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OPEN SPACE PRESERVATION AND ACQUISITION ALONG ILLINOIS WATERWAYS

MARGIT LIVINGSTON*

Throughout the past decade, as the work week has shrunk and per capita income has risen, Americans have found themselves with more and more leisure time.1 In Illinois, specifically, demand for outdoor recreational activities will increase by almost eighty percent between 1970 and 1985—an increase of more than five times the population growth for the same period.2

Although the demand for recreational facilities is growing rapidly, the State of Illinois is lacking in public recreational and park areas.3 The crisis in the availability of open space and recreational facilities is most acute in the urban areas in Illinois, and it is predicted that unless an affirmative program is undertaken to meet the rising demand for parks and natural areas, the crisis will worsen.4 This shortage will affect a large number of the state's residents. According to the 1970 census, eighty-three percent of Illinois' population is urban—that is, living in municipalities of 2,500 or more inhabitants.5

Many local governments will be faced with the responsibility of upgrading the parks and conserving scenic areas within their jurisdictions. Although both the state6 and federal7 governments have open

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1. TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH 79-80 (1973). Because of increasing energy shortages, one may question whether the high level of affluence and long-distance recreational trips that Americans currently enjoy will continue for many more years. Demand for recreational facilities close to populous urban areas, however, should increase as Americans use their automobiles less frequently for vacations.

2. ILLINOIS DEPARTMENT OF CONSERVATION, ILLINOIS OUTDOOR RECREATION 62-65 (1974) [hereinafter cited as ILLINOIS OUTDOOR RECREATION].

3. Although Illinois is the fifth most populous state in the nation, it is ranked forty-ninth in state park land per capita. Reclassification Would Sharply Reduce Illinois State Parks, SIERRA CLUB LAKE & PRAIRIE I (Feb.-Mar. 1979).

4. See ILLINOIS DEPARTMENT OF CONSERVATION ANNUAL REPORT 14 (Feb. 1975). The department estimated that local governments in Illinois currently need 200,000 additional acres of open space, "yet each year, in the Chicago area alone, potential parklands equivalent to the size of the city of Joliet are converted to urban uses." Id.

5. ILLINOIS OUTDOOR RECREATION, supra note 2, at 24.

space acquisition programs and other statutory schemes to improve recreational opportunities, many of these programs are focused on large rural or semirural areas suitable for federal, state, or regional parks. The cities and park districts are left to provide recreational areas closer to the urban core, the need for which will increase as gasoline supplies become scarce. 8

Illinois is fortunate in having numerous rivers and streams, 9 many of which flow through metropolitan areas. 10 These waterways are natural focal points for comprehensive local park and open space programs. Water and the adjacent land permit the widest range of recreational opportunities of perhaps any area within a city. 11 Among all recreational activities, the demand for water-based pursuits such as swimming, boating, and fishing is expected to increase the most over the next few years. 12 In addition, waterways have great aesthetic value, and the creation of a linear parkway along a waterway can serve to rejuvenate a downtown business area. 13

In light of these considerations, this article will explore the legal aspects of the acquisition and preservation by Illinois local governments of water-based recreational and scenic areas. Generally, two purposes will motivate a local government to undertake a waterway project: the desire to preserve unspoiled streams in urban fringe areas and the desire to beautify urbanized streams and develop their recrea-

7. E.g., the Capital Development Bond Act of 1972, ILL. REV. STAT. ch. 127, § 751 (1977), permits issuance of bonds by the state for the acquisition and construction of facilities, including land and buildings, for open space and recreational and conservation purposes.

8. The Illinois Department of Conservation views local governments as the most appropriate bodies to serve the urban population's open space and recreational needs, in particular the needs of low-income persons who are likely to seek leisure activities close to home. ILLINOIS OUTDOOR RECREATION, supra note 2, at x, 130.

9. Illinois is bordered by three major rivers, the Mississippi, the Ohio, and the Wabash, and has a total of 9,352 miles of rivers and streams within its borders. Id. at 3-4.

10. For example, the Chicago River in Chicago, the Rock River in Rockford, the Sangamon River in Springfield, the Kankakee River in Kankakee, and Boneyard Creek in Champaign-Urbana flow through urban areas.

11. C. LITTLE, CHALLENGE OF THE LAND: OPEN SPACE PRESERVATION AT THE LOCAL LEVEL 17 (1968). The Illinois Technical Advisory Committee on Water Resources has recommended that the highest priority for any open space/recreational land acquisition program should be to increase public access to waterways. ILLINOIS TECHNICAL ADVISORY COMMITTEE ON WATER RESOURCES, WATER FOR ILLINOIS: A PLAN FOR ACTION 384 (1967) [hereinafter cited as WATER FOR ILLINOIS].

12. Between 1970 and 1985, the demand for water-based recreational activities is expected to increase 107 percent. ILLINOIS OUTDOOR RECREATION, supra note 2, at 65.

13. For example, the San Antonio River Walk, which consists of parks and attractive cafes and shops bordering the San Antonio River, has revitalized the downtown commercial district and drawn tourists into the city. C. GUNN, D. REED & R. COUCH, CULTURAL BENEFITS FROM METROPOLITAN RIVER RECREATION—SAN ANTONIO PROTOTYPE 7-14 (1972).
tional potential. Both purposes will be considered in the analysis of legal constraints.

Several issues associated with acquiring and preserving land along an urban stream will be examined. First, this article will review the various methods by which a unit of local government can obtain open space adjacent to a waterway. Second, the advantages and disadvantages of each of these methods will be discussed in light of the community's goals, the cost, and the constraints under Illinois law. Finally, the outlines of an open space acquisition/preservation program that a local governmental body initiating an urban stream project might follow will be described. There will be no attempt to suggest all the possible combinations of open space acquisition techniques, but a broad plan of action will be delineated.

Three general categories of means by which a public body can preserve or acquire park land or scenic areas also will be discussed: (1) regulation, which includes zoning, compensable regulation, and subdivision regulation; (2) acquisition, which consists of purchase and condemnation; and, (3) donation, dedication, and prescriptive rights. The first two categories are usually initiated by governments, although private groups also purchase open lands. Private individuals most often instigate and control the third category of methods, sometimes encouraged by state and local agencies.

REGULATION

State governments may exercise their inherent police power to regulate an activity for the public health, welfare, safety, and morals. The state may delegate this power to local governments, which would otherwise not have it. Generally, in regulating a certain activity, the gov-

14. Parks along waterways provide recreational opportunities in themselves, as well as access points to the water and places to build boating facilities. In Illinois, the public has an easement of navigation in navigable waterways. Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905); Braxon v. Bressler, 64 Ill. 488, 491-92 (1872); City of Chicago v. McGinn, 51 Ill. 266, 271-72 (1869). The easement arguably includes not only the right of commercial navigation, but also the right to use the water for pleasure boating, fishing, swimming, and wading. See Illinois ex rel. Scott v. Chicago Park Dist., 66 Ill. 2d 65, 360 N.E.2d 773 (1976). The public navigational easement by itself, however, does not permit members of the public to cross private land to reach the water. See generally Livingston, Public Recreational Rights in Illinois Rivers and Streams, 29 DEPAUL L. REV. 353 (1980).

15. For example, the Nature Conservancy and the Natural Land Institute were formed to acquire natural areas by gift or purchase. In 1975, the Illinois branch of the Nature Conservancy acquired land in Illinois worth $2 million.

16. See text accompanying notes 138-76 infra.

17. The exception to this rule in Illinois is home rule units which, under the Illinois Constitution, "may exercise any power and perform any function pertaining to its government and affairs
Government is not required to compensate individuals who may be injured in some way by the regulation. However, in the land use area, a type of compensable regulation in which the individuals harmed would be reimbursed for a part of their loss has been advocated as a means of avoiding constitutional infirmities.\(^{18}\) This section will examine the value, as open space preservation methods, of the traditional kinds of land use control, zoning, and subdivision regulation and also will touch upon the potential usefulness with regard to this area of innovative compensable regulations.

**Zoning**

Zoning is the classic land use regulatory device, and in Illinois both municipalities\(^{19}\) and counties\(^{20}\) have zoning powers. There are several types of zoning that may be used by the open space planner: flood plain zoning, conservation zoning, minimum lot size zoning, cluster zoning, and interim zoning. A local government sponsoring an urban stream project may use one or several different types in combination to preserve open riverfront lands.

Although not expressly aimed at providing greenbelts and conserving scenic areas, flood plain zoning may have the incidental effect of opening up land along waterways.\(^{21}\) Apart from the desire to preserve open space, state and local governments generally have a strong incentive to pass flood plain zoning ordinances provided by the National Flood Insurance Program legislation.\(^{22}\) To qualify for federal assistance under this program, an area must have adequate land use measures in effect that meet federal criteria.\(^{23}\) In Illinois, this type of zoning is particularly important because an unusually high percentage of the state’s land is subject to flooding.\(^{24}\) In urban areas, the encroachment of buildings on riparian lands increases the damage caused by

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18. See text accompanying notes 81-89 infra.
23. Id. §§ 4002(b)(3), 4022, 4102.
24. The percentage of land area in Illinois subject to flooding is eleven percent, twice the national average. WATER FOR ILLINOIS, supra note 11, at 248.
flooding both near the built-up areas and further downstream.\textsuperscript{25} Based on studies of the 100-year flood pattern,\textsuperscript{26} flood plain regulations consist of not only zoning but also building and locational restrictions.\textsuperscript{27} Flood plain zoning ordinances as such generally classify areas within the flood plain in a separate use district and permit only open space or very low density uses.\textsuperscript{28} Although zoning to inhibit flood damage is generally considered a proper purpose of zoning, courts have not always upheld flood plain zoning ordinances if the land restricted has development potential.\textsuperscript{29}

Conservation zoning serves to preserve areas of unusual historic, scenic, recreational, or agricultural value by severely limiting the type of structures that can be built in such areas. Conservation zoning may involve the creation of conservation districts, designated areas in which no property may be developed except in accordance with the restrictions specified in the ordinance. On the other hand, a conservation zoning ordinance may delineate a conservation zone, similar to a commercial or residential zone, which may be applied to any given parcel which has unusual scenic or historic value. Some ordinances provide for both conservation or historic districts and a conservation zoning designation that may be applied to individual tracts not in a conservation district.\textsuperscript{30} However, unless the area has not yet been developed, conservation zoning has little utility. Thus, in urban communities, a

\textsuperscript{25} Although large scale floods occur on Illinois' major rivers, the greater part of the annual flood damage results from the numerous floods on smaller streams. \textit{Id.} at 239, 242.

\textsuperscript{26} \textsc{Land Use, supra} note 21, at 45-46.

\textsuperscript{27} Municipal and state building codes usually require the property owner to raise the ground and building levels above the high water mark before any structures are erected. Locational requirements prohibit structures within a specified distance from the stream corresponding to the floodway. \textit{E.g., Kankakee Municipal Code} §§ 14-1/2-8 to 14-1/2-12 (1972); \textsc{Rockford Municipal Code} § 11-1/2-11 (1970).

\textsuperscript{28} Another type of flood plain zoning ordinance disallows all but those uses that would suffer minimal flood damage such as parking lots, fairgrounds, drive-in theaters, and parks. \textsc{Land Use, supra} note 21, at 45-46.

\textsuperscript{29} In one Illinois case, the appellate court invalidated a flood plain zoning ordinance that classified plaintiffs' riverfront property as single family residential. American Nat'l Bank & Trust Co. v. Village of Winfield, 1 Ill. App. 3d 376, 274 N.E.2d 144 (1971). The court implicitly accepted flood plain regulations as a proper exercise of the police power but said that in this instance the plaintiffs' proposed use of the property as the site for an apartment building was at least as compatible with preserving the flood plain, if not more so, than a single family residence. Plaintiffs' expert witness testified that plaintiffs' building plans for the parcel would preserve the flood plain area. In dictum, the court noted that although maintaining the property in its "natural" condition would no doubt benefit the public, the plaintiffs could not be singled out to bear the cost of such preservation. The city in that situation should condemn the property and compensate the owner. \textit{Id.} at 379, 274 N.E.2d at 195-96.

\textsuperscript{30} The New York City Landmarks Preservation Law, for example, allows the Landmarks Commission to designate individual buildings and parcels of special historic value as "landmarks" or "landmark sites" and to denote entire neighborhoods as "historic districts." \textsc{New York City Charter and Administrative Code}, ch. 8-A, § 205-1.0 (1976).
stream that is bordered on both sides by buildings could not quickly be restored to recreational use through a conservation zoning ordinance. The ordinance could prohibit any change to any existing buildings or any construction of additional buildings. However, it could not require landowners to remove the existing structures, and thus the nonconforming uses would persist for several years. Conservation zoning would therefore be more useful in a suburban area where the land adjacent to a waterway has not been developed.

A third kind of zoning, minimum lot size zoning, requires developers to build houses on lots of a certain minimum acreage. This type of ordinance is usually coupled with a requirement that the houses be single family dwellings rather than duplexes or apartment buildings. Like conservation zoning, minimum lot size zoning has its greatest value as an open space preservation device in developing suburban communities. But it is less useful in preserving open space along streams than conservation zoning because it tends to produce blocks of evenly spaced houses on parcels having no public access rather than open lands suitable for recreation or aesthetic enjoyment.

On the other hand, when large lot zoning is combined with cluster zoning, it can aid in the preservation of open space along waterways. Cluster zoning permits developers to avoid minimum lot size requirements and to place houses on the land that they are subdividing according to its topography. Houses may be located closer together than would normally be permitted under the minimum lot size ordinance so long as the overall density remains the same as it would have been under the ordinance. Developers are thus encouraged to cluster the houses on the portion of their land most suited to construction and to leave open the rougher terrain, which is often adjacent to lakes or streams.

In order to accomplish its goal of preserving and acquiring open

31. The right to continue a nonconforming use is considered a property right in Illinois which cannot be taken away from the owner by an unreasonable ordinance not grounded in the public welfare. An ordinance which required immediate removal of all commercial and residential structures from parcels so that open space would be created would no doubt be considered unreasonable. A reasonable period of amortization should be allowed. See Brown v. Gerhardt, 5 Ill. 2d 106, 110, 125 N.E.2d 53, 56 (1955); Sanderson v. DeKalb County Zoning Bd. of Appeals, 24 Ill. App. 3d 107, 110, 320 N.E.2d 54, 56-57 (1976); Cities Service Oil Co. v. Village of Oak Brook, 15 Ill. App. 3d 424, 428, 304 N.E.2d 460, 463 (1973).


space along an urban waterway, a municipality may need to employ one additional type of zoning while it is preparing the open space element of its urban stream plan—interim zoning. Interim zoning ordinances prohibit any change in the existing uses or property within a specified district for a certain period of time. During the resulting development "freeze," the municipality gains the necessary time to consider various methods to open up the stream and its banks to public use and does not have to worry that the land that is being considered for a park will be filled with an apartment building.

The primary advantage of zoning as an open space preservation technique is that it is probably the least expensive of the various techniques. A municipality or county expends none of its funds in passing a conservation district zoning ordinance. In addition, the land remains in private ownership and thus on the property tax rolls. Moreover, zoning restrictions can cover a wide area, and hence a strip of land on either side of an urban or suburban waterway could be barred from further development with virtually no cost to the public.

Open space zoning, however, has a number of serious deficiencies. It is questionable, for example, whether a landowner could be required by a zoning ordinance to allow public access to his property. Hence, a conservation zoning ordinance can prohibit building on flood plains and can preserve a scenic view next to an urban river, but it cannot

34. One Illinois community, Champaign-Urbana, has embarked on an urban stream beautification project. Still in the planning stage, the two cities enacted a moratorium ordinance to halt construction of buildings along the stream, Boneyard Creek. The original moratorium ordinance, which prohibited new construction within a seventy-five foot corridor along the stream, was enacted for an initial six month period and was subsequently renewed for an additional six months. A revised, less restrictive ordinance was then enacted requiring setbacks of varying distances along the stream in accordance with a master plan for the development. This ordinance remained in effect until December 31, 1979. Interview with Kurt Froelich, Champaign City Attorney (July 18, 1979).

The courts have had mixed reactions to this type of regulation. See, e.g., Meadowland Regional Dev. Agency v. Hackensack Meadowlands Dev. Comm'n, 119 N.J. Super. 572, 293 A.2d 192 (1972) (interim zoning ordinance "freezing" development of 10,000 acres of undeveloped land for two-year period upheld); Horne v. Board of Supervisors, No. 32309 (Cir. Ct. Va. 1974) (county ordinance banning building of new subdivisions and residential or industrial complexes invalidated).

35. A highly restrictive zoning ordinance, however, may reduce the assessed valuation of a piece of taxable property since it is assessed according to a percentage of its fair cash value, which is equivalent to fair market value. See ILL. REV. STAT. ch. 120, § 501(1) (1977). If the probability of obtaining a rezoning was slight, the fair market value of the property undoubtedly would be reduced over what it had been before the zoning ordinance was enacted.

36. The municipality also saves the cost of providing as much police and fire protection or as many sewage treatment facilities, schools, and parks as it would for a developed parcel.

37. It is possible that the ordinance could require public access if the landowner were permitted to charge fees. See Heyman, Open Space and Police Power, in OPEN SPACE AND THE LAW 13 (1965) [hereinafter cited as Police Power].
create a public recreational area along the river.38

Another liability of zoning as an open space preservation tool stems from its questionable statutory and constitutional status. A zoning ordinance that classified the land bordering an urban stream in a conservation district and allowed the owners to use their property only for park purposes could be challenged on a number of legal grounds: (1) that it violates substantive due process; (2) that it results in a confiscation or “taking” of individuals’ property without just compensation; and, (3) that it is ultra vires.39

An unreasonable exercise of zoning powers by a governmental body constitutes a deprivation of property without due process of law and thus violates the fourteenth amendment of the United States Constitution and article I, section 2 of the Illinois Constitution. In Illinois, there is a presumption in favor of the validity of a zoning ordinance as a legislative enactment,40 and one attacking the ordinance has the burden of proving by clear and convincing evidence that it is arbitrary and unreasonable.41 If it is fairly debatable as to whether a particular ordinance is reasonable, the courts will sustain the legislative judgment.42

In determining whether a zoning ordinance violates notions of substantive due process, Illinois courts have examined whether the ordinance serves a legitimate governmental purpose, whether there is a reasonable relation between the end sought and the means used to achieve it, and whether the ordinance allows the property owner any reasonable return from his property. Although traditionally in Illinois an aesthetic purpose alone was insufficient to uphold a zoning ordinance,43 more recently the Illinois Supreme Court has indicated a willingness to sanction zoning for aesthetic purposes.44 Furthermore, the

38. In one New York case, a zoning ordinance which purported to zone certain land for park use only and to provide public access to it was invalidated. See discussion of Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, appeal dismissed, 429 U.S. 990 (1976), in text accompanying notes 51-54 infra.
39. See generally, Police Power, supra note 37, at 8-11. An open space ordinance should survive an equal protection challenge if it covers the riverfront property. The court need find only that this classification has a rational basis.
44. In one case, the Supreme Court upheld an Evanston ordinance that zoned plaintiff's property for single family residential purposes. LaSalle Nat'l Bank v. City of Evanston, 57 Ill. 2d 415, 312 N.E.2d 625 (1974). The court accepted as a valid justification for the ordinance the city's
courts have sustained ordinances that, in addition to an aesthetic goal, had some other purpose related to the public health, safety, welfare, comfort, or morals.\textsuperscript{45} A conservation zoning ordinance that restricted land along a waterway to open space and low density uses could be justified on the basis that, in addition to preserving scenic areas, it reduced the threat of flood damage. Thus, if the ordinance is properly drafted, then the municipality or county should be able to resist an attack on the purpose of the ordinance.\textsuperscript{46}

Similarly, with careful drafting, the ordinance should withstand the charge that there is no reasonable relation between the goal sought and the means employed to attain it. If the provisions of the ordinance specify that property adjacent to the stream may be used for purposes compatible with its character as part of the flood plain but exclude those uses that will increase substantially damage caused by flooding, then the ordinance could not be deemed arbitrary. Normally, any structure such as a house, apartment building, or parking lot will make the area bordering a waterway more susceptible to flooding and will also increase the flood damage downstream.\textsuperscript{47}

The largest hurdle in the due process area that the proponent of an open space zoning ordinance will have to surmount is the assertion that the ordinance deprives the owner of any reasonable return on his property. This issue has been recognized as theoretically distinct from whether an ordinance constitutes a "taking" or confiscation of property without payment of just compensation.\textsuperscript{48} In the face of charges that goal of having lower structures and a smaller population near the lakefront and adjacent park areas so that the recreational advantages and scenic attributes of the lakefront would be preserved. The court suggested that an aesthetic purpose alone may be a purpose sufficient to invoke the police power:

\begin{quote}
[T]here would appear to be significant authority that aesthetic factors may, in some instances, be used as the sole basis to validate a zoning classification or be acknowledged as a viable factor in zoning determinations. We are of the opinion that in the present case aesthetic qualities are a properly cognizable feature. . . .
\end{quote}

\textit{Id.} at 432-33, 312 N.E.2d at 634 (citations omitted).

\textsuperscript{45} Neef v. City of Springfield, 380 Ill. 275, 280, 43 N.E.2d 947, 950 (1942); Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969). \textit{See also} Berman v. Parker, 348 U.S. 26 (1954). There is no longer much question in Illinois that a zoning ordinance for the purpose of preserving open riverfront lands would be held to have a legitimate purpose. The Zoning Enabling Act was amended in 1971 to allow municipalities to zone to "facilitate the preservation of sites, areas, and structures of historical, architectural and aesthetic importance." \textit{Ill. Rev. Stat.} ch. 24, \S 11-13-1 (1977).

\textsuperscript{46} The Illinois Department of Local Government Affairs has prepared a useful compendium of different types of flood plain regulations entitled \textit{GUIDES FOR FLOOD PLAIN REGULATION} (PMS 74-2, 1974). The report was prepared specifically to assist local units of government in solving their flood plain problems.

\textsuperscript{47} \textit{WATER FOR ILLINOIS}, \textit{supra} note 11, at 242.

\textsuperscript{48} Different remedies also are invoked by the landowners whose property is affected by the regulation. An overly broad zoning ordinance will be declared invalid whereas an owner whose
ordinances deprived owners of any reasonable beneficial use of their property, non-Illinois courts have upheld conservation zoning regulations even where they allowed property owners only severely limited open space uses.\textsuperscript{49} But, just as often, courts in other jurisdictions have struck down such regulations.\textsuperscript{50}

In one New York case, \textit{Fred F. French Investment Co. v. City of New York},\textsuperscript{51} the court invalidated on due process grounds a New York City ordinance that zoned plaintiffs' land for park purposes only and required that plaintiffs allow public access for sixteen hours each day.\textsuperscript{52} Plaintiffs had no possibility of realizing any reasonable economic return on their land, the court said, and the ordinance in effect deprived the owner of all his property rights in the parcels except bare title and the slim possibility of a future reversion of full use.\textsuperscript{53} The court deemed the option to transfer development rights to certain other parcels in Manhattan too abstract and speculative, given the administrative contingencies, to afford the landowners any probability of a recoupment of their economic loss on the park lands.\textsuperscript{54} This case reveals the importance of careful drafting in creating a conservation zoning ordinance: if the owners had been allowed some reasonable beneficial use of their property or if the development rights transfer

scheme had been worked out to remove the administrative contingencies and uncertainties, the ordinance might have been upheld.

The Illinois courts have employed a type of balancing approach in assessing zoning ordinances that reduce the value of an individual's property. On the one hand, they have said that mere reduction in the value of property is not sufficient to invalidate an ordinance and that diminished value is only one factor to be considered along with several others. These other factors include the existing uses in the neighborhood; the zoning of nearby property; the extent to which the ordinance promotes the general health, safety, and welfare of the public; the relative gain to the public as compared to the hardship imposed upon the individual property owner; the suitability of the particular property for the purposes allowed under the ordinance; and the length of time that the property has remained unused in light of the development pattern in the area. Although some of the courts emphasize one or more of these factors over the others, most Illinois courts balance the public gain against the private harm to determine the validity of an ordinance as applied to a particular property owner. Thus, if a conservation zoning ordinance prohibited all but open space uses in an area adjacent to a rapidly developing community and if the parcels so zoned were ideally suited for the construction of homes and other buildings, then the court would probably not sustain it. However, property along a waterway is not likely to be as suitable for development as parcels farther inland because of the flooding problems. Moreover, if the ordinance were to allow the owner some profitable use of his land, then it would more probably be upheld.

The confiscation or “taking” issue, as was indicated earlier, is conceptually separate from the substantive due process question. The latter revolves around whether a regulation is an overly broad exercise of the police power, whereas the former arises from the constitutional provisions prohibiting the government from appropriating an owner’s


property except for public use and upon payment of just compensation. In contending that an open space ordinance constituted a "taking" of his property, a landowner would sue for inverse condemnation and seek to compel the local government to pay just compensation for the land that it had appropriated. Courts generally have confused the "taking" and due process issues, and many decisions have spoken of an overly broad zoning ordinance as resulting in a "taking" of property and thus have invalidated the ordinance. Illinois courts have rarely struck down zoning ordinances that diminished property values on the basis that the government had in effect confiscated the property, although courts in other jurisdictions have allowed inverse condemnation actions in that situation.

It has been suggested that a zoning regulation should not be deemed a "taking" except in rare circumstances where (1) the government physically appropriates the property; (2) the regulation causes the land to be physically invaded (e.g., by flood waters); or, (3) the ordinance zones the land for public parks or buildings (except where the landowner can make a profit by operating his land as a public recreation area). The recent decision by the United States Supreme Court in Penn Central Transportation Co. v. New York City indicates that the Court is not ready to accept such a clean separation between the due process and "taking" issues. In ruling on the validity of the New York landmarks preservation law as applied to the Grand Central Terminal, the Court discussed whether the regulation constituted a "take-

60. The confusion stems originally from Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which he made the statement, often-quoted, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized a 'taking.'" Id. at 415.
61. See, e.g., Tews v. Woolhiser, 352 Ill. 212, 185 N.E. 227 (1933).
63. F. Bosseman, D. Callies & J. Banta, The Taking Issue 253-55 (1973). The authors also comment on several other approaches to the taking issue. Id. at 236-37.
64. 438 U.S. 104 (1978).
65. Enacted pursuant to a state enabling act, the Landmarks Preservation Law was designed to preserve historic neighborhoods and buildings in New York City. A Landmarks Preservation Commission was created to identify landmarks and historic areas worthy of preservation. After a hearing on a particular parcel, the commission could designate it as a landmark or historic district if it was found to meet the ordinance's standards. The New York City Board of Estimates then reviews the decision, and the property owner may seek additional judicial review.

Once his property achieves landmark status, the owner must keep it in good repair and is prohibited from modifying the exterior architectural features of the landmark without the commission's approval. Three procedures may be used to gain administrative approval. The owner
ing” of the plaintiffs’ property. It is clear, however, that the plaintiffs were not seeking inverse condemnation of their property but a declaration that the ordinance was invalid as applied to them. Although the Court ultimately sustained the ordinance for various reasons, it suggested that it would not limit the “taking” concept to those situations in which the government took physical control over the property. Thus it seems that the “taking”/due process analysis will remain a kind of amorphous hybrid and that although an Illinois court or the United States Supreme Court may speak in terms of a “taking,” it may then proceed not to order inverse condemnation but only to invalidate the ordinance. A municipality should be prepared then to meet both lines of attack.

The additional importance of the Penn Central case for local governments involved in open space planning is that the Court indicated the types of factors which will sustain a preservation ordinance. The Court found that although the ordinance required plaintiffs to maintain the Grand Central Terminal as an historic landmark, it did not amount to an interference with their property rights of such a magnitude that compensation would be required to sustain it. Plaintiffs were allowed to continue to use the property as a railroad terminal—housing offices

may seek a “certificate of no effect on protected architectural features” on the basis that the change or improvement will not alter any architectural feature of the landmark. He may apply for a certificate of “appropriateness” on the basis that the modification will not interfere unduly with protection of the landmark’s unique features. Finally, the owner may seek a certificate of appropriateness on the ground of “insufficient return” where he can demonstrate that the landmark designation prevents him from realizing a reasonable return on his property.

In 1967, the commission designated the Grand Central Station terminal as a landmark. Penn Central Transportation Company, owner of the terminal, later applied to the commission for approval to build an office building above the terminal. Both plans submitted by Penn Central were rejected, and a certificate of appropriateness denied.

Penn Central and its lessee then filed suit in state court seeking declaratory and injunctive relief and damages for the “temporary taking” that occurred between the date that the property was designated as a landmark and the date when the building restrictions were lifted. The trial court granted declaratory and injunctive relief but severed the damages issue. On appeal, the Appellate Division of the New York Supreme Court reversed and held that plaintiffs’ property had not been “taken” under the landmarks law since the evidence failed to establish that the relation deprived them of all reasonable beneficial use of the property. Penn Central Trans. Corp. v. New York City, 50 App. Div. 2d 265, 377 N.Y.S.2d 20 (1975). The New York Court of Appeals affirmed. 42 N.Y.2d 324, 366 N.E.2d 1271 (1977).

Although plaintiffs did ask for damages for a “temporary taking,” the main relief requested was a declaratory judgment that the ordinance was constitutionally infirm as applied to their property and an injunction prohibiting the city from using the Landmarks Preservation Law to prevent them from building any structure that could otherwise lawfully be built. See 438 U.S. at 119.

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67. See text accompanying notes 69-72 infra.

68. The Court stated, “As is implicit in our opinion, we do not embrace the proposition that a ‘taking’ can never occur unless Government has transferred physical control over a portion of a parcel.” 438 U.S. at 123 n.25.

69. Id. at 135-38.
and concessions—and, thus, the Court said, were able to realize a reasonable return on their investment even without consideration of the value of the parcel's unused development rights. Moreover, plaintiffs could seek approval for new construction above the terminal from the Landmarks Preservation Commission. Finally, the unused development rights could be transferred to any of eight eligible parcels in the vicinity. Applying these factors to an open space/park ordinance, a municipality should permit compatible uses that allow property owners to have some profitable activities on their land. Existing uses should be allowed to continue for some period of time, and new construction consonant with the open space preservation purposes should be subject to the approval of the municipality in consultation with the city or regional planning commission. If possible, the ordinance should permit owners to transfer unused air rights to nearby parcels. This type of ordinance will accommodate to some extent both the interests of the public in riverfront open spaces and the reasonable expectations of private property owners, who should not be required to shoulder an unfair portion of the burden of providing for public park land.

In addition to substantive due process and confiscation arguments, a third ground for invalidating a zoning ordinance is that it is ultra vires, or beyond the limits of the enabling legislation. In Illinois, this argument no longer exists with respect to home rule municipalities, which are not bound by the provisions of the Zoning Enabling Act. Non-home rule municipalities, however, must still conform to those limitations and are precluded from passing an ordinance that is not reasonably related to the public health, safety, comfort, welfare, or morals. Illinois courts have struck down without hesitation ordinances that reduced property values but did not benefit the public welfare. The courts might also invalidate as ultra vires any nontradi-

70. The New York Court of Appeals had rejected plaintiffs' assertion that their revenue statements revealed that the terminal showed a net operating loss for the years 1969 and 1971, and plaintiffs did not appeal that determination. Id. at 119-22, 129.
71. Id. at 136-37.
72. The Court noted that the transferability of development rights may not have constituted "just compensation" if a "taking" had been found by it but that it did serve to soften the financial strictures imposed by the landmarks law. Id. at 137.
73. Cain v. American Nat'l Bank & Trust Co., 26 Ill. App. 3d 574, 325 N.E.2d 799 (1975); Johnny Bruce Co. v. City of Champaign, 24 Ill. App. 3d 900, 321 N.E.2d 469 (1974). A home rule municipality may have zoning powers by virtue of both the Zoning Enabling Act and the constitutional provisions regarding home rule. In enacting a type of zoning ordinance not specifically authorized under the enabling statute, a municipality should consider declaring in the ordinance that it is passing the regulation pursuant to its home rule powers. See Forrest, Improved Land Use Regulation for the Home Rule Municipality, in HOME RULE IN ILLINOIS 101-06 (1973).
75. LaSalle Nat'l Bank v. County of Cook, 12 Ill. 2d 40, 140 N.E.2d 65 (1957); Cohen v. City
tional type of zoning such as contract zoning. Thus, the municipality depending upon an open space or flood plain zoning ordinance would have to show both that it served the public welfare (which would probably be fairly easy to do) and that the particular type of zoning (e.g., cluster zoning, contract zoning) was authorized by the enabling statute.

Zoning's low cost as an open space preservation device must be balanced against its questionable constitutionality and its inability to provide public access to riverfront land without incurring judicial disapproval. Some of the constitutional problems may be overcome by careful drafting and sympathetic courts. For example, instead of banning construction of any buildings along the riverfront, the city might pass an ordinance allowing structures and designs that are compatible with the flood plain area. The ordinance could require riverfront owners to maintain the natural condition of a small strip immediately adjacent to the waterway and to landscape the remaining developed area.

Thus, zoning's most important function in open space preservation may be to buy time for municipalities that currently lack funds to purchase riverfront parcels. During the interim or moratorium period, the city can seek out sources of funding and develop a long-range plan for acquisition of selected parcels along the stream. But, again, a municipality must tread lightly in this area because a court usually will not hesitate to strike down an ordinance where it suspects that the ordinance's purpose is to lower the property's value prior to condemnation.

of Des Plaines, 30 Ill. App. 3d 918, 333 N.E.2d 513 (1975); LaSalle Nat'l Bank v. Village of Harwood Heights, 2 Ill. App. 3d 1040, 278 N.E.2d 114 (1972). 76. Contract zoning involves the rezoning of a parcel by a municipality on the condition that the property owner abide by certain restrictive covenants or additional restrictions on the use of his property. This type of zoning has been held invalid in Illinois. See Cederberg v. City of Rockford, 8 Ill. App. 3d 984, 291 N.E.2d 249 (1972).

77. Generally, the party attacking the ordinance has the burden of showing that the law is arbitrary and unreasonable. However, Illinois cases indicate that the burden shifts to the proponent of the ordinance to prove that it is reasonably related to the public health, safety, comfort, morals, or welfare where the evidence shows the highest and best use of the property cannot be made under the ordinance. See, e.g., DuPage Trust Co. v. City of Wheaton, 38 Ill. App. 3d 159, 347 N.E.2d 752 (1976); Edward Hines Lumber Co. v. Village of Villa Park, 34 Ill. App. 3d 711, 340 N.E.2d 239 (1976); Hoekstra v. City of Wheaton, 25 Ill. App. 3d 794, 323 N.E.2d 57 (1975).

78. Another method of overcoming constitutional problems, the use of compensable regulations, will be discussed in the next section. See text accompanying notes 81-89 infra.

79. One commentator, however, has noted that even with a moratorium zoning ordinance, much land will be irretrievably lost during the interim period. W. Whyte, The Last Landscape 53 (1968) [hereinafter cited as Whyte].

Compensable Regulations

One method that has been suggested as a way of surmounting charges that a conservation zoning ordinance results in a “taking” of private property without just compensation or is an overly restrictive police power regulation is the use of compensable regulations. Under such a scheme, the owners of property in designated open space districts may use their land only for certain compatible purposes, such as a park or nature preserve, and are prohibited from constructing houses, apartment buildings, or commercial structures.

For the loss suffered by landowners because of the reduction of their properties’ development potential, they are compensated by the municipality either by cash payments or by the ability to sell or transfer their excess development rights. The concept of transferable development rights has been applied mainly in the area of historic landmark preservation, but there seems to be no reason why it could not also be utilized to maintain open space in the cities and suburbs.

Several different TDR schemes have been developed, but one—the Chicago plan—deserves particular note here. This plan was originated as a means of preserving Chicago’s historic landmark buildings, and the Illinois General Assembly revised the state’s preservation enabling act in 1971 to allow local governments to implement the plan. A city adopting a preservation program based on the Chicago plan could begin by designating “development rights transfer districts.” These could be of two types: transferor districts, which would include the areas in which the landmarks or open space was concentrated, and transferee districts, which might be the same areas as the transferor districts or which might take in alternative developable areas. When a particular parcel is denominated a landmark or open space parcel, its owner could transfer the development rights to lots within the transferee districts and receive a lower tax assessment, reflecting the reduced value of the property. At the time of the transfer, the owner would be required to execute a “preservation restriction” in favor of the city.

81. Transferable development rights are hereinafter referred to as TDR. New York City and Chicago in particular have developed TDR programs for landmark preservation. See generally Rose, The Transfer of Development Rights: A Preview of an Evolving Concept, 3 REAL ESTATE L.J. 330, 337-38 (1975) [hereinafter cited as Rose].
82. Id. See also Comment, Urban Park Preservation Through Transferable Development Rights, 90 HARV. L. REV. 637 (1977).
83. Rose, supra note 81, at 337-38.
84. For a description of the evolution and content of the Chicago plan, see J. COSTONIS, SPACE ADrift 28-64 (1974) [hereinafter cited as SPACE ADrift].
This restriction would prohibit any further development of the transferor parcel and require the present and successive owners to maintain the property in its current condition.

An owner who chose not to participate voluntarily in the transfer program but instead to develop his property would force the city to condemn a preservation restriction and the property's associated development rights. The city would have to pay the owner just compensation for the rights thus acquired. These development rights would be placed in a municipal "development rights bank" along with development rights donated by private owners of landmarks or open land and those transferred from publicly owned sites. To fund its acquisition of development rights through the use of eminent domain, the city could sell the rights in the development rights bank to property owners desiring to build structures that would otherwise be in violation of zoning ordinances. Even with these extra development rights, developers would still have to comply with certain bulk limitations and planning controls.

Although the Chicago plan was designed to preserve landmark buildings, it could be used also to save open areas adjacent to urban streams. Its principal advantage over conventional zoning is that it is fairer to individual landowners whose land is placed in a conservation district. It is more likely to survive constitutional challenges because it provides for compensation either through cash payments or through the ability to transfer and presumably to sell excess development rights. Moreover, this scheme is specifically authorized by the Illinois Historical Preservation Enabling Act, which is directed at the preservation not only of landmark buildings but also of any area or place "having special historical, community, or aesthetic interest or value."86

Although the Chicago plan and other TDR programs may have certain advantages over conventional zoning, they, too, pose a number of potential problems. For instance, they are subject to attack on several legal grounds of their own, different from those presented by an overly restrictive zoning ordinance.87 Moreover, because landmark sites and open space areas are often worth more as part of a larger tract of land than in isolation, the city that delayed acquisition of a preserva-

86. Id. (emphasis added).
tion restriction on a particular site might discover later that it did not have enough funds in development rights bank to cover the inflated cost of acquisition. Further, because TDR schemes require a rather extensive administrative framework at the local level, they are more complex and more costly to implement and enforce than a conventional zoning ordinance.

Subdivision Regulation

Another type of land use control maintained pursuant to the police power is subdivision regulation. Under Illinois law, municipalities and counties may require that a developer who desires to subdivide his property submit a plan of the proposed subdivision to the local governmental body for approval. As a prerequisite to approval, the municipality is authorized to compel the developer to dedicate a certain portion of his land for school and park sites, or to pay a fee in lieu of dedicating land.

In the past, subdivision exactions tended to be disapproved by Illinois courts, particularly where the city appeared to be trying to obtain land for schools or parks to serve the entire community, rather than only the residents of the new subdivision. In several cases, the courts struck down ordinances that required “excessive” dedications as constituting a taking of property without payment of just compensation.

After the Illinois Supreme Court decision in *Krughoff v. City of Naperville*, however, Illinois courts should be more liberal in upholding subdivision exaction ordinances. In *Krughoff*, the court sustained a Naperville ordinance requiring a subdivider to contribute land, or money in lieu of land, for park and school sites. Because the ordinance geared the amount of land to be dedicated to the number of people brought into the area by the new subdivision, the court said that the

89. Id. at 185.
90. 71. Rev. Stat. ch. 24, §§ 11-12-7, 11-12-12 (1977) (municipalities); id. ch. 34, § 414 (counties).
93. Id.
94. 68 Ill. 2d 352, 369 N.E.2d 892 (1977).
95. The Naperville ordinance requires, as a prerequisite to plat approval, that the subdivider dedicate 5.5 acres of land for recreational areas for every 1,000 of ultimate population in the proposed development. This amount may be reduced to the extent that the developer provided for private recreational facilities within the subdivision. A table included in the ordinance esti-
ordinance met the requirement established in earlier cases that the dedication be proportioned to needs "uniquely attributable" to the developer's activities. Thus, a carefully drafted ordinance providing for the dedication of only the amount of land for recreational and educational facilities necessitated by the additional subdivision should survive a constitutional challenge in Illinois courts.

Like zoning, subdivision regulation has the advantage of being an inexpensive open space preservation device. Although developers may be likely to dedicate the portion of their property least suitable for development, this practice may benefit the municipality in that the property along streams, while unsuitable for buildings, is the most desirable as open space. Unlike zoning, subdivision exactions have the advantage of actually opening up the land to public recreational use whereas conservation zoning in most cases can only preserve the scenic features and restrict the development of land adjacent to a waterway. On the other hand, subdivision ordinances have limited usefulness since they can preserve only as much land as property owners decide to subdivide and develop for residential purposes. If a landowner decides to build an apartment house on a parcel of riverfront property without subdividing it, he may do so without complying with subdivision requirements. Moreover, if a developer were to subdivide his property but develop it for commercial purposes, he presumable would not need to dedicate any land for park or school sites since no new demand on the existing parks and schools would be created directly by the new subdivision.

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mates the number of individuals and the age distribution of children who might be expected to live in various types of housing units. The developer, if he disagrees with the estimated population as determined by the table, may submit his own demographic study. Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976).

96. Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977). The court thus found that Naperville had statutory authority to enact a subdivision ordinance both within its corporate limits and within one and one-half miles of them. The court never reached the question of whether the city had authority under its home rule powers to enact subdivision regulations.

97. The ordinance drafters will need to ascertain how much recreational land is reasonably required for each individual or each family. See, e.g., note 95 supra.

98. WHYTE, supra note 79, at 54; Note, Park Planning and the Acquisition of Open Spaces: A Case Study, 36 U. Chi. L. Rev. 642, 663-64 (1969) [hereinafter cited as Park Planning].
acquired by a local government, it is likely to remain in public use for an indefinite period. Moreover, land that is acquired can be improved for public recreational purposes, and public access to waterways can be provided. Zoning regulations by themselves only restrict development so that the public can enjoy the scenic view along the riverfront. By the same token, subdivision regulations can provide access to riverfront property only where the owner decides to subdivide his land for residential development and thus are less useful in developed urban areas.

Acquisition, however, has the disadvantage of being more costly than regulation, even where the local government does not purchase or condemn the entire fee simple. Furthermore, funding for open space acquisition is often difficult to obtain, and many local governments, although ostensibly committed to an urban stream or other open space project, often accord other programs such as crime control and public housing a higher fiscal priority.

A governmental body may acquire land by purchase, by condemnation, and by donation. In addition, it may seek to obtain the entire fee simple in the property or some lesser interest.

Purchases

Municipalities and other local governments in Illinois are empowered to acquire and hold real property for general governmental purposes and for certain specified purposes, including recreational uses. Moreover, Illinois has a statute that authorizes the Illinois Department of Conservation to provide financial assistance to local governments for the acquisition of open space lands. This statute does not specifically empower units of local government to purchase open space property. However, when read in light of the other statutes authorizing local governments to acquire lands for recreational and scenic purposes, it indicates that the legislature contemplated that local govern-
ments would be preserving open lands within their jurisdictions.\textsuperscript{105}

Although outright purchase of the fee simple in property adjacent to an urban waterway may be the simplest method of acquiring the land and may provide the most nearly complete form of control over the property, several variations of this method offer other advantages. Installment buying allows the local government to spread payments over a number of years while the land remains undeveloped.\textsuperscript{106} The municipality, county, or special district need not expend at one time a large sum of money, which is often impossible to raise, and can agree with the landowner on a purchase price before development pressures have inflated the land's value. The landowner has the advantage of spreading his capital gains over a number of years and thus reducing his income tax liability.\textsuperscript{107} His property tax liability also may be decreased if the city takes title to the land at the time of the initial agreement. Moreover, depending upon his agreement with the municipality, he may be able to stay on the land until the full purchase price has been paid. If he does so, the city is relieved of maintenance obligations.

Pre-emptive buying involves the purchase of a few strategically located parcels in a large tract of land.\textsuperscript{108} The local government that cannot afford to buy the entire tract may be able to appropriate enough funds to acquire some portion of the property. By carefully selecting the parcels to be purchased, the local government can thwart the plans of developers to build on the remaining property, particularly property along a riverfront that is likely to require filling and flood prevention measures. Because the developer must go to added expense to protect from flooding all the parcels in the tract, including the ones owned by the government, he may not find it profitable to develop the land that he owns.

A third variation of the outright purchase consists of purchases by the local governmental body concurrent with the resale, leaseback, or

\textsuperscript{105} Moreover, home rule units of government may exercise any power pertaining to their government and affairs. ILL. CONST. art. VI, \textsection 6(a). This would presumably include the purchase of open lands along an urban waterway for local recreational purposes, unless the waterway were a major regional or state river under the supervision of the Illinois Department of Transportation or the Illinois Department of Conservation.

\textsuperscript{106} Park Planning, supra note 98, at 649-50.

\textsuperscript{107} For a thorough discussion of the tax consequences of various open space preservation techniques, see Thomas, Transfers of Land to the State for Conservation Purposes: Methods, Guarantees, and Tax Analysis for Prospective Donors, 36 OHIO ST. L.J. 545 (1975) [hereinafter cited as Thomas]. The income tax consequences of installment buying are discussed. Id. at 560.

\textsuperscript{108} WHYTE, supra note 79, at 69-70.
reservation of a life estate in the original owner. Under any one of these approaches, the local government must outlay the entire cost of the fee (or the fee encumbered with a life tenancy) initially, although part of this outlay is recouped through the proceeds of a resale to the original owner or through rental payments. Rental payments, in particular, may be employed to establish a revolving fund for purchase of additional open space or for repayment of bonds used to finance the original acquisition. Restrictions in the deed or rental agreement forbid the owner to develop his land in a manner that would destroy its scenic and recreational value. Since none of these schemes allows immediate public access to the land, they are best used when there is no pressing need for the property as a recreational site. The governmental agency gains the assurance, however, that the land will be available at the end of the life tenancy or the lease, and, at the same time, the government avoids the responsibility of maintaining the property.

Because fee purchase is frequently expensive, local governments interested in preserving open lands bordering an urban stream may prefer to acquire less-than-fee interests in these lands. Less-than-fee interests can include easements, leaseholds, and licenses. Easements can be either positive or negative. An affirmative easement grants to the holder certain positive rights with respect to the landowner’s property—for example, the right to enter the property for recreational purposes or the right to require the landowner to maintain the property in a certain condition. Negative easements, on the other hand, prohibit the landowner from doing certain things with his property. For instance, under a negative easement, a landowner may relinquish the right to use the property for commercial or industrial purposes or to make a more intensive use of it. Conservation easements, which are directed towards resources and wildlife protection, and scenic easements, which are used to preserve the beauty of an area, are usually couched as negative easements. A leasehold is an agreement between the landowner and the public agency under which the owner rents his property to the agency for a specified period of time. The agency pays an agreed upon sum annually and in return gains access to the property for the public and a promise from the owner not to alter his land during the period of public occupancy. A license allows the

109. LAND USE, supra note 21, at 37; WHYTE, supra note 79, at 65-68; Thomas, supra note 107, at 562; Park Planning, supra note 98, at 648-49.
110. Comment, Easements to Preserve Open Space Land, 1 ECOLOGY L.Q. 728, 735-37 (1971) [hereinafter cited as Easements].
111. LAND USE, supra note 21, at 40-41.
public to enter the owner's land and may be cheaper than an easement or a leasehold. However, it is less permanent than the other interests in that a landowner usually may cancel a license at any time.\textsuperscript{112}

There are several advantages both to the public and to the landowner where the governmental unit buys less than the entire fee simple.\textsuperscript{113} The cost of an easement is usually considerably less than that of the entire fee. Moreover, the encumbered land remains on the tax rolls, although at a reduced assessed valuation, and the property owner bears the expense of upkeep. Further, property burdened with a negative easement will make fewer demands on community services such as sewers, schools, and police and fire protection. The landowner in turn enjoys the advantage of being able to stay on the land and possibly to make a productive use of it. In addition, he may receive a preferential property tax assessment reflecting the reduced value of his interest. If the landowner owns additional parcels nearby, he may find that their value is increased by their proximity to a scenic or recreational area.

Easements, despite their advantages, can pose problems for a local government that tries to focus its urban stream project on acquisition of riverfront easements. If the land along the river is under intense development pressure, the cost of the easement may approach or almost equal the cost of the entire fee.\textsuperscript{114} Furthermore, if the terms of the easement are not precise and clearly understood by the landowner, expensive and time-consuming renegotiation or litigation may result in the future.\textsuperscript{115} Finally, it is uncertain in Illinois whether, in the absence of an express legislative grant, local governmental bodies have the authority to purchase and hold less-than-fee interests and to construct improvements on land to which they do not have the full fee title.\textsuperscript{116} Local governments may overcome these disadvantages, however, by anticipating development pressures on riverfront land, by carefully drafting any easement agreements, and by lobbying for state legislation specifically authorizing local governments to purchase, condemn, hold, and improve less-than-fee interests. The quest for state legislation may

\textsuperscript{112} Id. at 41.


\textsuperscript{114} Herring, supra note 33, at 107.

\textsuperscript{115} \textit{Easements}, supra note 110, at 737.

\textsuperscript{116} See R. Osmundsen, The Legal Environment of Coastal Zone Management Planning in Illinois 48-59 (1975) (University of Illinois College of Law unpublished report) in which the author notes that although the departments of conservation and transportation have authority to acquire less-than-fee interests in property, they may not be authorized to construct any improvements on property to which they do not hold the fee title.
be much more difficult than the other two steps if the Illinois General Assembly fears that local governments would use the enabling statute to increase excessively expenditures for open space purchases. Local governments must stress to state legislators that nothing in the present law prohibits local governments from purchasing easements. In addition, the ability to purchase easements will not necessarily increase expenditures for open space preservation and acquisition but merely allow local governments to use the available funds over a wider land area. Easements in many riverfront parcels could be purchased rather than fee interests in a few tracts.

A number of states have made easement acquisition a part of, if not the major portion of, their open space preservation programs. In Illinois, local governments might want to consider purchasing easements in riverfront property as an interim measure before purchase of the fee or as a permanent scheme where intensive public use is not anticipated.

Condemnation

A municipality or other local government that has commenced an urban river beautification project may discover that landowners along the riverfront are unwilling to sell their property to the public agency or that even if they are willing to sell a price cannot be agreed upon. In that case, the city will be forced to use its power of eminent domain to acquire the property.

Municipalities and other local governments have the power to condemn land for public purposes so long as just compensation is paid to the owner. Municipalities, park districts, and other units of local government are authorized specifically to acquire land for recreational purposes. Condemnation of riverfront property to provide a park, a conservation area, or even merely a scenic view would undoubtedly be considered a valid public purpose. The only anxiety

117. See, e.g., Illinois Department of Transportation, Division of Waterways, Annual Report 41-46 (1973); Note, Progress and Problems in Wisconsin's Scenic and Conservation Easement Program, 1965 Wis. L. Rev. 352.


121. E.g., id. ch. 42, §§ 393, 394(c) (river conservancy district); id. ch. 96 1/2, § 6342 (forest preserve district).

122. See, e.g., Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill. 2d 132, 174 N.E.2d 850
that a municipality or other local government should have regarding the condemnation of riverfront land is related to the price set at the condemnation proceeding. In determining the fair cash market value of the property taken, one evaluates the property's highest and best use. The highest and best use constitutes the most profitable use to which the land can reasonably be adapted, and evidence may be presented as to the probability of rezoning the property to allow a higher use. Thus, although parcels along a stream may currently be zoned as open space or for single family residences on large lots, intense development pressure may make rezoning to multifamily residential or commercial classification extremely probable. As a result, the condemning agency will be forced to pay a premium price for the property. On the other hand, if the city can show that it has an open space plan which designates the condemnee's land for park purposes, it can counter the assertion that a rezoning to a higher use was likely. At the same time, the city is probably precluded from down-zoning the property for the purpose of lowering the condemnation award even further.

Like purchase, condemnation affords the local government permanent and complete control over the property taken. It, too, however, is an expensive method of acquiring and preserving park lands near a watercourse. Moreover, condemnation proceedings are time-consuming and costly and often produce adverse reactions among landowners whose property is being condemned. Since a local government that undertakes a stream restoration project will want to secure the approval of as many local residents as possible, it should

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(1961) (condemnation of land for park purposes held a legitimate municipal function); Forest Preserve Dist. v. Chicago Title & Trust Co., 351 Ill. 48, 183 N.E. 819 (1932) (condemnation of land for road leading to forest preserve held a valid public purpose). See also Berman v. Parker, 348 U.S. 26 (1954).


124. The fair cash market value of the property is said to constitute the price that a willing buyer would pay for the property to a willing seller. Department of Pub. Works & Bldgs. v. Oberlaender, 42 Ill. 2d 410, 247 N.E.2d 888 (1969).


127. Id. § 5.031.

128. Schroeder, supra note 32, at 355.

129. LAND USE, supra note 21, at 38-39; Park Planning, supra note 98, at 652-53.

130. It is often the enthusiasm of local citizens which sparks local governmental efforts to pursue an urban stream project. For example, in Champaign-Urbana, Illinois, the Champaign County Bicentennial Commission sponsored a three month campaign in 1976 to raise $30,000 for
attempt to negotiate sales or to encourage donations of property before resorting to eminent domain. The threat of condemnation, on the other hand, may add teeth to an open space acquisition program and enable municipal authorities to negotiate a reasonable purchase price with owners of land adjacent to a stream.

As was discussed earlier in regard to purchase of open lands, the condemnation of an easement in riverfront property, rather than the entire fee, may lower the high cost of acquiring such property. The easement in the public could allow public access to the stream, could prohibit the owner from developing his property, or could require the owner to maintain the scenic qualities of his parcel. The condemnation of conservation or scenic easements has been upheld in a number of states, but in Illinois there is no express grant of authority to municipalities, counties, or park districts to condemn a less-than-fee interest. Such power may be inferred, however, from Illinois case law.

**Donation, Dedication, and Prescriptive Rights**

Zoning, subdivision exactions, purchase, and condemnation are government-initiated methods of acquiring scenic and recreational areas adjacent to urban waterways. In addition to these methods, local governments implementing a plan for stream restoration should be aware of several techniques for open space preservation that originate in the private sector. Donations and dedications usually involve intentional gifts of land by private owners to public agencies or nonprofit conservation organizations. Prescriptive rights are commonly acquired through a master plan to restore and beautify a local stream, Boneyard Creek. The campaign was successful, and the necessary funds were raised. Planning and land acquisition are now proceeding at a steady, if slow, pace. For an account of the Bicentennial Boneyard Creek campaign, see issues of the Champaign-Urbana News Gazette, April 4, 1976 through July 15, 1976. During that period, articles appeared daily urging donations of land and/or money in support of the “Our Boneyard” project.

131. See text accompanying notes 139-49 infra.
132. Park Planning, supra note 98, at 653.
133. See text accompanying notes 94-101 supra.
135. E.g., Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).
136. The Illinois courts strictly construe statutes granting eminent domain power to governmental bodies, and thus without an express statutory authorization to condemn less-than-fee interests, the courts might invalidate a local government's attempt to acquire an easement. See Righeimer, supra note 123, at § 1.03.
137. See Peoples Gas Light & Coke Co. v. Buckles, 24 Ill. 2d 520, 182 N.E.2d 169 (1962); City of Waukegan v. Stanczak, 6 Ill. 2d 594, 604, 129 N.E.2d 751, 757 (1975); Miller v. Commissioners of Lincoln Park, 278 Ill. 400, 406, 116 N.E. 178, 181 (1917). These cases imply that in exercising its power of eminent domain, a public agency should not take any larger interest in a piece of property than is necessitated by the public purpose for which it is being taken.
by the public through the inadvertence or neglect of the landowner. Although governmental bodies cannot force gifts from private property owners, they can make owners more aware of the advantages of donation and dedication and, in fact, can embark on carefully planned programs to encourage gifts. They can also investigate whether the public has any prescriptive easements over land bordering their city's waterways. These methods, if properly fostered, can save local governments the expense of purchase or condemnation and the legal problems often accompanying overly restrictive zoning or subdivision regulations.

**Donation**

A landowner of riverfront property who desires to see his land used for conservation or recreational purposes might be willing to donate some or all of it to a local governmental body. The donative urge will probably be stronger before development pressure has begun, and thus it is important for local governments to seek out prospective donors while low-intensity uses are still the only ones contemplated by the owners.

Donation can be accomplished by a variety of means: outright gift of the fee simple; donation of a conservation or recreational easement; donation with the reservation of a life estate; and grant of the fee simple but with a provision for reverter if the property is not maintained according to the donor's wishes. The gift may be made either by a grant during the donor's life or a transfer in trust to a trustee charged with the responsibility of seeing that the property is used for the donor's intended purposes or by a testamentary transfer. The recipient of the gift may be a public agency such as a municipality, county, or park district; a private nonprofit corporation dedicated to conservation of open lands, such as the Nature Conservancy; or, a community land trust.

A gift or bequest of property to a public body or charitable organization can benefit the owner in a number of ways, particularly with

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138. For descriptions of programs to encourage donations of land for conservation purposes, see Whyte, supra note 79, at 72-77; Maryland Environmental Trust, Conservation Easements (1974).

139. Thomas, supra note 107, at 564-73.

140. Many of these organizations purchase land and then resell it at cost to government agencies when public funds become available. C. Little, Challenge of the Land 59 (1969); Herring, supra note 33, at 123-24.

141. Thomas, supra note 107, at 578.
respect to taxes. The owner's real estate tax assessment is reduced to the extent that the value of his interest in the property is diminished. He is also exempt from federal gift tax liability if the donation is made to a governmental unit or charitable organization. In addition, when figuring his federal income taxes, the owner may claim a charitable contribution deduction from his adjusted gross income equal to the fair market value of the donated land. Furthermore, if he devises the property instead of making an inter vivos gift, considerable federal estate tax savings may be realized. Additional, nontax advantages are that the owner no longer has the expense of maintaining the property and he has the satisfaction of knowing that he has contributed to the visual and recreational amenities of his community. The local government reaps the benefit of obtaining open or recreational lands at minimal cost.

Despite these advantages, individual landowners are often reluctant to donate their land. Some may fear that even with restrictive covenants in the deed the government body will not use the land as they intended. If donors are made aware of the various safeguards available, some of these fears may be alleviated. Other factors mitigating against large-scale donations are landowners' ignorance of the advantages of making gifts of their land and the lack of effort by state and local governments, with the assistance of conservation groups, to inform riverfront property owners of the benefits of land donation. A local government considering development of such a program might

142. See generally Thomas, supra note 107, at 545-86; Latcham & Findley, The Influence of Taxation and Assessment Policies on Open Space, in OPEN SPACE AND THE LAW 55-72 (1965).
143. "In the assessment of real estate encumbered by public easement, any depreciation occasioned by such easement shall be deducted in the valuation of such property." ILL. REV. STAT. ch. 120, § 501(5) (1977).
144. I.R.C. § 2522(a).
146. I.R.C. § 2055(a); Thomas, supra note 107, at 555.
147. See Bowes v. City of Chicago, 3 Ill. 2d 175, 120 N.E.2d 15 (1954); Weissburg, supra note 113, at 48.
148. For example, the donor can give the property through an intermediary organization such as a conservation group. The deed can specify that if the government body that receives the donation ever uses the land for purposes contrary to those stipulated by the donor, then the land reverts to the intermediary organization. See Thomas, supra note 107, at 583-86.
study similar programs in other jurisdictions.\textsuperscript{149}

\textit{Dedication}

Similar to donation in its purpose, dedication is generally defined as the gift or appropriation of private property to the public for a public purpose.\textsuperscript{150} It can be accomplished either by complying with the statutory requirements for dedication\textsuperscript{151} or by fulfilling the common law requisites.\textsuperscript{152} Statutory dedication passes the title to the fee to the city as grantee, which holds the title in trust for the public, whereas under a common law dedication title remains in the grantor subject to an easement in the public to use the land for certain purposes.\textsuperscript{153}

To achieve a statutory dedication, the landowner must strictly comply with the plats statute.\textsuperscript{154} The statute requires an owner who plans to subdivide his property into parcels any one of which is less than five acres to have his property surveyed and platted by a registered land surveyor.\textsuperscript{155} The plat must show, among other things, all public streets, parks, and other public grounds within the subdivision.\textsuperscript{156} The owner must file the plat with the proper unit of local government,\textsuperscript{157} and the acknowledgement and recording of the plat by the governmental body vests it with fee simple title of all the portions dedicated to the public on the plat.\textsuperscript{158} Once the land has been dedicated, the owner cannot revoke the dedication, except upon vacating the plat in accordance with the statute.\textsuperscript{159} Approval of the city or county to which the title had passed is required for revocation in all cases.\textsuperscript{160}

Even if the city claims unsuccessfully that certain property was dedicated to the public according to statute, the court may still find a common law dedication. A common law dedication may encompass a

\textsuperscript{149} See Herring, supra note 33, at 123.
\textsuperscript{152} Woodward v. Schultz, 15 Ill. 2d 476, 155 N.E.2d 568 (1959).
\textsuperscript{153} Id. at 482, 155 N.E.2d at 572. See Sears v. City of Chicago, 247 Ill. 204, 93 N.E. 158 (1910).
\textsuperscript{156} Id. § 1.
\textsuperscript{157} If the property lies within an incorporated village or city, the owner must file his plat with the municipality. If it lies within an unincorporated area, he must file the plat with the appropriate county. Id. § 2.
\textsuperscript{158} Id. § 3.
\textsuperscript{159} Id. §§ 6, 7.
\textsuperscript{160} Shoreline Builders Co. v. City of Park Ridge, 60 Ill. App. 2d 282, 209 N.E.2d 878 (1965).
variety of purposes, including recreational lands. Most Illinois courts have held that three requisites must be met in order for a common law dedication to be found: an intention on the part of the owner to dedicate the property to the public for public purposes; an acceptance of the offer to dedicate by the public; and clear, satisfactory, and unequivocal proof as to the offer of dedication and the acceptance. The intention to dedicate may be shown by various acts and declarations of the owner. These statements and declarations must show an active intent on the part of the owner to dedicate the property; a mere nonassertion of his right of ownership is insufficient to prove the necessary intention. Similarly, proof of acceptance requires some showing of affirmative actions indicating an acceptance by the public, such as active use by the public of the land, removal of the property from the tax rolls, and repair and maintenance of the property by the municipal authorities.

A common law dedication takes effect upon acceptance by the public and is binding upon subsequent grantees of the original owner. Moreover, a common law dedication does not require a specific grantee such as a city or other governmental body; the public itself suffices as a recipient of the dedication. Because of these rules, without knowing it, the public in some municipalities and counties may have access to the local waterways by virtue of a common law dedication. Further, if the city did not open up the area dedicated to public use upon a plat immediately after the plat was filed, there may exist statutorily dedicated recreational areas of which a local community is unaware. Hence, before proceeding with purchase or condemnation of

161. See City of Morrison v. Hinkson, 87 Ill. 587, 589 (1877).
163. See, e.g., DuPont v. Miller, 310 Ill. 140, 147-48, 141 N.E. 423, 426 (1923) (public use of waterway for over forty years with owner's knowledge; owner's failure to pay taxes on land underlying waterway; passage of ordinances making waterway part of Chicago harbor); Moffett v. South Park Comm'rs, 138 Ill. 620, 624-26, 28 N.E. 975, 977 (1891) (previous owner built fence thirty-three feet north of south property line).
165. Town of Bethel v. Pruett, 215 Ill. 162, 170, 74 N.E. 111, 114 (1905); Eisendrath & Co. v. City of Chicago, 192 Ill. 320, 326, 61 N.E. 419, 421 (1901); Rees v. City of Chicago, 38 Ill. 322, 336 (1865); In re Application of County Collector, 44 Ill. App. 3d 327, 330, 357 N.E.2d 1302, 1303 (1976).
access rights and riverfront property, a local government involved in an urban stream project should investigate whether any lands along the river have been dedicated to the public. If it is discovered that property has been dedicated, the public authorities should attempt to find out whether any conditions or limitations were attached to the grant since use of the property in violation of the original grantor’s limitations could result in revocation of the dedication.169

Like donated parcels, dedicated land is removed from the real estate tax rolls and the burdens of maintaining the property are placed upon the local government.170 It might be noted in passing, however, that a common law dedication creates only a perpetual easement on behalf of the public and theoretically does not grant fee title to the city or other public body.171 The fee title remains with the original owner and his subsequent grantees. The practical utility of owning the fee title is rather minimal since possession and control of the land usually resides with the municipality or other local governmental unit. There remains, of course, the possibility that at some time the city might abandon possession of the land, at which time the easement would revert to the fee owner.172

Prescriptive Rights

In addition to encouraging donations and dedications of land adjacent to urban waterways, local governments should explore to what extent the public has acquired any prescriptive rights with respect to riverfront property. The public’s right to use navigable waters for fishing, swimming, and boating cannot be enjoyed unless members of the public can gain lawful access to the stream. Acquisition of a prescriptive easement across land adjacent to the waterway is a low cost means by which the public can obtain such access.

A prescriptive easement over an owner’s property entitles the holder of the easement to cross the property on a specific path.173 The easement holder may be a specified private individual, who has used

172. Although an easement does not normally confer the right to possession but only the right to use the land, the type of easement created under a common law dedication is a curious hybrid and apparently affords the easement holder both rights. The fee owner retains only a possibility of reverter. In re Application of County Collector, 44 Ill. App. 3d 327, 332, 357 N.E.2d 1302, 1303 (1976).
the path in the required way for the specified period, or the easement may reside in the public generally where unidentified members of the public have used the right of way. Such a prescriptive right can be established only by use of the right of way that is open, uninterrupted, exclusive, and adverse under a claim of right, for a period of twenty years. The use of the path must also be with the knowledge and acquiescence of the owner, but not with his permission. If the owner actively consents to the public’s crossing his land, then the public cannot acquire a prescriptive easement. However, if members of the public commonly use a certain pathway under the belief that it is a public sidewalk or trail, and the owner, although he knows of the trespass, does nothing, then after the statutory period the public will have acquired a prescriptive right which cannot be taken away by the owner. If obtaining access to an urban waterway is an important consideration to a community, local officials should attempt to ascertain whether the public has acquired any prescriptive easements over land bordering the river.

**Conclusion**

Among the several open spaces preservation techniques outlined in this article, none by itself will be sufficient to fulfill the goals of a local government engaged in an urban stream project. The different devices may be used in combination, however, to achieve a satisfying result. Which combination will best serve the needs of the local government will, of course, depend on the type of riverfront uses contemplated.

If the project focuses primarily on preserving open, scenic areas

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174. See cases involving prescriptive easement in the public to use a private roadway, e.g., Armstrong v. Olson, 57 Ill. App. 3d 223, 372 N.E.2d 114 (1978); Illinois ex rel. Carson v. Mateyka, 57 Ill. App. 3d 991, 373 N.E.2d 471 (1978); King v. Corsini, 32 Ill. App. 3d 461, 335 N.E.2d 561 (1975). In these cases, the courts examined whether the public use met the statutory standards under which a private road becomes a public highway. Ill. Rev. Stat. ch. 121, § 2-202 (1977). To become a public highway, a roadway must be used openly and notoriously by all people for the statutory period of fifteen years. The number of persons using the roadway is not as determinative as the availability of the road to public use. In other words, the court will consider whether the members of the public believed that they had a free and unrestricted right to use the roadway. Van Amburg v. Reynolds, 372 Ill. 317, 322-23, 23 N.E.2d 694, 696-97 (1939).

175. Taylor v. Wentz, 15 Ill. 2d 83, 153 N.E.2d 812 (1958); Leesch v. Krause, 393 Ill. 124, 65 N.E.2d 370 (1946); Bontz v. Stear, 285 Ill. 599, 121 N.E. 176 (1918). The twenty-year period applies to a prescriptive easement established under the common law requirements. If the right of way qualifies as a public roadway under the statutory requisites, then only a fifteen-year period of public use must be shown. A highway is defined by the relevant statute as “any public way for vehicular travel.” Ill. Rev. Stat. ch. 121, § 2-202 (1977).

adjacent to the waterway, the municipality can rely on zoning regulations and acquisition of scenic easements. If public access to the riverfront is not desired, a zoning ordinance placing the riverfront lands in a conservation district will preserve the undeveloped state of the land. The ordinance, however, must be carefully drafted to avoid possible constitutional challenges. For example, it should not deprive the riparian owners of any reasonable return on their property and thus should allow residential and commercial uses that are compatible with the parkway design. If the riverfront parcels are of sufficient depth, the ordinance might require a strip of several feet along the stream be left completely open. In addition to or in lieu of allowing certain compatible uses, the conservation zoning scheme could provide for some sort of compensation to the owners, in the form of transferable development rights or purchase of development rights with tax funds. In fact, the ordinance could be patterned after the New York Historic Preservation ordinance in allowing landowners to transfer unused development to nearby parcels. In light of the Supreme Court’s recent decision in the Penn Central case, any conservation historic preservation ordinance that allows landowners some reasonable beneficial use of their property and permits transfer of development rights where there is a market for them or the owner also has land in the transfer district should withstand challenges on due process and “taking” grounds.

In addition to a riverfront conservation zoning ordinance, donations of scenic easements can aid in preserving open lands along a waterway. These have many advantages both for the landowner and the municipality, as was discussed earlier. The owner who was not planning to sell or develop his land in any event may donate a scenic easement to a public body or a qualifying nonprofit conservation organization and thereby reap both property and income tax savings. The owner may at the same time remain on the property and devise it to his children, knowing that the riverfront area will remain undeveloped. In a community where there is considerable citizen support for the urban stream project, some owners make donations spontaneously, without much prodding by the municipality. Generally, however, to stimulate donations, the municipality or other local government will

177. Suffolk County, New York pioneered a farmlands preservation program in which the county devised plans to purchase the development rights to 15,000 acres that it wished to keep as open farmland. Farmers welcomed the program as a means of gaining immediate cash and relief from high property taxes based on the land’s commercial value. Other states such as California and New Jersey have been studying the Suffolk County program with an eye towards adopting it. N.Y. Times, Sept. 30, 1977, § A, at 1.
need to organize a campaign to inform the area landowners of the advantages of scenic easement donations.

If, in addition to preserving open riverfront lands, the local governmental units decide to create a linear parkway or at least to provide public access at numerous places along the waterway, zoning ordinances alone will not suffice. In most cases, it will be impossible to tailor an ordinance that requires riparian owners essentially to maintain a public park along the waterway and at the same time that will survive constitutional objections. An interim moratorium zoning ordinance, however, that prohibits new development for six or nine months will allow the local governments to complete planning and obtain funds for the acquisition of parcels. During and after this interim period, the local governments should determine which parcels along the waterway are best suited for recreational uses. They should then investigate whether the public has acquired any rights of access in these parcels either by dedication or prescription. Owners of these selected tracts should be approached and donations of part or all of their land encouraged. The government authorities should suggest that, if an owner did wish to live on the property during his lifetime, he could deed the parcel to the city, reserving a life estate in himself.

If donations are not forthcoming, the local governments should be prepared to purchase the most desirable parcels at the end of the moratorium. Because urban land is generally expensive, and funds for open space/recreational projects in short supply, the planners should consider carefully which tracts are essential to the project. If the landowners are unwilling to sell or a price cannot be negotiated, the municipality may, of course, condemn the property and pay its fair cash value.

Part of the waterway may lie in a relatively undeveloped suburban area. If so, a subdivision exaction ordinance, similar to the Naperville ordinance, should be enacted to require subdividers to dedicate part of their land for park purposes. Although the ordinance probably cannot specify which portion of the land should be dedicated, many developers will want to give up the riverfront property because of the difficulties of building on the flood plain. The subdivision ordinance, like a conservation zoning ordinance, must be written so as to withstand legal objections. In Illinois, even after the decision in the Krughoff case, a subdivision ordinance cannot require a developer to dedicate land unless the need for such land is uniquely attributable to the additional population brought into the community by the new development.
Thus, the ordinance should gear the amount of land to be dedicated to the numbers of new residents in the development.

A mix of regulation, acquisition, and voluntary contributions then will achieve, in most cases, the desired results in an urban stream restoration project. Each must be used in light of its advantages and limitations, and the open space planner must bear in mind the particular needs of his community, the availability of funding, the relevant legal constraints, and the extent of community support for the project. Completion of a stream project may take many years, but careful planning and use of the proper legal devices should remove much of the frustration and delay that often beset such long-term local ventures.