizations to acquire conservation servitudes: First, the "strictly necessary" requirement contemplates only the acquisition of workrooms, offices, conference rooms and the like. Second, while the "strictly" qualification does not apply to public-utility organizations in either case the Code refers only to acquiring "real property". It does not mention droits réels, interests in real property running with the land, which would include servitudes. Finally, even if an expansive interpretation of necessity and realty were given, it must be remembered that private servitudes are limited by the definition contained in article 637 of the Civil Code.

Accordingly, public-utility organizations would still be faced with the requirement of a dominant tenement. According to the private law, therefore, it is presently impossible for such associations to acquire servitudes non aedificandi, for instance, on a large scale. To make it possible, it would be necessary to replace the concept of a dominant tenement with a larger, totally different concept: protection of nature in the public interest.

NOTES

1. Listed by art. 640 CC et. seq. Among the servitudes described in these articles, only one, however, (run-off of natural waters) really derives from the location of the places.
2. Described by art. 649 to 685 CC, among which the basis for administrative servitude can be found (649 and 650 CC).
3. Voirin, n. 501, cited by Auby, Servitudes administratives J.C.A. Fasc. 390.
4. Vignerou, Servitudes légales no. 27, J. -Cl. Civil: Art. 637-639
5. The perpetuity is not essential: two owners may create servitudes for a limited period of time (Civ. Béthune 2.5.1934 S. 1934, 2, 51.)
6. a) They are extinguished only if there is no longer a reason for them to be maintained (703-710 CC), as for instance for non-usage for 30 years. For those servitudes which are continuous (non aedificandi, non altius tollendi, light and view . . .), this period of time will run from the date when an act contrary to the servitude has been performed.
b) As a consequence, the owner of the servient tenement may not free his land from its burden by purchase of the servitude, unless provided by a special law (e.g. law on repurchase of certain servitudes burdening the pools of Les Dombes, 21.7. 1856).
7. Vignerou, supra note 4. at 27, 31, 33. Being accessory rights, they may only be transferred, seized, rented, mortgaged or condemned together with the dominant or servient tenement (Cass. civ. 3.9. 1900, Gaz. Pal. 1er sem. p. 3).
8. Code Civil, arts. 1143-44 (demolition, at cost of the servient tenement holder, of a building constructed in violation of a servitude).
9. Civil Cassation, 11 May 1937, S. 1937, 1, 297.
10. Auby, Servitudes administratives, P. 86, J. -Cl. fasc. 390.
11. See Krasnowiecki & Paul, The Preservation of Open Spaces in Metropolitan Areas, 110 U. Pa. L. Rev. 179 (1961);

- Mandelker, Notes from the English: Compensation in Town and Country Planning, 49 Calif. L. Rev. 699, 708 (1961).
12. Conseil d'Etat, 16 July 1924, Société de publicité Boreau.
 13. E.g., Decree of 31 Oct. 1961, art. 31 (national parks); Decree of 29 Oct. 1952 (forest code).
 14. Town-planning Code, art. 82. For an analysis of the various statutes providing for compensation, see Auby, supra, sec. II.
 15. C.E., Avis, 18.2.1924.
 16. When no compensation is provided for by law or when the necessary conditions for compensation are not fulfilled, the servient tenement loses value accordingly. In these circumstances, it might be a temptation for the administration to create administrative servitudes in order to devalue the land as a prelude to expropriation. It is held by courts, however, that "[t]he existence of an administrative servitude does not reduce the value of the [servient] tenement vis à vis the administration." Cass req. 18.10.1888 D. 88,1,230.
 17. The most important servitudes in this area are derived from decrees dated 21.12.1958, replacing prescriptions of the Town-planning and Habitation Code of 26.7.1954. Permanent additions and amendments to this body of regulations make it a legal muddle. Let us only mention that the present regulations allow imposition of servitudes without compensation for such purposes as forbidding building, prescribing minimum lot sizes, building characteristics, and permissible land uses and forbidding the cutting of woods.
 18. Law of 1.7.1957 completing law of 2.5.1930 (art. 8 bis) permitting special charges with a view to conserving species.
 19. Law of 22.7.1960, Decree of 31.10.1961 which enables forbidding inside the park hunting and fishing, industrial and commercial activities, execution of public and private works, mining operations, utilization of water, circulation of the public, etc. . . The decree of 1.3.1967 on natural regional parks does not create new servitudes.
 20. Law and decree of 29.10.1952 creating the Forestry Code providing for various prohibitions of deforestation; law of 28.11.1963 and decree of 17.7.1966 on seashores and maritime domain, creates a servitude non aedificandi on the area adjacent (20 to 50 m) to the maritime domain.

21. Use of this flexible procedure is often made. France has more than 5,000 inscribed sites, and their number is still increasing. Previously, only curious rocks, hills, groups of trees, and the like were inscribed. Now larger pieces of land are involved: the entire Ile de Ré, some villages in the Provence, parts of the coast of Brittany, are inscribed sites.
22. Law of 2 May 1930, on protection of natural monuments and sites.
23. Classification is declared by ministerial decision if the owner agrees. If he does not, a decree in the Conseil d'Etat is necessary (classement d'office).
24. An analogue is an agency in charge of managing regional parks established pursuant to the decree of 1 March 1967. Such an agency can acquire by contract real property and droits réels according to private law procedures. A circular letter of 1 July 1967 states, "On the other hand, they will form privileged zones by agreement of the agency and local landowners for applying some existing measures. Moreover, they will rely on freely agreed upon contractual obligations. It will be possible to solve many local problems by contractual agreements between the agency in charge of the park and either collectivities which are members of this agency or private owners whether physical or moral persons."
25. For servitudes established by contract by the state, see Auby, *Id.* 73-78. Particularly interesting are the servitudes created by contract relating to architecture requirements in Paris, which the Cour de Cassation analyzed as private servitude, but had to create a fiction related to servient and dominant tenement for that purpose. It was said that the whole city constituted the dominant tenement vis à vis each segment which was burdened.

APPENDIX II

GERMAN "BESCHRÄNKTE, PERSÖNLICHE DIENSTBARKEITEN"

Corresponding to the American easement in gross, paragraph 1090 in conjunction with paragraph 1018 of the German Civil Code (BGB) allows land to be burdened, to the benefit of natural persons, organizations having a legal status, or the state, with a beschränkte, persönliche Dienstbarkeit (a limited, personal servitude) in a way that can (a) forbid every owner and user of the burdened land to perform certain acts on this land and (b) entitle the one in whose favour the land is burdened to use the land in certain respects and to allow others to use it. This device may be employed to achieve any economic or reasonable, non-economic purpose of land use; it is necessary only that the content of the beschränkte, persönliche Dienstbarkeit be defined with sufficient precision. The burden imposed runs with the burdened land. Accordingly, all the various charges on property that can be attained through the easement technique in the United States are, in principle, likewise attainable in Germany in the form of a beschränkte, persönliche Dienstbarkeit.

There are, however, legal difficulties to adapting the device of personal Dienstbarkeit to conservation purposes. Some of these aspects of the device may account for the failure of conservation organizations in Germany to acquire limited land-use rights thereby achieving conservation goals with less money than outright acquisition and with no obligation to maintain or cultivate the land.¹ These difficulties especially concern assignment of the benefits created and possible extinguishment of personal Dienstbarkeiten on forced sale.

The personal Dienstbarkeit is in principle inalienable and non-transferable.² The general rule is that, when a natural person dies or an association is dissolved, its personal Dienstbarkeiten expire.³ A corporation or organization with a legal status can prevent the expiration of its personal Dienstbarkeiten in the event of its liquidation by taking certain precautions in its articles of incorporation or other governing documents as appropriate. Those documents must simply specify that, in case of dissolution, the organization's property as a whole is to be transferred to another organization with a legal status or to the state.⁴ A servitude would thus be transferred with the property to the entitled successor.⁵ Perhaps for many public-interest organizations, the successor with the most reliably predictable longevity would be the state treasury.⁶ Pursuant to paragraph 46, 2 BGB, the state treasury, having received the

property in this manner, would then be obligated to administer the personal Dienstbarkeit according to the objectives of the liquidated association.

Beschränkte, persönliche Dienstbarkeiten for landscape conservation purposes may be created only by contract. No statute presently enables governmental acquisition of such personal Dienstbarkeiten by eminent domain. The protection of landscape and nature by means of sovereign power (including the scope of governmental authority and designation of the various agencies among which that authority is distributed) is conclusively regulated in the Bundesbaugesetz (Federal Building Law), the Reichsnaturschutzgesetz (Nature Protection Law), and other laws. These public laws confer broad governmental authority for limiting private property for purposes of landscape conservation. On the basis of this authority, and in most cases even more far-reaching land-use controls than those sought to be attained in the United States with scenic and conservation easements may be attained in Germany with no compensation or relatively little compensation in comparison to the value of the regulated land when devoted to its most economically advantageous use.

However, land-use controls cannot be sought on the basis of the Reichsnaturschutzgesetz if by this the interest of the property owner would be affected to such a severe and extensive degree that the interest of the general public in the preservation of nature must yield on the grounds of fairness.⁷ In such a case, the far-reaching and substantive limitation of property rights permissible without compensation⁸ under the Reichsnaturschutzgesetz,⁹ is not permissible.¹⁰ Because it very often seems difficult to define the boundary between a permissible substantive limitation of property rights and an expropriation, nature-protection authorities tend to purchase land in need of protection instead of making use of their governmental authority given by the Reichsnaturschutzgesetz. As long as there is no change in the implementing regulations of the Reichsnaturschutzgesetz which will grant compensation¹¹ in the case of a severe and extensive scenic conservation measure (expropriation) it seems more helpful to close this gap through the purchase¹² of persönliche Dienstbarkeiten instead of acquiring full title to the land, thereby conforming the financial expenditure to the limited purposes hoped to be achieved.

The greatest barrier to conservation organizations desiring to purchase only limited land-use rights in the form of personal Dienstbarkeiten instead of acquiring full proprietary ownership of land is the instability of Dienstbarkeiten in the event of a forced sale of the burdened tenement.

In general, if a forced sale of land is initiated by a creditor whose claim was recorded prior to the recording of a beschränkte, persönliche Dienstbarkeit, the personal Dienstbarkeit automatically expires upon the sale¹³ and its holder is entitled only to monetary compensation.¹⁴ The obvious difficulty is that monetary compensation will virtually always be an inadequate and inappropriate remedy for personal Dienstbarkeit preserving environmental values. (If, of course, the personal Dienstbarkeit is recorded prior to the claim of the initiating creditor, then the Dienstbarkeit remains in the geringste Gebot, i.e., it remains attached to the land.) This expiration of personal Dienstbarkeiten upon a forced sale initiated by previously recorded creditors can occur even if all prior creditors are fully compensated. Present law places the burden on the holder of the personal Dienstbarkeit to prevent its expiration in these circumstances; it will expire unless the holder resorts to the procedures of § 59, ZVG. According to that text, the holder of the personal Dienstbarkeit may make a formal demand that it remain attached to the land even though it does not fall into the protected class of interests known as geringste Gebot if all prior claims are guaranteed.¹⁵ Only in these circumstances will the personal Dienstbarkeit falling outside the geringste Gebot, be guaranteed without the consent of priority creditors.

Present law does shift the burden, however, for one class of servitudes as to which monetary compensation is, in effect, presumed to be inadequate. Paragraph 9 Einführungsgesetz zum ZVG provides that personal Dienstbarkeiten providing for a Leibgedinge, Leibzucht, Altenteil, or Auszug (various forms of life-pension guarantees) do not automatically expire upon a forced sale even though they do not fall into the geringste Gebot if state law so provides. A priority creditor must demand extinguishment of such a personal Dienstbarkeit if his claim would be adversely affected by the personal Dienstbarkeit's remaining attached to the land. This rule does not, of course, irrevocably prejudice previously recorded claims; it merely shifts the burden from the holder of a Dienstbarkeit to the priority creditors where the Dienstbarkeit falls within this class for which compensation would be inadequate. Inasmuch as compensation is likewise inadequate for landscape-conserving personal Dienstbarkeiten and they would thus fall within the policy of this exception, the text should perhaps be amended to include them.¹⁶

The inconvenience of present practice for environmental personal Dienstbarkeiten is that the holder of a personal Dienstbarkeit must initiate a formal demand that it would not expire upon a forced sale even if all prior creditors would be fully protected. If, on the other hand, they were treated like the class described in §9 Einführungsgesetz zum ZVG, the holder of an environmental personal Dienstbarkeit need take no action unless a demand for expiration were made by priority creditors. In the event that such a demand were made, the

only sure recourse for the Dienstbarkeit holder would be to attend the sale prepared to purchase the land at a price which would compensate all prior creditors whose claims are at stake.

CONCLUSION

The charges on land which can be obtained with American conservation easements can also be obtained with beschränkte, persönliche Dienstbarkeiten. Although this device is highly personal, conservation organizations can take effective steps to ensure the continuation of their personal Dienstbarkeiten even beyond the life of the organization. The major difficulty is presented by laws concerning expiration of personal Dienstbarkeiten upon forced sale initiated by previously recorded creditors. While the law could be changed to ease the practical burden of these texts, it seems apparent that heavily mortgaged land must be avoided. If land is not heavily burdened, a § 59 ZVG demand is likely to preserve the personal Dienstbarkeit because the high bid at forced sale would ordinarily satisfy prior claims.

Conservation organizations, as well as, in certain cases, the state, may well find it to be advantageous to purchase limited land-use rights pursuant to §§ 1090, 1018 BGB. Where full proprietary ownership is not necessary to the purpose, personal Dienstbarkeiten promise a means of conforming the financial outlay to the limited purposes hoped to be achieved. And, as the American experience suggests, environment-protecting personal Dienstbarkeiten may in many cases be donated. Acquiring limited environment-protecting rights also has the advantage that the landowner remains in possession and the conservation organization, in whose favour the Dienstbarkeit is recorded, is not charged with the maintenance of the land, as would be the case if full ownership had been purchased.

NOTES

1. That a landscape-conserving personal Dienstbarkeit would serve public environmental interests as well as the private interests of its holder presents no more legal difficulty than outright acquisition, which could similarly serve public as well as private interests.
2. See § 1092 I S. 1 BGB.
3. See §§ 1061, 1090 II BGB.
4. § 45 BGB. The personal Dienstbarkeit could also be transferred to a natural person, but all personal Dienstbarkeiten held by a natural person expire upon his death. If a person owns land which would be benefited by a servitude on nearby land, he would acquire a Grunddienstbarkeit (a real servitude). See § 1018 BGB. As in the American and French systems, this form of servitude is in principle perpetual and would run with both the burdened and benefited land.
5. See § 1059 a I Ziff. 1, 1092 II BGB.
6. See § 45 BGB.
7. See BVerfGE 5, 145; 7, 299; 11, 75.
8. See BVerfGE 21, 82/83: "The fact that the land and earth are fixed quantities and indispensable, forbids that their use be completely left to the unsupervised play of free powers and to the pleasure of individuals. A just legal and societal ordering demands that the interests of the public in land must be realized in much fuller measure than by other types of property. The land and earth are neither in their economic sense nor in their social importance comparable with other types of property; in legal transactions it cannot be treated as personal property."
9. See § 18 Nat Sch DVO.
10. Art. 14 III GG.
11. Compensation is granted, e.g., for expropriatory measures under the Bundesbaugesetz, §§ 40, 93 ff; Bundesleistungsgesetz (Federal Requisitions Law), §§ 20 ff; and Landesbeschaffungsgesetz (Land Procurement Law), §§ 17 ff.
12. Parliament, by controlling the financial outlay of government authorities, also controls the management of those scenic and nature protection areas for which public funds were used. This would inhibit the respective governmental

authorities from rezoning or issuing exemptions practically at will which are too often contrary to the long-term general welfare. In view of the increasing importance of environmental protection, it seems justified to place the administration of scenic or nature protection areas under special parliamentary supervision, independently of whether public funds have been used for establishing these areas or not.

13. See §§ 44, 52 I, 91 I, Zwangsversteigerungsgesetz (ZVG).
14. See § 92 ZVG.
15. In order to determine whether all prior claims are guaranteed if the personal Dienstbarkeit remains attached to the land, the land is put to sale, (a) on the condition the servitude expires, and, (b) on the condition the servitude stays. (So-called Doppelausgebot, see § 59 II ZVG).
16. Paragraph 9 I Einführungsgesetz zum ZVG could be amended to read, "If a beschränkte, persönliche Dienstbarkeit contains a Leibgedinge, Leibzucht, Altenteil, Auszug or a right for the purpose of protecting the environment, the beschränkte, persönliche Dienstbarkeit does not expire in a case of a forced sale, on condition that state law so provides, even if it does not fall into the geringste Gebot." An amendment, which would extend this proposal - e.g. upholding a servitude prejudicing prior rights - is not to be recommended. Anyone who has a right recorded prior to the servitude must be able to trust that it cannot in effect be withdrawn later. Otherwise the entire system of land burdening would in its practicability be endangered.

