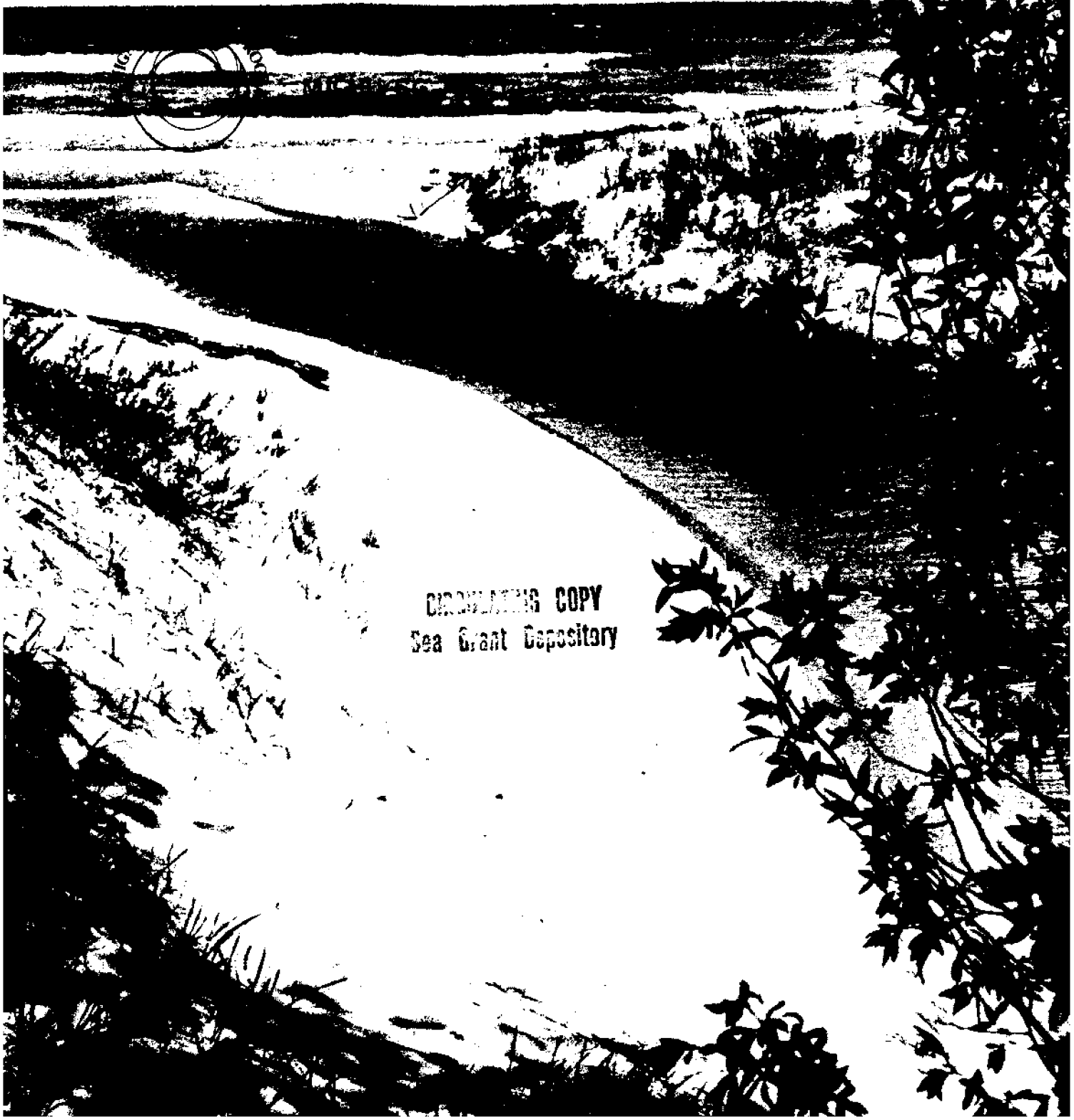
Acquisition of Public Access Sites to the Great Lakes

by
Diana V. Pratt



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December, 1979

Michigan Sea Grant Program
Publications Office
2200 Bonisteel Boulevard
Ann Arbor, Michigan 48109

MICHU-SG-79-214

Price: $3.00

Introduction

The Coastal Zone Management Act[1] requires that coastal states applying for federal funds to design and implement coastal zone management programs provide for public access to the waters. Although the programs are formulated in the state government, implementation can and will occur at all levels including the townships, villages, municipalities, counties and the state. The concerns of each and the mechanisms by which each will seek to acquire public access sites is different. Where the state has the financial resources to condemn unique land for parks, a local government will have difficulty raising the money for purchase or condemnation, and further it will face the consequent loss of property tax revenues.

The concept of public access to coastal waters takes on a variety of forms in the minds of the public according to the uses envisioned. Types of public use include: bathing, boating, sunning, camping, fishing, boat launching, boat storage, hiking, off road vehicle use, aesthetic enjoyment, bird watching, hunting, trapping and picnicking. Each category encompassess a considerable range of meaning. For one person a public access site for aesthetic enjoyment means a desolate stretch of woods and beach crossed only by a wild trail; to another it is a scenic turnout on a highway. Camping ranges from roughing it in the wilderness to parking a camper at the site and attaching lines for water, sewer, and electricity. Boating includes kayaks and commercial vessels. Public access must at one site or another accommodate this great variety of public uses.

Public access changes its meaning with its context and environment. If the aim is to provide a viewing area for

1. 16 USC Sec. 1451-1464.

nesting and migrating waterfowl in a rural wetland, the public agency might choose to have the area designated as an enviromentally sensitive area under a Shoreland Protection or Wetland Preservation Statute.[2] It could also acquire an easement from the landowner for a raised wooden walkway and purchase or lease some land back from the shoreline for parking. A city, whose goal is to provide the public with a place from which to watch an active port, could work with commercial developers to create a wide and tastefully landscaped promenade in front of a row of small specialty shops and restaurants. The promenade would benefit both the public and adjacent businesses. Where the local tax base might suffer from the outright acquisition of the coastal strip, it might benefit from the combined public and commercial use. In a developing surburban area the local planning agency could employ subdivision exaction to establish the same public viewing area.

Traditional dictates of property law, where land is viewed as an isolated parcel described by metes and bounds, are not helpful. In former centuries the use made of the land by an owner was with some exceptions, his business alone. With increased population and urbanization, limits were put on uses to make sure they were mutually compatible. The constitutional question of a "taking"[3] is not seen as purely a physical invasion or appropriation of a measurable and definable piece of land. Regulation that does not permit profitable use of land can also be a taking. Like Water Law,

2. Michigan, Shoreland Protection and Management Act, MSA Sec. 13. 1831-1845 MCLA Sec. 281.631-645. Federal wetland regulatory power is based upon: Coastal Zone Management Act, 16 U.S.C. Sec. 1451-1464; Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1432-1454; Sec. 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403; and Sec. 424 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 et seq.
3. U.S. Constitution, 5th and 14th Amendments; Michigan Constitution of 1963, Article X, Sec. 2.

which has long been seen in terms of rights of use, interests in land should no longer be merely divisions in space with distinct parameters, and in time - leases, life estates, remainders, and so forth, but should also be considered a collection of rights to use. Planning too, should not be limited by the artificial boundaries imposed by recorded title or by the constraints of the present moment. Recent developments in land use planning have expanded these conceptual horizons.

The landowner's perspective has also changed. How he thinks less about his land as a place to live or farm and more about the value of the land. Value is determined in part by location, and in part by present and potential uses of the area, often a direct function of the police power, zoning. There is nothing particularly fair about zoning. If there are two lots on opposite sides of the street in an inexpensive residential neighborhood and the area on one side of the street is zoned commercial by an ordinance, that lot has increased in value. The second lot by the same administrative action has decreased in value. The constitutional issue is not an easy one. Has the second lot been taken? Does it matter if both lots are vacant? Or if both have houses on them? Zoning ordinances for the most part have been upheld as within the discretion of the public agency to regulate for the health, safety, welfare and morals of the public.[4]

In Wisconsin the highest court held that the value of a wetland was determined by its highest and best use in its natural condition and not by the value it might have attained if filled.[5] If other courts were to follow this holding all zoning ordinances, which permitted current uses, but limited

4. Euclid v. Ambler Realty Co., 272 U.S. 365, (1926); Arverne Bay Const. Co. v. Thatcher 278 NY 222, 15 NE 2nd 587 (1938).
5. Just v. Marionette County, 56 Wis 2nd 7, 201 NW 2nd 761 (1972).

further development would be upheld. As holdings on the "taking" question in most jurisdictions have not gone this far, we cannot predict where the line between compensable taking and permissible regulation exists. This poses a dilemma in the acquisition of public access sites and the maintenance of compatible land uses in adjacent areas. The more regulation permitted, the less land must be acquired and the lower the cost to the public fisc.

This article will discuss various methods of acquiring public access to the coastal waters. We will consider access sites for a variety of public uses involving the acquisition of limited and the full panoply of rights inherent in the land. A variety of costs and payment alternatives will be presented involving both public and private sources of funds. The tax consequences will also be discussed.

Dedication

Public access to the shoreline can be acquired by dedication. The doctrine has long been used to transform private roads into public ones. The basic requirements of common law implied dedication are an intent to dedicate on the part of the owner and acceptance by the public. The evidence on these two issues need not be direct, but can be implied from the owner's acquiescence and the public's use.[6]

The application of dedication to beach access has been relatively recent. In 1964 the Texas court[7] held that there had been an implied dedication where the public had used the beach for over a century for swimming, picnicking, walking, fishing, sunning, and other recreational uses. Public enjoyment of the area was permissive in that no objection had ever been raised to the use, and the dedication was found to be implied in that no one had ever asked permission of the owner to use the land.

The doctrine was employed and thoroughly analyzed in California.[8] In its opinion the California Supreme Court held that the public could establish dedication either by showing intent to dedicate and acceptance by the public under circumstances that negate that the use is by license, or by giving evidence of open and continuous use for the prescriptive period. Where the use is for fewer than 5 years, the prescriptive period in California, there must be proof of the owner's consent to the dedication.

The court distinguished public adverse possession from that by a private individual. Adversity in these cases is established by public use of the land as if it were public

6. 22 Stanford Law Review 564, 574 (1970).
7. Seaway Co. v. Attorney General, 375 SW 2d 923 (Tex. Civ. App. 1964).
8. Dietz v. King, Gion v. City of Santa Cruz, 2 Cal. 3rd 29; 465 P 2d 50; 84 Cal. Rpts. 162 (1970).

land and by lack of objection by the owner. Public maintenance of the area is also helpful.

In order for the owner of the land to negate a finding of dedication to the public, he or she must affirmatively prove that the public had a license to use the property or that he or she has affirmatively and persistently tried to prevent public use. A few no trespassing signs, that immediately disappeared, or the placement of a log across the road, which was quickly removed, did not constitute a 'bona fide attempt to prevent public use'.[9]

The court also considered the problem raised in the law review article cited above,[10] that dedication for purposes of roads and recreational areas has been considered in many jurisdictions to require different standards. The court found a clear public policy in the California Constitution, Article XV, Section 2, favoring public access to navigable waters. The court concluded that access to beaches like roadways serve an important function in our society and that the standards used for roads are applicable to beaches.

Common law or implied dedication is a useful doctrine that can be employed in the Great Lakes States as well, to provide public access to navigable waters. In Michigan, the general requirements are an intent to dedicate by the owner of a fee simple interest in the land and acceptance by the public.[11] Dedication must be for a public purpose benefitting the public in general.[12] An offer to dedicate may be withdrawn prior to acceptance[13] but it may not be revoked after acceptance.[14] The requirements for implied dedication

9. Ibid., p. 55.
10. See note 6, supra.
11. Clark v. City of Grand Rapids, 334 Mich 646, 55 NW 2d 137 (1952), Alton v. Keeuwenberg, 108 Mich 629, 66 NW 571 (1896).
12. Kraushaar v. Bunny Run Realty Co., 298 Mich 233, 298 NW 514 (1941).
13. Detroit v. Detroit SMR Co., 23 Mich 173 (1871).
14. Theisen v. Detroit, 254 Mich 338, 237 NW 46 (1931).

in the other Great Lakes States are similar.[15]

Common law dedication does not transfer title to the land, but only gives the public an easement. The advantage of this method, however, is the low cost.

Land may also be dedicated to the public by statute under the various plat acts.[16] The Michigan statute is representative:

> (1) When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to rest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other.
>
> (2) The land intended for the streets, alleys, commons, parks or other public uses as designated on the plat shall be held by the municipality in

15. City of Vermilion v. Dickason, 372 NE 2d 608 (1976); Bengtson v. Village of Marine on St. Croix, 246 NW 2d 582 (1976); Bartlett et al v. Stalker Lake Sportsman's Club et al, 168 NW 2d 356 (1969); Flynn v. Beisel, 102 NW 2d 284 (1960); Hunt v. Oakwood Hills Civic Assoc. Inc., 119 NW 2d 466 (1963); Lake Beulah Protective and Improvement Association v. Christenson, 76 NW 2d 276 (1956); Gibson v. Ocker, 214 NE 2d 395 (1966); City of Cannelton v. Lewis, 111 NE 2d 899 (1953); Coffin v. Old Orchard Development Corp., 186 A 2d 906, 408 Pa 487 (1962); Sayre Land Co. v. Borough of Sayre, 384 Pa 534, 121 A 2d 579 (1956); Hankin v. Harbison, 443 Pa 196, 279 A 2d 36 (1971); Village of Joppa v. Chicago and Eastern Illinois Railroad Co., 366 NE 2d 388, 51 Ill App 3rd 674, 9 Ill Dec 131 (1977).

16. Michigan MSA Sec. 26.430 (253), MCLA Sec. 560.253; Illinois 24 Sec. 11 105-1; Indiana-14-4-5-1 et seq. 160-888; 18-5-10-33, 48-801; Minnesota-160.05, 505.03; New York General Municipal Law Sec. 72-f Enviromental Conservation Sec. 45-0101 et seq. Town Law Sec. 277-278; Ohio Sec. 1517.04 et seq., Sec. 717.06 et seq.; Pennsylvania Sec. 53-3381 et seq., Sec. 53-46735; Wisconsin 21 Sec. 236.29.

which the plat is situated in trust to and for such uses and purposes.

Statutory dedication differs from its common law counterpart in that a fee simple and not an easement interest is transferred. The land is offered for dedication in the plat and accepted upon approval and recording the plat. It is particularly interesting to note that subsection (2) invokes the public trust doctrine, and that the land is held in trust not by the state as in Illinois Central Railroad v. Illinois[17], but by the municipality.

Statutory dedication has long been employed to provide the public with streets, alleys and their amenities.[18] The technique has recently been expanded to exact from subdividers land for parks[19] or fees in lieu[20] of land, where the donation of land is not practical for reasons of location, geography, or size.[21] The rationale behind this enforced dedication is that the subdivision will house people of sufficient numbers to require the creation of a park for their use. Where there is already a park in the neighborhood or the subdivision is too small to warrant a separate park, fees in lieu of land will enable the local government to provide park facilities at a different locale.

The technique of subdivision exaction can be used by coastal units of government to provide public access to the Great Lakes for a variety of public recreational purposes: boat launching sites, fishing piers, parkland, natural areas and others. In lieu fees from inland subdivisions can be

17. 146 US 387, S Ct 110, 361 Ed 1018 (1892).
18. Ridgefield Land Co. v. City of Detroit, 241 Mich 468 (1928).
19. Jordan v. Village of Menominee Falls, 28 Wis 2d 608, 137 NW 2d, 442 (1965); MSA 26.430 (253).
20. Jenad v. Village of Scarsdale, 18 NY 2d 78 (1966).
21. 26 Arkansas Law Review 415, 416.

used to purchase recreational shoreline, where it is clear that population influx to the subdivision makes it necessary for the local government to provide additional public parkland. The local zoning ordinance ought to provide for both in lieu fees and subdivision exaction so that land developers can anticipate these requirements in calculating the costs of their projects.

Custom

The custom doctrine is one with spectacular potential, but unfortunately one with limited applicability. Under the doctrine, local custom is given the force of law when the custom is reasonable, certain, compulsory, continued, peaceable, consistent with other customs, and has been in effect from time immemorial.[22] In England time "immemorial" meant that the memory of man runneth not to the contrary[23] or specifically that the custom had existed since before 1284 and the reign of King Edward I.[24] Historically custom was limited to local application and a particular use.[25] American recorded history is not sufficiently ancient for strict application of the doctrine. It was used, however, in New Hampshire in 1834.[26]

The Oregon and Hawaiian Courts revived the doctrine in the late 1960s to open their beaches to the public. In Thornton v. Hay[27], the Oregon Supreme Court held that "the dry sand area along the Pacific shore' has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.[28] The doctrine was expanded beyond the local scope described by Blackstone to include the entire dry sand shoreline of Oregon.

In Hawaii the custom doctrine was also used to give the public a right of access to the beaches below the vegetation line. The history of the Hawaiian Islands is very different from that of the other 49 states. The court used a common

22. W. Blackstone Commentaries, 76-78.
23. Ibid.
24. Ibid.
25. 26 Hastings Law Journal 823, 828 (1975).
26. Perley v. Langley, 7 N.H. 233 (1834).
27. 254 Oregon 584, 462 P 2nd 671 (1969).
28. Ibid., 462 P 2nd 675-676.

law doctrine brought to the islands by the settlers with the custom evidenced in the language, culture, and former royal government of the native population. "Time immemorial" in the Hawaiian context is 1846 when the government was organized. The doctrine was first used in 1958 in the case of Oni v. Meek.[29] There are three Hawaiian beach cases of importance. In re Ashford[30] held that the seaward boundary of a royal patent was "na ke kai" or "along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves.[31] In County of Hawaii v. Sotomuna[32] the court redefined the boundary between public and private land as the "edge of vegetation growth",[33] thereby opting for the landward of the two alternatives previously presented. In a public policy statement, the court favored "public use and ownership (of) as much of Hawaii's shoreline as is reasonably possible."[34] McBryde Sugar Co. v. Hawaii,[35] although specifically a water rights case holding that the right to running water is held by the State in trust for the public, suggests that beach access too, falls under the public trust doctrine.[36]

The custom doctrine as described above has not been used in the Great Lakes states. A variation of the doctrine as used in England and described by Blackstone appears in the common land cases, where the inhabitants of a region

29. 2 Hawaii 87 (1858).
30. 50 Hawaii 314, 440 P 2nd 76 (1968).
31. Ibid. at p. 315, 440 P 2nd 77.
32. 517 P 2nd 57 (1973).
33. Ibid. at 62.
34. Ibid. at 61-62.
35. 504 P 2nd 1330, affirmed on rehearing 517 P 2nd 26 (1973).
36. See note 25 at pp. 838-839.

own some land in common for their joint public use.[37] Except where common ownership can be reasserted to common lands, these cases are of little aid in creating public access sites to the Great Lakes and other public waters.

The custom doctrine as used in Thornton v. Hay,[38] however, has some potential for use in these states, particularly in the northern relatively unpopulated sections of Minnesota, Michigan, Wisconsin, and New York. Here the custom of open public use of the shores was recognized by statute.[39]

> The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the conference, without any tax, impost, or duty therefore.

37. Beeson v. Tice, 45 NE 612, 17 Ind. App 78, rehearing denied 46 NE 154, 17 Ind App 78 (1896); Stead v. President et al of Commons of Kaskaskia 90 NE 654, 243 Ill 239 (1910); Land Com'rs of Commons of Kaskaskia v. Pres. and Trustees of Commons of Kaskaskia 94 NE 970, 249 Ill 578 (1911); Hebert v. Lovalle 27 Ill 448 (1861), Lovalle v. Strobel 89 Ill 370 (1878). Haps v. Hewitt 97 Ill 498 (1881); Naughton v. Soucy 91 NE 1033, 245 Ill 225 (1910); Ward v. Field Museum of Natural History, 3 Ill cc 26; Long Island Research Bureau v. Town of Hempstead 118 NYS 2d 39, 203 Misc 619, aff'd 126 NYS 2d 857, 283 App Div 663, aff'd 125 NE 2d 872, 308 NY 818 (1953); Beers v. Hotchkiss 175 NE 506, 256 NY 41 (1931), Gregg v. Irish 6 S&R 211 (1820); Trustees of Western University of Pennsylvania v. Robinson 12 S&R 29 (1824); Bell v. Ohio and PR Co. 25 Pa 161, 64 Am Dec 687, 1 Grant 105, 2 PIJ 42 (1855); Commonwealth ex rel City of Reading v. Berko County Com'rs 109 Pa 214, 41 LI 415, 16 WNC 205 (1885); Weistershauser v. Fairman 52 Pa Super 169 (1912); City of Cincinnati v. White's Lessee, 31 US 431, 6 Pet 431, 8 L Ed. 452, 1 Ohio F. Dec. 419 (1832); Crippen v. Pres. etc. of Ohio University 12 Ohio 96 (1843).
38. See note 27, supra.
39. Northwest Ordinance of 1787.

It codified the customs of the voyageurs and Native American peoples of freedom of access to and between the waterways at a time when most travel occurred on these arteries. A Minnesota statute[40] gives modern recognition to this custom. These states could follow Hawaii's example and find evidence for this common law doctrine in the language, ways, and culture of their Native American populations. Unlike the Oregon and Hawaiian applications, which opened all the beaches of their respective states, the doctrine can only be used in specific local instances in the Great Lakes region and at a time prior to population and development pressures. Although its application is limited, the doctrine is a useful tool in view of its low cost.

40. Minnesota Statutes Sec. 160.06. "Any trail or portage between public or navigable bodies of water or from public or navigable water to a public highway in this state which has been in continued and uninterrupted use by the general public for 15 years or more as a trail or portage for purposes of travel, shall be deemed to have been dedicated to the public as a trail or portage. This section shall apply only to forest trails on established canoe routes and the public shall have the right to use the same for the purposes of travel to the same extent as public highways. The width of all trails and portages dedicated by users shall be eight feet on each side of the center line of the trail or portage."

Sale and Leaseback

Long term acquisition of public access sites can be achieved through a sale and leaseback arrangement similar to that used by the federal government for acquisition of land for National Parks and Recreation Areas.[41] The governmental agency, in the federal examples either the Secretary of the Interior of the Secretary of Agriculture, purchases or condemns the land within the boundaries of the park or recreation area. The owners then have the right to remain on the land for a specific term of years or for life.[42] The cost of acquiring the land is the fair market value at the time of purchase minus the fair market value of the retained interest.

The provision appearing in the legislation creating North Cascades National Park is typical:

> "Any owner of property acquired by the secretary which on the date of acquisition is used for agricultural or single family residential purposes, or for commercial purposes which he finds are compatible with the use and development of the park or recreation areas, may, as a condition of such acquisition, retain the right of use and occupancy of the property for the same purposes for which it was used on such date, for a period ending at the death of the owner or the death of his spouse, whichever occurs later, or for a fixed term of not to exceed twenty-five years, whichever the owner may elect. Any right so retained may during its existence be transferred or assigned. Any right so retained may be terminated by the Secretary at any time after the date upon which any use of the property occurs which he finds is a use other than the one which existed on the date of the acquisition. In the event the Secretary terminates a right of use and occupancy under this section, he shall pay to

41. 16 USC Sec. 79, 16 USC, Sec. 90b, 16 USC Sec. 410, 16 USC Sec. 459b,c, 16 USC Sec. 460.
42. 16 USC Sec. 79d, 16 USC 90b-2, 16 USC 459b-3.

> the owner of the right the fair market value of the portion of said right which remains unexpired on the date of the termination."[43]

The sale and leaseback method of acquisition has clear advantages for both the owner and the public agency. Once the property is sold, the owner is no longer liable for property taxes. Assuming that there is no outstanding mortgage against the property, the owner can live there rent free for up to twenty-five years. If he or she chooses not to live on the premises, the right to live there can be transferred or assigned with resultant income to the owner. Capital gains taxes payable by reason of the sale or exchange of a capital asset under IRC Sec. 1221-1222, would be payable only as the benefit accrues over the lifetime of the sale - up to 25 years.

The following example illustrates a sale and leaseback arrangement for an owner-taxpayer.

> Basis of Property = $48,000 Reasonable market value of property at time of sale to public agency = $120,000.
>
> Reasonable rental value for 25 year lease of property at time of sale to public agency of $400 per month or $120,000 over 25 years.
>
> Period of lease = 1980-2005, 1980-1990 no capital gain, 1990-2005 capital gain at rate of $4800 per year taxed under IRC Sec. 1202 at regular income rate of only $2400 per year.

For an owner-taxpayer with a net taxable income of $10,000, the cost of housing for the year would be $379; a net taxable income of $20,000, would be $600; a net taxable income of $40,000, would be $987. The plan is particularily advantageous to the senior citizen or other taxpayer on a fixed income. Those owners not wishing to remain on the premises can earn rental income over the lifetime of the lease.

43. 16 USC Sec. 90b-2.

The advantages to the public are also clear. Where the cost of acquisition and market value of the long term lease are the same or nearly so, the public agency will have to pay out little if any money to the owner. Where acquisition is for future use, the public agency will not have to maintain the premises in the interim and will have the public access site or park land when it is needed. The major disadvantage to the public agency will be the loss of property tax revenues during the leasehold period. This amount is not great for two reasons: first the market value of the property will in most cases be more than the cumulative taxes paid during the term of the lease, and second the loss is spread out over the leasehold period.

The Role of Land Use Planning

None of the methods of acquiring public access discussed above is a panacea that will provide the ultimate solution. Each of them should be used in the context of a comprehensive, long-range land use plan.

Planning for public access sites to the Great Lakes involves a number of considerations that will change over time with increases in population, change in recreational use, the growth of urban areas, increase of leisure time available to the population, and the change in age and affluence of the population. A few of the most obvious recent changes are these. The birth rate in the United States has leveled off in the last ten years. Couples are electing to have fewer children and having them later in life. With the increased popularity of recreational vehicles, the number of people using campgrounds has increased tremendously. Interstate highways have increased accessibility, so that the rustic campground of ten years ago now has "hook ups" and disposal facilities. The rustic camp sites have moved further out. Other use patterns have changed, too. More people are jogging, fishing, and picnicking in the areas where they live and work. Recreational activities are no longer relegated to weekends and vacations; they have become increasingly intergrated into people's daily lives. The cost and availability of gasoline will increase the need for local recreational facilities.

Planners have to operate on three levels. They must adapt to these and other present changes, meeting the current access needs; they must be actively preparing for the short term requirements, what the public will be using five years hence; and they must be planning where public access sites should be established for use twenty years from now. It may not be possible to predict what uses will be made of the land in the year 2000, but it is possible to anticipate on at least

a regional basis, the approximate number of users. Land use planning has evolved from the zoning of large blocks of land labelled: residential, agricultural, commercial, and industrial, to allow multiple compatible uses within a particular zone. Waterfront areas, whether urban or rural are different from inland areas in their water related potential for commercial, industrial, residential and recreational uses. A factory that gets all its raw materials by rail or truck does not belong in the shoreline, neither does a private housing development, where it excludes public access. These are briefly some of the policy considerations to be made by the public through its government and to be implemented by land use planners.

The major legal consideration to be faced in zoning and land use planning is "taking".[44] There is a line between what is permissible regulation of land use and what constitutes impermissable control and requires compensation. A practical problem accompanies this issue as well. The more stringent the regulation, even if it remains within the bounds of constitutional permissibility, the more vocal public opposition to zoning becomes. The result is often a land use plan with no teeth, that fails to adequately meet the public objectives. In trying to plan for the future, a zoning board may designate as open space land it later wishes to acquire for a public access site. The ordinance is unlikely to withstand constitutional attack. The following section will propose using the transfer of development rights idea in an attempt to meet the constitutional challenge and defuse public opposition to rigorous planning.

44. 5th Amendment U.S. Constitution; Article X Section 2 Michigan Constitution of 1963.

Transfer of Development Rights

The transfer of development rights idea was orginated in Chicago as a proposal mechanism for preserving historical landmarks.[45] [46] The idea was developed by Costonis to preserve historical landmarks threatened with demolition by ensuring that the owners could realize a greater profit. A building with, for example, 200,000 square feet of floor space to rent could make more money than one with only 40,000 square feet of rentable space. As the need for commercial space in Chicago's downtown area grew, the development pressure on under developed lots increased tremendously. In 1972 Chicago's Old Stock Exchange Building, built by Adler and Sullivan in 1893, was demolished, a victim of these development pressures. Briefly, the "Chicago Plan" allowed for designation of an historical building as a landmark.[47] A preservation restriction covering the land and building could then be recorded[48] providing the conditions of the restriction, among them restrictions on use, covenants not to destroy or materially alter the structure, maintenance and restoration requirements, where appropriate, remedies for breach, and duration of the preservation restriction.[49] The development rights then could be transferred to a different site. The sale of these rights would compensate the historic landmark owner for the loss of his or her development potential. Either the

45. Space Adrift, Landmark Preservation and the Marketplace, John J. Costonis, University of Illinois, Chicago, Illinois 1974.
46. Costonis, 'The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks', 85 Harvard Law Review 574 (1972).
47. See note 45, p. 40.
48. Ibid., p. 44.
49. Ibid., p. 44.

rights would be sold directly by the landowner or sold first to a municipal land bank and then when the market pressures were sufficient, sold to developers.[50] The Landmark Commission would in either case regulate the sale of development rights to prevent a glut on the market and maintain their value.[51] The city zoning would have to be enforced consistently and bonuses sufficiently rare in the transferee site or there would also be no market for the development rights.[52] The plan provided for specific transferee districts with the development rights apportioned in such a way as to not create further urban design problems.[53] The transfer of the development rights would give the owner the further incentive of a property tax reduction.[54] The plan also provided for outright acquisition of the landmark, when it was no longer commercially viable even after the development rights had been transferred. The cost of acquisition would only be the market value of the landmark without further development potential[55]. At the time of the publication of the book, the plan had not been put into practice in Chicago.

New York City has also worked with the development rights transfer scheme. The first use of the idea was adapted in 1968 in Section 74-79 of the Zoning Ordinance.[56] It provided that the owner of a historic landmark could transfer the authorized floor space that was not used in the landmark to an adjacent building site.

The transfer of development rights has been upheld by

50. Ibid., pp. 42, 52.
51. Ibid., pp. 42, 94.
52. Ibid., p. 97.
53. Ibid., p. 49.
54. Ibid., p. 43.
55. Ibid., p. 48.
56. Development Rights Transfer in New York City, 82 Yale Law Journal 338, 349 (1972).

the Court of Appeals.[57] The use of this system for the preservation of Manhattan's Tudor City Parks was approved by the New York City Board of Estimate as a part of Zoning Resolutions Sec. 91-00 et seq (1973). When challenged in Court,[58] the zoning ordinance was reinstated. The city appealed and the Court of Appeals affirmed. The Court stated at page 13

> That the loose-ended transferable development rights in this case fall short of achieving a fair allocation of economic burden. Even though the development rights have not been nullified, their severance has rendered their value so uncertain and contingent, as to deprive the property owner of their practical usefulness, except under rare and coincidental circumstances.

A TDR plan that eliminates this uncertainty has a very good chance of surviving appellate challenge. Recently the city has successfully transferred development rights in order to preserve part of the Fulton Fish Market.[59]

The transfer of development rights scheme planned for or implemented in Chicago and New York are specifically designed for dense urban areas with very little floor area ratios, and little or no open space. The plans in these two cities were formulated to protect historic landmarks. The planners had to avoid the constitutional problem of "taking" private property, and the constraints on the public fisc. In Charleston, S.C. and New Orleans, La., zoning to create historic districts not only preserved landmarks, but increased property values within the district and at the

57. Newport Associates Inc. v. Solow, 30 NY 2d 263, 238 NE 2d 600, 332 NYS 2d 617 (1972), Cert denied 110 U.S. 931 (1973).
58. Fred F. French Inv. Co. v. City of New York, 77 Misc 2d 199 at 205, 352 NYS 2d 762 at 768 (1973), affirmed 385 NYS 2d 5(1976).
59. Speech by the Director of Development, New York City at National Workshop on Urban Waterfronts held in Detroit, January, 1979.

same time property tax revenues. Historic buildings in New York and Chicago, however, are isolated. The development pressures are intense and escalating property taxes encourage development rather than preservation. Any zoning ordinance intended to preserve the structures would most certainly be unconstitutional as a 'taking". Further, if the cities bought the landmarks, the municipal coffers would lose three ways: the cost of acquisition, the expense of maintenance, and a decrease in property tax revenues. The transfer of development rights places the cost in the private sector. The city tax base is unaltered. The revenues that would have been generated by development at the transferor site, are produced at the transferee site. No compensation is required by the government. Finally, the landmark owner realizes a considerable profit from the sale of the development rights.

The problems facing those who wish to protect environmentally sensitive coastal areas and who wish to provide for public access to the shore are similar. If the coastal areas are zoned to prevent development, a 'taking will have occurred and compensation must be paid. If we wish to acquire public access to or along the shore, the land must be purchased or condemned at considerable expense to the public. A modification of the development rights transfer scheme proposed for dense urban areas can help by placing some of the financial burden on the private sector and by taking the sting out of comprehensive land use planning. Although TDR has been applied primarily to dense urban areas under strong development pressures, there is no reason that it cannot be used as a basic land use planning technique in both rural and urban areas, where no immediate development pressure exists.[60]

60. Charles E. Roe, 'Innovative Techniques to Preserve Rural Land Resources", Environmental Affairs 419 (1976); Chavooshian S. Norman, "Transfer of Development Rights: A New Concept in Land Use Management", 32 Urban Land II (1973); Rose, "A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space", 2 Real Estate Land 635 (1924).

A planning agency, city, township or other, would first collect data on on the existing and projected population and growth patterns. The agency would plan the area to meet the projected needs 20 years in the future and the character the public wishes to preserve or create. The area would then be zoned to the specifications of the plan, allowing for undeveloped environmentally sensitive areas and open space for future public parks and access sites. Development rights would be assigned to the protected lands and an acquisition schedule proposed, so that the local government could acquire the development rights as development pressure on the land-owner caused economic loss. The priority for acquisition would parallel the degree of "taking" of the property. The development rights would then be banked with the local planning agency for resale when development pressure at the transferee sites created a market for the rights. The gradual acquisition of development rights would spread the economic burden to the local government over time.

At the time of acquisition the transferor would grant the government a conservation easement running with the transferor site for the benefit of the public. The conservation easement would be duly recorded with the County Registrar of Deeds and filed with the local property tax assessment agency. The assessed value of the transferor site would be adjusted by the value of the conservation easement.

Transferee districts for the development rights would be a part of the comprehensive land use plan with a special exception permitting procedure to allow for appropriate incorporation of the development rights into the sites. The local government would realize income from the sale of the rights. The transaction would involve the transfer of a development rights deed, which would be recorded with the County Registrar of Deeds and a copy filed with the local tax assessing agency. The assessed value of the transferee site would then be increased by the value of the development

rights, thereby increasing the local property tax base.

The funds gained by the local government could then be used to acquire development rights of lesser priority, or ultimately to help finance the additional public services required as a result of the new development. The local government could control the market for development rights by initially imposing tight set-back, height, and bulk restrictions in the transferee districts with a second set of absolute standards permitted with the purchase of development rights.

There are several advantages to the plan. The public as a whole would benefit from the preservation of environmentally sensitive areas. Land reserved for future parks and public access sites would be kept free from development until such time as they were needed. They could then be acquired at the undeveloped value. The land owner would have received additional money from the sale of the development rights. Development would proceed in specific areas where soil and water conditions permitted and in line with planned expansion of public services. The funds received by the local government from the sale of development rights could be used to augment these services. Finally the resistance of local residents to comprehensive land use planning would be considerably decreased when it became clear that no one would suffer severe economic loss as a result of zoning restrictions, even if the restrictions did not meet the legal definition of a taking.

The local planning agency would have the latitude to decide on the extent of the development rights transfer plan. The narrowest scheme would allow development rights only where the land use plan passed the legal limits of a "taking" and compensation was required. This version of the plan would be appropriate for an area with geographical conditions and an economic and employment pattern appropriate for extensive development. A broad scheme of development

rights transfer could be adopted by a local planning agency wishing to attract a consensus for a stricter plan. As long as the land use plans do not exclude particular uses and economic groups, they should successfully survive challenge in court.

The transfer of development rights idea is not without its problems. A very broad TDR scheme, where development rights certificates are allocated for a wide range of diminution in property values caused by the land use plan, would require the local government to pay for the acquisition of the rights where no legally defined "taking" existed. Although the government could later recoup the revenue from the sale of the development rights in the transferee area, the use of the money would be lost in the interim, property tax revenues would be temporarily reduced, and administrative costs would be incurred. The local government would be compensating for what would otherwise be deemed valid regulation.

Another difficulty with comprehensive TDR land use planning schemes is that they have so far been voluntary from the point of view of the property owner.[61] It is not clear whether or not the use of eminent domain would be permissible for the acquisition of development rights. Governmental agencies can only condemn land by eminent domain for "public purposes". The courts have permitted eminent domain for urban renewal,[62] for parks,[63] for flood

61. Roe, see note 60, supra; Rose, see note 60, supra; Rose, "Psychological, Legal, and Administrative Problems of the Proposal to Use the Transfer of Development Rights to Preserve Open Space", 51 J. Urb. Law, 471 (1974).
62. Berman v. Parker, 348 U.S. 26 (1954).
63. Shoemaker v. United States, 147 U.S. 282 (1893); Halper v. Udall, 231 F Supp 574 (S.D. Fla. 1964).

control,[64] for irrigation,[65] for pollution control,[66] for prevention of soil erosion,[67] for wildlife management,[68] for recreation,[69] and in Puerto Rico for land banking.[70] Although condemnation for land banking is analogous to its use for open space preservation and land use planning as public purposes, a court test will be necessary to see if eminent domain can be used to enforce a comprehensive land use plan TDR ordinance. Clearly the plan will be more successful if uniformly applied, but the local government may not want to take the political risk of requiring adherence to the plan. The considerable profits to be made when selling agricultural land for residential subdivision development will cause public resistance to the plan, even where the hopes for a windfall profit are in the long range future and highly speculative.

The transfer of development rights may also violate the due process and equal protection clauses of the state and federal constitutions.[71]

The concept has a further problem in that the owner of the transferor site must execute a conservation easement to the public at the time when the development rights are transferred away from his or her land. There are two basic types of easements, easements in gross and easements appurtenant. The second category has both a burden and

64. United States v. W. Va. Power Co., 91 F 2nd 611 (4th Cir.)(1937).
65. Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896).
66. Doering v. South Euclid, 112 Ohio App. 177, reversed on other grounds, 112 Ohio App 177, 186.
67. United States v. Carey, 143 F 2nd 445 (9th Cir. 1944).
68. In re United States, 28 F Supp 758 (W.D.N.Y. 1939).
69. Johnson City v. Cloninger, 213 Tenn. 71 (1963).
70. P.R. Laws Ann. title 23 Sec. 311 F (q) (1964).
71. "The Unconstitutionality of Transferable Development Rights", 84 Yale L. J. 1101 (1975).

and benefit running with the land. A roadway easement is an apt example. The road runs through lot A to lot B. Lot A is the servient tenement and bears the burden of the easement. Lot B is the dominent estate and receives the benefit of the easement. The easement is said to run with the land and will appear in the deeds to both lot A as a burden and lot B as a benefit. An easement in gross does not run with the land and is often extinguished when the land is sold and there is no notice, actual or constructive, to the purchaser. What type of easement is a conservation, open space, or scenic easement? While it is true that it burdens the servient easement, it does not benefit the dominant estate as there is no dominant estate. Who has the power to enforce the easement? In order to make it enforcable it should be an easement appurtenant. In the case of scenic easements to preseve a scenic or historic highway, then the highway if owned outright by the state, county, or local government could be the dominant estate. A recitation in both the enabling statute and the local ordinance defining the easement as an easement appurtenant to the public would also help to ensure the enforceability of the easement.

Farmland and Open Space Preservation

Although the concept of development rights transfer has not been specifically used in the rural and suburban settings, a similar idea has been developed to enable rural landowners to resist development pressure. The right to develop the land is not transferred but just held in abeyance with tax advantages to the owner in the interim. A discussion of the Michigan statute, the Farmland and Open Space Preservation Act,[72] is included because it provides a temporary means of discouraging development of lands appropriate for future public access sites.

The statute provides for a development rights agreement in the case of farmland and a development rights easement in the case of open space. The statute is designed to create tax incentives for the preservation of farmland and open space, so that the respective property owners can afford to resist development pressures. The statute as currently constituted does not consider the possibility of transferring development rights. It does allow for the state or local government to bear the cost of the unpaid tax revenues during the period that development is not taking place, and for reimbursement by the taxpayer upon the termination or relinquishment of the easement or agreement.

The provisions with respect to farmland[73] allow an owner of farmland to apply to the local governing body for a development rights agreement. The local land use planning and soil conservation agencies are then notified and given 30 days to respond. Unless otherwise agreed the local governing body will accept or reject the application within

72. MSA Sec. 26.1287(1) (19), MCLA 554.701-19.
73. MSA Sec. 26.1287(5), MCLA 554.705.

45 days. The application is then sent to the state land use agency within the Department of Natural Resources with a statement from the local tax assessing officer on the fair market value of the land and structures. If rejected by the local governing body, the farmer can still apply to the state land use agency. If approved by the state, a development rights agreement is sent to the applicant with the following types of provisions:

(a) A structure shall not be built on the land except for use consistent with farm operations or with the approval of the local governing body and the state land use agency;

(b) Land improvements shall not be made except for use consistent with farm operations or with the approval of the local governing body and the state land use agency;

(c) Any interest in the land shall not be sold except a scenic, access, or utility easement which does not substantially hinder farm operations;

(d) Public access shall not be permitted on the land unless agreed to by the owner; and

(e) Any other condition and restriction on the land as agreed to by the parties is deemed necessary to preserve the land or appropriate portions of it as farmland."[74]

The owner of farmland covered by a development rights agreement must still pay property taxes in the amount assessed by the local assessors, but is eligible for a credit against his or her state income tax liability for the amount by which the property taxes on the land and structures used in the farming operation, including the homestead, restricted by such development rights agreement exceeds 7% of the household income."[75] A credit is also

74. MSA Sec. 26.1287(5)(7)(a)-(e), MCLA 554.705(7)(a)-(e).
75. MSA Sec. 26.1287(10), MCLA 554.710.

given under this section against the single business tax liability. At the natural termination of the agreement a lien will be filed against the farmland for the total amount of the tax credit over the preceding seven years.[76] If the agreement is relinquished prior to the natural termination date, a lien will be filed against the property for the total amount of the credit against state income tax with interest at 6% per year compounded from the time the credit was received until the lien is paid.[77] The lien in both cases is payable either at the time the land is sold or when the use of the land changes.[78]

The open space development easement operates differently. If the land is riverfront land within 1/4 mile from the river and subject to designation under the National River Act of 1970[79] or undeveloped land designated as an environmental area under the Shorelands Protection and Management Act of 1970,[80] the landowner may apply to the state land use agency[81] for a development rights easement.[82] If approved, accepted, and the easement is recorded by the land use agency, the land is exempt from ad valorem property taxes and the state shall reimburse the local governing unit for lost revenues, if any. The value of the easement is the difference between the fair market value of the property prior to the development rights easement and after granting the easement.

76. MSA Sec. 26.1287(12)(9), MCLA 554.712(7).
77. MSA Sec. 26.1287(12)(4), MCLA 554.712(4).
78. MSA Sec. 26.1287(12)(5), MCLA 554.712(5).
79. MSA Sec. 11.501-516, MCLA 281.761-776.
80. MSA Sec. 13.1831-1845, MCLA 281.631-281.645.
81. Land use agency within the Department of Natural Resources MSA 26.1287(2)(17), MCLA 554.702(17).
82. MSA Sec. 26.1287(6), MCLA 554.706.

There is also a provision in the act for the granting of a development rights easement to the local governing body[83] by the owner of the land the preservation of which in its present condition would conserve natural or scenic resources, including the promotion of the conservation of soils, wetlands, and beaches, the enhancement of recreation opportunities, the preservation of historic sites, and idle potential farmland of not less than 40 acres which is substantially undeveloped and which because of its soil, terrain, and location is capable of being devoted to agricultural uses as identified by the Department of Agriculture".[84] If the application is approved and accepted by the local governing body and the easement is recorded, the development rights are exempt from ad valorem property taxation. It is important to note that where the land is not suitable for development or farming and where it is located in rural areas, the development rights may not be worth anything and the property tax will not change.

Like the farmland preservation section of the statute, the open space section provides for a lien to be filed by the state land use agency[85] or the local governing body[86] at the natural termination of the development rights easement for the amount of tax liability credit given the property owners over the preceding seven years. Where the easement is relinquished prior to that time interest must be paid at the rate of 6% from the date the credit was given either to the state land use agency[87] or the local governing body.[88] The property owner may sell the land covered by the

83. MSA 26.1287(7), MCLA 554.707.
84. MSA 26.1287(2)(8)(b), MCLA Sec. 554.702(8)(b).
85. MSA 26.1287(13)(7), MCLA 554.713(7).
86. MSA 26.1287(14)(7), MCLA 554.714(7).
87. MSA 26.1287(13)(4), MCLA 554.713(4).
88. MSA 26.1287(14)(4), MCLA 554.714(4).

development rights agreement or easement with no lien or penalty so long as the subsequent owner complies with the provisions of the agreement or easement.[89]

Although the statute does not provide in any way for the transfer of development rights, it could be amended to give the local governing body the authority to accept a permanent development rights easement from the owner of the servient tenement and allow for transfer of the rights to a transferee district. Provisions for mandatory granting of the easement through invocation by the local governing body of its condemnation authority would be necessary to ensure that the local land use agency's plan was fully implemented. A comprehensive local land use plan should be a prerequisite to the use of eminent domain.

89. MSA Sec. 26.1287(11) 554.711.

Public Use of Private Land

When a unit of government, either state or local, does not have the resources to purchase or condemn land for public access, it may choose to acquire an easement to use the land without obtaining the full fee simple interest. The disadvantage to the government agency is, however, that the cost of the easement may be nearly as great as that of the fee simple. Although the landowner may not wish to part with either the land or an easement, he or she would often be willing to allow public use of the land if two problems could be resolved.

The landowner's two major objections to granting the governmental unit an easement will be that the owner might incur liability for injury to members of the public using the easement, and the chance that the riparian might lose title to the land by adverse possession or implied dedication. The fear of incurring liability is a real one. When a landowner opens up his or her land to the public there is a duty of care to keep the premises safe for the public. The degree of care depends upon the status of the member of the public, whether an invitee[90] or a licensee.[91] There is even a duty of care,

90. The duty of care required of a landowner with respect to an invitee is an affirmative duty to make the premises reasonably safe for the invitee's use. Mills v. A.B. Dick Co. 26 Mich App 164 (1970); Gillen v. Martini 31 Mich App 685 (1971).

91. The standard of care required with regard to a licensee is to use ordinary care to prevent injury arising from active negligence where the landowner knows or in the exercise of ordinary care should have known of the presence of the licensee; Palston v. S.S. Kresge Co. 324 Mich 575 (1959); Landowner must warn licensee of known dangers; Cox v. Hayes 34 Mich App 527 (1971).

albeit a limited one, vis a vis trespassers.[92]

The riparian's second objection to granting the city an easement is that ownership of the land might be transferred to the city after the prescriptive period has run[93] on either the theory of adverse possession, which requires continuous, notorious, open, visible, hostile use; or on a theory of implied dedication,[94] where the proofs would only have to show that the public used the land for the prescriptive period, thereby establishing both that the owner had dedicated the land to the public and that the public had accepted the dedication.

In order to confront these two objections and in addition offer the landowner an incentive to grant an

92. The landowner is only liable for injury to trespassers that occurs as a result of the owner's, lessee's, or tenant's gross negligence or wilful and wanton misconduct; MSA Sec 13, 1485, MCLA Sec 300.201; Heider v. Michigan Sugar Co. 375 Mich 490 (1965), but there is no duty to keep the premises safe for trespassers; Chamberlain v. Hoopnoa 1 Mich App 303 (1965).

93. Sec 27A.5801 (Limits on actions for recovery of possession of land). Sec 5801. No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
1) When the defendant claims title to the land in question by or through some deed made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee; or by a sheriff or other proper ministerial officer under the order, judgment, process, or decree of a court or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale the period of limitation is 5 years.
2) When the defendant claims title under some deed made by an officer of this state or of the United States who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state the period of limitation is 10 years.
3) In all other cases under this section, the period of limitation is 15 years. (MCL Sec 600.5801).

94. Seaway Co. v. Attorney General, 375 S.W. 2d 923 (Tex. Ctr. App. 1967).

easement, a statute has been proposed for introduction in the Michigan Legislature. The proposed legislation goes beyond its rural ancestors from Pennsylvania[95] and Minnesota.[96] That statute provided only that a landowner, who allowed the public recreational access would not incur any liability for doing so. There is no formal grant of easement with a specific grantor and grantee. In a rural setting it is not necessary to have a specific named grantee. As no improvements by the grantee were contemplated, there was no need for any assurance that the easement would be in effect for the useable lifetime of the improvements. Unlike the rural landowner, the industrial urban property owner may have long-term capital expansion plans for the land. These plans may not be inconsistent with public use for 20 years or more, but would preclude the industrial owner from risking loss of the property by implied dedication.

The liability question also changes when the setting for the easement changes. Industrial districts have hazards that do not exist in the countryside. If there is a formal grant of easement liability could transfer to the grantee. So long as the liability assumed by the city or other grantee were the same as that held for other recreational lands, there would be no increased burden on the grantee. A city would not, however, wish to become strictly liable for hazardous industrial activity.

The proposed statute[97] provides options for both types of land owners. Sections 3 and 4 absolve the property owner from any duty of normal care or ordinary liability. A property owner may proceed informally to open up his or her premises and be free from responsibility for the public. Should the owner wish to do so, however, he or she may

95. 68 Purdon's Statutes 477-1 et seq.
96. Minnesota Statutes 87.01-03.
97. See page 38.

proceed formally under Section 6 and have a grant of easement to the state or local unit of government grantee recorded with the Registrar of Deeds for the county in which the land is located. The Grant of Easement must be accepted by the agency before it becomes effective.

If the grantor opts for the formal route, the following advantages are available to him or her. The ad valorem property tax may be reduced to reflect the transfer of the easement during the time it is in effect.[98] The prescriptive period for either adverse possession or implied dedication will not run while the easement exists.[99]

Although liability is transferred from the grantor to the grantee, the public agency grantee does not assume more than their existing liability for land used for similar purposes,[100] and will not allow the grantor to opt out of wilful or malicious creation of a dangerous condition, to opt out of liability where she or he charges admission to the premises, or to opt out of strict liability.[101]

The formal grant of easement does not prevent the owner from selling the land, so long as the public easement continues.[102] Both the grantee and the grantor are protected from a change in use of the land during the period when the easement is in effect by the enforcement provisions.[103]

The twenty year minimum period for the recorded easement provides the grantee with a long enough term to make improvement of the area feasible. Lesser terms must be accommodated under the informal easement provisions.

The proposed statute should encourage property owners

98. See Section 7.
99. See Section 11.
100. See Section 13.
101. See Section 5.
102. See Section 8.
103. See Section 9.

to open up their land to the public for recreational purposes. It should be equally applicable to rural, suburban and urban areas. It provides for expanded public recreational use of land otherwise unused by their owners. The statute might easily be enacted as an amendment to the Farmland and Open Space Preservation Act.[104]

104. MSA Sections 26.1287 (1)-(19); MCLA Sections 554.701-719.

public recreational easement act. An act to provide for public recreational easements across private land; to prescribe the liability limits of the easement grantor; to provide for acceptance of a recreational easement by the state or local unit of government; to provide for a reduction in ad valorem property taxation by the value of a recreational easement; and to prescribe the liability responsibilities of the governmental agency grantee.

section 1. short title. This act shall be known and may be cited as the "public recreational easement act".

section 2. definitions.

(a) "Land" means any parcel of real property.

(b) "Owner" means a possessor of a fee interest in real property.

(c) "Recreational purpose" means use by the members of the public for active and passive leisure time activities, including but not limited to the following: fishing, swimming, boating, water sports, picnicking, hiking, nature study, bicycling, viewing or enjoying historical archaelogical, scenic, scientific, or educational sites.

(d) "Charge" means the admission price or fee asked for invitation or permission to enter and go upon the land.

(e) "Grantor" means the owner of the real property, who is granting an easement for recreational purposes for the benefit of the public.

(f) "Grantee" means the state or local unit of government, which assumes liability for the easement and responsibility for its maintenance and improvement.

(g) "Easement" means the right of the public to use land for recreational purposes.

(h) "Taxing authority" means the real property tax assessing agencies in both the city, village, or township where the real property is located.

(i) "Natural termination of the easement" means the date agreed upon by the grantor and the governmental agency grantee

of the easement, but in no event earlier than (20) twenty years after the easement is orginally recorded.

(j) "Premature termination of the easement' means termination of the easement by the grantee prior to its natural termination.

section 3. duty to keep premises safe; warning. Except as specifically recognized or provided in section 5 of this act, an owner of land who makes his land available without charge for public recreational use under this act or a grantor of a duly accepted and recorded easement owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

section 4. assurance of safe premises; duty of care; responsibility; liability. Except as specifically recognized by or provided in section 5 of this act, an owner of land who makes his land available without charge for public recreational use under this act or a grantor of a duly accepted and recorded public recreational easement does not thereby:

(a) extend any assurance that the premises are safe for any purpose;

(b) confer upon such person the legal status of an invitee or licensee to whom a duty of care is owned;

(c) assume responsibility for or incur liability for any injury to persons or property caused by an act or omission of such persons.

section 5. liability not limited. Nothing in this act limits in any way any liability which otherwise exists:

(a) for wilful or malicious creation of a dangerous condition, use, structure, or activity on land subject to a duly accepted and recorded recreational easement or land made available by the owner under this statute for public recreational use, provided, however, that liability shall

rest only with the person or persons, natural or corporate responsible for the creation of the dangerous condition, use, structure, or activity;

(b) for injury suffered in any case where the owner of the land charges the person or persons who enter or go on the land for the recreational use thereof;

(c) for injury suffered in any case where the owner or grantor is engaged in a dangerous, hazardous, or ultra-hazardous activity, for which said owner or grantor would be strictly liable in tort.

section 6. easement; recording registrar of deeds; transmittal to taxing authority.

(a) An owner of land may grant a recreational easement for the benefit of the public to the state or a political subdivision thereof, by offering a grant of easement for a period not less than (20) twenty years after the easement is recorded.

(b) The grant of easement shall contain the following provisions:

i. name and address of the grantor;

ii. legal description of the land subject to the easement;

iii. name of grantee;

iv. purpose of the easement;

v. recreational uses permitted to the public;

vi. restrictions on public use, if any;

vii. nature of improvements that may be constructed by the grantee to fulfill the purposes of the easement and facilitate the permitted uses;

viii. natural termination date of the easement;

ix. a provision stating that the easement shall remain in effect until a notice of termination of easement is duly recorded;

x. a statement of acceptance of the easement by an authorized representative of grantee;

xi. a grant of authority to the grantee to impose restrictions or conditions on public use of the easement; and

xii. a statement of acceptance of liability, if any, by the grantee, including the terms of said liability.

(c) The notice of termination of easement shall contain the following provisions:

i. name and address of the grantor;

ii. legal description of the land formerly subject to the easement;

iii. date of termination of easement;

iv. name of governmental agency; and

v. liber and page where the grant of easement is recorded.

(d) The grantee shall, upon its acceptance of the grant of easement, record the same with Registrar of Deeds for the county in which the land is located.

(e) The grantee shall forward a copy of the accepted grant of easement to the local assessing office and to the state land-use agency for their information.

(f) The recreational easement shall continue in effect until such time as it is terminated by either the grantor or the grantee of the easement, but in no event prior to the natural termination of the easement.

(g) Where the grantor elects to terminate the easement at the time of its natural termination or at any time thereafter, he or she shall send a notice of termination of easement to the grantee, and not less than (30) thirty days thereafter, record the notice of termination of easement with the Registrar of Deeds for the county in which the land is located.

(h) Where the grantor elects to terminate the easement at the time of its natural termination or at any time thereafter, he or she shall forward a copy of the termination of easement to the local assessing office and to the state land-use agency for their information.

(i) Where the grantee elects to terminate the easement at the time of its natural termination or at any time

thereafter, it shall send a notice of termination of easement to the grantor or his successor in interest, and not less than (30) thirty days thereafter, record the notice of termination of easement with the Registrar of Deeds for the county in which the land is located.

(j) Where the grantee elects to terminate the easement at the time of its natural termination or at any time thereafter, it shall forward a copy of the termination of easement to the local assessing office and to the state land-use agency for their information.

(k) The Registrar of Deeds shall charge ($3.00) three dollars for recording the first page of each grant or termination of easement and ($1.00) one dollar for each additional page thereof.

(l) The public recreational rights held by the state or unit of local government grantee in a public recreational easement under this section shall be exempt from ad valorem taxation.

section 7. taxing authority; assessment of value of land; value of real property.

(a) Upon receipt of a grant of easement, the local taxing authority shall, at the next regularly scheduled reassessment of the land subject to the easement, deduct the value of the easement from the assessed value of the land for purposes of ad valorem taxation.

(b) The value of the easement shall be the difference, if any, between the value of the real property before the easement was granted and the value of the property after the grant of easement.

(c) Upon receipt of a grant of easement the local taxing authority shall, at the next regularly scheduled reassessment of the land subject to the easement, reassess the land including the parcel formerly subject to the easement for purposes of ad valorem taxation.

section 8. sale of land; notice.

(a) Land subject to a recreational easement may be sold without penalty under section 8 so long as the successor in title complies with the provisions of the easement.

(b) The seller shall notify the governmental agency grantee of the change in ownership.

section 9. enforcement; premature termination.

(a) At any time the land is used by the grantor in a manner inconsistent with the provisions of the easement, the grantee may, upon (60) sixty days notice in writing to the grantor, prematurely terminate the easement according to the provisions of section 6 (6).

(b) At any time the land is used by the grantor in a manner inconsistent with the provisions of the easement, the grantee may, in the alternative, bring suit in the Circuit Court for the County in which the land is located for specific performance of the terms of the easement.

(c) Where the grantee prematurely terminates the easement pursuant to subsection (a), the grantee shall prepare and record a lien against the land formerly subject to the recreational easement for the total amount of the tax credit. The lien shall also provide for interest at the rate of 6% per annum compounded from the time the tax credit was first obtained until the lien is discharged.

(d) The lien may be paid and discharged at any time and shall become payable at the time the land or any part of it formerly subject to the recreational easement is sold.

(e) At any time the land is used by the grantee in a manner inconsistent with the provisions of the easement the grantor may, upon (60) sixty days notice in writing to the grantee, prematurely terminate the easement according to the provisions of section 6(f).

(f) Where the grantor prematurely terminates the easement pursuant to subsection (e), any waiver of ad valorem property taxation granted by reason of the recreational

easement shall cease effective upon the recording of the notice of termination of easement.

section 10. right of first refusal in grantee. The state or political subdivision thereof as grantee of a duly recorded recreational easement shall have a right of first refusal to purchase the land subject to the easement, if the easement grantor sells the land during the time the recreational easement is in effect.

section 11. prescriptive period shall not run. The prescriptive period for both adverse possession and implied dedication shall not run in favor of the public and against the grantor of a duly recorded recreational easement during the period the said easement is in effect.

section 12. no discrimination. No owner of land or grantor of a recreational easement shall receive the benefits of this act unless the said recreational easement is available for recreational purposes to all members of the public without regard to race, color, creed, sex, age, or country of national origin.

section 13. liability of public agency. The liability and duty of care of the state or a political subdivision thereof, as grantee of a recreational easement, to keep the premises safe shall be the same as that liability held by it in fee simple for use by the public for recreational purposes; provided, however, that the easement has been accepted by that public body and that the grant of easement specifically states that the grantee accepts both the duty of care and the liability.

section 14. construction of act. Except as specifically recognized or provided in section 12 of this act nothing in this act shall be construed to:

(a) create a duty of care or ground for liability for injury to persons or property; or

(b) relieve any persons, using the land of another or easement for recreational purposes, from any obligation which

he may have in the absence of this act to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.

Tax Consequences to the Donor of Interests in Real Property

We have discussed above a number of methods by which owners of real property can transfer to the state or local governmental agency a fee simple or lesser interest in real property. Where the sale or exchange occurs at fair market value, the tax consequences will be the same as those resulting from a sale to a private and profitable individual or agency. Where the transfer was an outright donation to a public agency or a transfer at less than the fair market value of the interest involved, there will be tax consequences benefitting the taxpayer. The tax implications of a transfer may occur at three separate levels of government: the local property tax, the state income tax, if any, and the federal income tax.

Local Property Tax Consequences

As a general rule, property taxes are assessed against the land owner on the basis of the following formula:

assessed value x millage = property tax

where the assessed value is a percentage of the fair market value and the millage varies with the needs of the local community and voter approval of taxation to finance these needs. In Michigan, Article 9 Sec. 3 of the Constitution of 1963 provides for uniform assessments.

> "The legislature shall provide for the uniform ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50%; and for a system of equalization of assessments. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation: Every tax other than the general ad valorem property

shall be uniform upon the class or classes on which it operates."

The legislature carried out the constitutional mandate in MCLA Sec. 211.27, MSA Sec. 7.27, in which the assessed value was set at "50% of its true cash value". "Cash value" is defined as "the usual selling price at the place where the property to which the term is applied shall be at the time of the assessment, being the price which could be obtained therefore at private sale, and not a forced or auction sale".

Should the entire fee simple be transferred from the taxpayer, the entire property tax will of course also be transferred. Where an easement, be it for a path or scenic, preservation, or conservation easement is transferred, the savings to the taxpayer will depend upon the difference in fair market or cash value of the property before and after the transfer of the easement.[105] Once the interest in real property has been transferred to the state, a municipality, or other local government, that interest is tax exempt.[106] Property transferred to qualifying charities is also exempt.[107] This difference will be marked or negligible depending on the type of property involved. If swampland is involved, for example, the land is unsuited to development and the assessed value will change little or none, when a preservation easement is transferred. Where, on the other hand, the percolation tests are favorable and the area lends itself readily to development, a conservation easement will reduce the market and, therefore, the assessed value of the property substantially.

105. MSA Sec. 26.1287 (6)(3); MCLA Sec. 554.706(3).
106. MSA 7.7, MCLA Sec. 211.27.
107. Ibid.

To insure that the value of the easement is transferred from the grantor for purposes of real property taxation; the easement should be an easement appurtenant and not an easement in gross. Traditionally the value of an easement has been transferred from the servient tenement to the dominant estate of the grantee only where the easement was appurtenant.[108]

The Michigan statute cited above[109] deals with a valuation question that continually concerns assessors in rural areas which are in the process of urbanization. A 40 acre parcel of land in the country may have a cash value of $40,000 today, but a potential cash value ten years hence of $200,000 or more. A conservation easement today would not change the assessed value of $20,000 at all. Where the nearest subdivision is 25 miles away, any potential increase in value is highly speculative. The statute[110] clearly states that the cash value is "at the place" and "at the time of the assessment". The assessed value is, therefore, $20,000. The land owner may, of course, decline to grant a conservation or preservation easement.

There is no statutory authority for the condemnation of a conservation or preservation easement. Attorney General Frank Kelly in Opinion #5216 stated that the Farm Land and Open Space Preservation Act, 1974 P.A. 116, MCLA 554.701 et seq; MSA 26.1287 (1) et seq, provides a voluntary means for private owners to relinquish the right to develop land in return for tax benefits. Because this act relies on voluntary participation by the land owner and uses tax tax incentives to accomplish this end, he concludes:

> It is therefore my opinion that a governmental agency may not acquire farm land and open space

108. Stansell v. American Radiator Co. 163 Mich 528, 128 NW 789, (1910).
109. MSA 7.7; MCLA 211.27.
110. See note 107, supra.

preservation rights by condemnation.

There is, however, statutory authority for the condemnation[111] of public easements; rights of way, and land for a number of public purposes including public parks, resorts, beaches, and other recreational purposes.[112] Just compensation is defined as the fair market value at the time of the taking, and this is "determined by considering and evaluating all factors and possibilities that would have affected price which willing buyer would have offered to willing seller for property under the circumstances."[113] The value of the land is in its natural condition and not as it would be if filled or otherwise substantially altered.[114]

Farmland and Open Space Preservation Act[115]

The Michigan Farmland and Open Space Preservation Act provides tax relief on several levels to owners of farm and other undeveloped land, who choose to grant a development rights easement to or enter into a development rights agreement with the state or local government. The land owner first submits an application to either the state or local government. If it is accepted, the grantor of an open space preservation easement gets a credit on his or her ad valorem property taxes for the value, if any, of the development rights. If the beneficiary is the state rather than the local government, the local government is reimbursed for resultant losses in property tax revenues.[116]

111. General Condemnation Statute, MSA 8.11 et seq., MSA 8.261 et seq.
112. MSA Sec. 5.2441 et seq.
113. State Highway Commission v. Minckler, 62 Mich App 273, (197).
114. Just v. Marionette County 56 Wis. 2nd 7, 201 NW 2d 761 (1972).
115. MSA Sec. 26.1287(1)-(19), MCLA Sec. 554.701-719.
116. MSA Sec. 26.1287 (6)(2)(e), MCLA Sec. 554.706 (2)(e).

For farmland owners only, there is a state income tax credit[117] for the amount by which their property taxes exceed 7% of their household income. If the state income tax liability is less than the credit, the farm owner receives direct payment of the difference. If for example, the property tax liability is $2000 per year, but the farmer's household income is only $10,000, the property tax exceeds 7% of the household income by $1300. If the state income tax is $200, the farmer will receive $1100.

Development rights easements must be for periods of 10 years or more.[118] If for some reason it is terminated prior to the natural termination date, a lien will be filed by the state or local government for the amount of either the ad valorem tax revenues lost as a result of the open space development rights easement, or the state income tax revenues lost or direct payments made to the farmer. Where termination is prior to natural termination, interest in the amount of 6% per year is added.[119]

If the natural termination date is reached, no interest payment is exacted from the grantor.[120] Payment of the lien is made either at the time the land is sold or the time the use of the land violates the terms of the development rights easement or agreement.

State Income Tax Consequences

State income taxing procedures vary considerably and a discussion of all of the Great Lakes States is beyond the scope of this report. In Michigan, except for the tax relief afforded farmers[121] discussed above, there is no charitable

117. MSA Sec. 26.1287 (10)(1), MCLA 554.710(1).
118. MSA Sec. 26.1287 (4)(1), MCLA Sec. 554.704(1).
119. MSA Sec. 26.1287 (12)(4), MCLA Sec. 554.712(4), MSA Sec. 26.1287 (13)(4), MCLA Sec. 554.713(4).
120. MSA Sec. 26.1287 (12)(7), MCLA Sec. 554.712(7), MSA Sec. 26.1287 (13)(7), MCLA Sec. 554.713(7).
121. MSA Sec. 26.1287 (10)(1), MCLA Sec. 554.710(1).

deduction parallel to the federal one discussed below. A taxpayer does not have the option of either taking a standard deduction or itemizing his deductions; one must take the standard deduction.

Federal Income Tax Consequences

A federal taxpayer, who donates an easement, either for a right of way or a scenic, conservation, or preservation easement to either a public agency or a qualifying charitable institution, can take a charitable contribution deduction. A gift to a governmental unit must be exclusively 'for public purposes".[122] Contributions of scenic or preservation easements are often valued by their converse, the development rights to the property. The tax court has ruled on the question allowing the charitable deduction.[123] The following are some other related rulings on the permissibility of the deduction and how one arrives at the value of the easement contributed or the development rights foregone. An open space easement in gross is allowable as a deduction as a gift of an undivided interest in property.[124] A deduction for a gift of a right of way easement used by the public

122. 26 USC Sec. 170(e)(1).
123. Fair v. Com. of I.R., 27 TC 866 (1957), Rev. Rul. 64-205, 1964-2 CB 112.
124. 26 USC Sec. 170 (f)(3); (b)(2) Reg Sec. 1.170A(b)(a). Subsection (iii) includes: "a lease on, option to purchase, or easement with respect to real property granted in perpetuity to an organization described in subsection (b)(1)(A) exclusively for conservation purposes", subsection (c) defines "conservation purposes":
    (i) the preservation of land areas for public outdoor recreation or education or scenic enjoyment;
    (ii) the preservation of historically important land areas or structures; or
    (iii) the protection of natural environmental systems."

for skiing and hiking is permitted.[125] A gift of a scenic easement to a governmental body was allowed, however the basis of the remaining property was reduced by the proportion of the basis attributed to the scenic easement.[126] If, for example, the taxpayer had purchased the property for $50,000 and had taken no depreciation on it, so that the basis remained $50,000 and at the time of the transfer the fair market value of the total was $120,000 with the scenic easement worth $20,000, the basis on the portion retained is reduced by $10,000 to $40,000. The value of an open space easement in perpetuity to a beach is calculated according to the following formula:[127, 128]

$$\text{Value of Easement} = \text{Fair Market Value Before Transfer} - \text{Fair Market Value After Transfer}$$

The importance of determining values by this formula can be seen by an examination of the donation of a beach and of an open space easement. The beach can probably be valued by itself and the taxpayer might very well get a larger deduction where this method permitted. Under the difference formula, however, the remaining property may have declined only slightly in market value as the use of the beach is still permitted to the landowner as a member of the public and the quality of life on the remaining parcel may not have changed appreciably. The value of an open space will depend upon whether development pressures presently exist or are merely future and speculative hopes. Where a taxpayer later donates the servient tenement as well, the value of the charitable deduction is the fair market value of the property minus the easement donated earlier.[129]

125. Rev. Rul. 74-583, 1974-2 CB 80.
126. Rev. Rul. 64-205; 1964-2 CB 62; 26 USC 170 (e)(2) Regs. 1.170 A4(c)(1).
127. Rev. Rul. 75-373, 1975-2 CB 77.
128. Rev. Rul. 73-339, 1973-2 CB 68.
129. Rev. Rul. 76-376, 1976-2 CB 53.

The amount of the charitable deduction allowed in any one year depends upon the category of property involved. The maximum allowable deduction to qualifying charities[130] is 50% of the taxpayer's "contribution base". The contribution base equals the adjusted gross income. The interest in real property of concern to us here will either be short term capital gain property, held for one year or less, or long term capital gain property, held for a period in excess of one year. For short term capital gain property, the amount of the deduction allowed is the fair market value of the property if it were sold on the date of the contribution less the amount which would have been ordinary income to the taxpayer had the property been sold.[131] In effect, the deduction equals the basis of the short term capital gain property.

The 50% of adjusted gross income is reduced to 30% allowable in any one year where the property is long term capital gain property,[132] that is a capital asset held by the taxpayer for more than one year. Although the 30% ceiling may not be sufficient to accommodate all of the value of an extensive interest in land, the taxpayer is permitted to carry the excess capital gain property contribution over to the next five years. This carry over is, however, also subject to the same 30% ceiling.[133]

There is an exemption from the 30% ceiling requirement which allows a taxpayer to contribute up to the 50% limit, if he or she wishes to reduce the amount of the long term capital gain which would have been realized had the property been sold and not contributed by 50% (62.5% for a corporation).[134] These alternatives are compared in the

130. Those charities listed under 26 USC 170(b)(1)(A), which includes governmental units, listed under Sec. 170(c)(1).
131. 26 USC 170(e), Sec Sec. 617(d)(1), 1245(a), 1250(a).
132. 26 USC 1222.
133. 26 USC 170(b)(1)(c).
134. 26 USC 170(b)(1)(C)(iii); 26 USC 170(e)(1)(B).

following example. If a married couple filing jointly has an adjusted gross income of $120,000, long term capital gain property to contribute with a basis of $40,000 and a value of $80,000, in order to avoid confusion and, assuming no other deduction, the tax when 30% of $80,000 or $24,000 is deducted will be $40,060, and the tax when 50% of $60,000 - the contribution minus 50% of the long term capital gain that would have been realized had the property been sold or $60,000 is deducted will be $20,604 for the tax year 1978. The taxpayer's election will of course, depend upon his or her total financial circumstances, but the approximately $20,000 difference in the total amount that could be deducted, is saved in taxes if the contribution is all made in one year. The tax must reduce the contribution by 50% of the value over basis (62.5% for corporations) for all contributions that tax year. He or she may not use the 30% rule for some and the 50% rule for others.[135]

A taxpayer may contribute a remainder interest in property reserving a life estate. The value of the remainder if transferred in trust is the fair market value at the time of the contribution in accordance with Sec. 20.2031-10 of the Federal Estate Tax Regulations. If the remainder is not transferred in trust, the value is the fair market value with depreciation computed by the straight line method and depletion discounted at 6% per annum.[136]

The value of a gift of land may be deducted from the value of a decedent's gross estate for purposes of Federal Estate Taxes, where the land is given 'exclusively for public purposes".[137]

If the gift is an intervivos transfer, the value may be deducted for Federal Gift Tax purposes if the donation is to

135. 26 USC 170(e)(1)(B).
136. 26 USC 170(f)(4); Regs. 1.170A-12.
137. 26 USC Sec. 2055 (1970).

a public agency for exclusively public purposes."[138]

This survey of tax consequences shows that the donation of a scenic conservation, or preservation easement, where the landowner relinquishes the right to further develop his or her land, gives all taxpayers a substantial property tax break, where the development rights are not future possibilities and therefore, speculative, but have real present market value. In Michigan, at least, there are no state income tax consequences of such a gift, unless the taxpayer is a farmer with a marginal income. From the Federal tax standpoint, whether Income, Estate or Gift tax, the benefits of a donation of an interest in land accrue only to those in the higher income tax brackets.[139]

138. 26 USC Sec. 2522(a)(1970).
139. See example after note 134, supra.

Conclusion

The most direct way of acquiring public access sites is to purchase them from the present landowner. Where the landowner is unwilling to sell, the governmental agency can condemn the land for a "public purpose" and then compensate the owner. Where this is beyond the financial capability of the governmental unit, there are several ways of providing for public use of land at little or no cost to the public coffers. Where the public has used the access site and the landowner has acquiesced for a sufficient period of time, an implied dedication of the land to the public may be found. If the landowner wishes to subdivide the property, the government can exact a dedication of land for an access site from the owner in exchange for approval of the subdivision. In order to do this the governmental unit must show that the increased population due to the subdivision necessitates new parkland.

Custom is a doctrine that can be used in those rural areas having a long tradition of free and open public use. Evidence from the voyagurs and Native American traditions will be particularly useful as evidence. The rationale of the Hawaiian cases can be used in the northern Great Lakes area, although the application will be local and not statewide.

Sale and leaseback arrangements like those initiated for acquisition of national parkland will be appropriate in some situations and particularly beneficial from the perspective of retired landowners. The effect will be that of a negative mortgage with no property tax payments. There will be no capital left at the end, but this will be balanced by substantially reduced living expenses for those who must stretch their social security checks in periods of rising inflation.

The success of these ways of creating public access sites depends upon a combination of governmental financial and enforcement ability and incentive to encourage the cooperation of the private landowner. The transfer of development rights concept may be advantageous to units of government because it places the cost of additional development in the private sector. The farmland and open space easement provisions encourage the participation of the landowner providing tax relief that permits him or her to resist development pressures.

The proposed public recreational easement act allows the landowner to permit public use of the land and avoid incurring liability for public injury. Where the easement is recorded, the property owner does not risk losing the land under the theory of implied dedication.

There are tax incentives built into several of the proposed mechanisms for acquiring public access sites. The circumstances and income of the landowner-taxpayer will dictate which is the most appropriate to each individual situation. These incentives can be effectively employed when they are made a part of an overall, comprehensive, long-range land use planning program.