NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 56

SCENIC EASEMENTS

LEGAL, ADMINISTRATIVE, AND VALUATION PROBLEMS AND PROCEDURES

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 56

SCENIC EASEMENTS

LEGAL, ADMINISTRATIVE, AND VALUATION PROBLEMS AND PROCEDURES

DONALD T. SUTTE, JR.
DONALD T. SUTTE, JR. & ASSOCIATES
HINSDALE, ILLINOIS
AND
ROGER A. CUNNINGHAM
UNIVERSITY OF MICHIGAN
LAW SCHOOL

RESEARCH SPONSORED BY THE AMERICAN ASSOCIATION
OF STATE HIGHWAY OFFICIALS IN COOPERATION
WITH THE BUREAU OF PUBLIC ROADS

SUBJECT CLASSIFICATION:
TRANSPORTATION ADMINISTRATION
LAND ACQUISITION
ROADSIDE DEVELOPMENT
LEGAL STUDIES

HIGHWAY RESEARCH BOARD
DIVISION OF ENGINEERING NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING 1968

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, thé highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Bureau of Public Roads, United States Department of Transportation.

The Highway Research Board of the National Academy of Sciences-National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as: it maintains an extensive committee structure from which authorities on any highway transportation subject may be drawn; it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to its parent organization, the National Academy of Sciences, a private, nonprofit institution, is an insurance of objectivity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway departments and by committees of AASHO. Each year, specific areas of research needs to be included in the program are proposed to the Academy and the Board by the American Association of State Highway Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are responsibilities of the Academy and its Highway Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

This report is one of a series of reports issued from a continuing research program conducted under a three-way agreement entered into in June 1962 by and among the National Academy of Sciences-National Research Council, the American Association of State Highway Officials, and the U. S. Bureau of Public Roads. Individual fiscal agreements are executed annually by the Academy-Research Council, the Bureau of Public Roads, and participating state highway departments, members of the American Association of State Highway Officials.

This report was prepared by the contracting research agency. It has been reviewed by the appropriate Advisory Panel for clarity, documentation, and fulfillment of the contract. It has been accepted by the Highway Research Board and published in the interest of an effectual dissemination of findings and their application in the formulation of policies, procedures, and practices in the subject problem area.

NCHRP Project 11-3 FY '67
NAS-NRC Publication 1710
Library of Congress Catalog Card Number: 68-61724

FOREWORD

By Staff

Highway Research Board

This report will be of immediate value and assistance to those who are responsible for the administration of the scenic preservation and enhancement provisions of the Highway Beautification Act of 1965 and related programs. An excellent review of the legal problems involved in the use of scenic easements is presented, with pertinent statutory and case law and administrative practices cited. A well thought out proposal is offered on how, through legislation and administrative practices, to proceed in acquiring scenic easements to best advantage, both now and in the future. It must be recognized, however, that this report is a first synthesis, and that as time goes by there will be additions to the knowledge in this field. Accordingly, some of the principles suggested in this report are subject to change or modification.

New and difficult problems are emerging from the implementation of the Highway Beautification Act of 1965 and the scenic road programs. These problems relate to the identification and application of legal and valuation principles for the acquisition of scenic, conservation, and roadside easements; outdoor advertising and junkyard activities; scenic enhancement interests; and the like.

Although established and orthodox legal and valuation concepts will be applicable in these instances, as in all others, their application to this relatively new subject matter presents numerous problems to be solved through research of the kind presented in this report. This research relates to scenic easements and includes the assembly, analysis, and reporting of past experience, including the experience of the State of Wisconsin and the National Park Service.

New legal problems arise in connection with the acquisition and administration of scenic easements. These problems include, but are not limited to, certain constitutional questions, the derivation of appropriate enabling legislation, the form and content of scenic easement conveyances, and the enforcement, transferability, and termination of scenic easement rights. This report contains an analysis and discussion of all these problems in light of the relevant experience, together with proposed new scenic easement enabling legislation and suggestions as to the form and content of scenic easement conveyances. In addition, current State scenic easement enabling legislation, constitutional anti-diversion provisions, and selected scenic easement forms are set out in appendices.

The various administrative problems involved in conducting a scenic easement program are discussed, and specific procedures for conducting a successful program in a State are recommended. Examples of scenic easement acquired illustrate the type of encumbrances that may be obtained. It is possible, however, that other rights than those cited in this report may have to be obtained in some situations if a scenic view is to be properly protected.

Valuation problems and procedures are presented, with the valuation aspects

noted that appear to be applicable to scenic easement appraisal. Both before-and-after sales case studies and comparison-type sales case studies are presented in the appendices for use by appraisers in determining the compensation that should be paid the property owner for the rights taken in a scenic easement acquisition.

An extensive annotated bibliography of the literature on scenic easements and related topics is included in another appendix.

This report suggests that further research should encompass the valuation of signboards and junkyards. Both of these aspects of the Highway Beautification Act of 1965 are currently being studied in the National Cooperative Highway Research Program, and the results will be published at a later date.

CONTENTS

FIGURES

TABLE

ACKNOWLEDGMENTS

The research reported herein was performed under a contract with Donald T. Sutte, Jr., & Associates, of Hinsdale, Ill., for whom Donald T. Sutte, Jr., and Roger A. Cunningham, Professor of Law, University of Michigan, acted as co-principal investigators. Professor Cunningham was concerned with preparation of the following sections of the report: Chapters 1, 2, 3, 4 and Appendices A, B, C, H. Mr. Sutte prepared Chapters 5, 6, 7 and Appendices D, E, F, G.

Special thanks are extended to B. J. Mullen, Director, Bureau of Right-of-Way, Wisconsin State Highway Commission, and his staff, and to R. C. Leverich, Chief of Right-of-Way, Lacrosse District, Wisconsin State Highway Department.

Others who were of assistance in the study were: George Becker, George Becker and Associates, Chicago, Ill.; T. H. Bovard, Deputy Director, Division of Right-of-Way, Ohio Department of Highways; Richard A. Bowler, Realtor-Appraiser, Granby, Mass.; F. C. Buchter, Department Counsel, California Dept. of Parks and Recreation; Gary E. Bullard, Assistant Chief Appraiser, State Road Dept. of Florida; J. E. Burton, Director of Roadside Development, Michigan Dept. of State Highways; Blaine B. Chase, Frederick R. Ross Co., Denver, Colo.; A. H. Christian, Right-of-Way Engineer, Texas Highway Dept.; O. R. Colan, Director, Right-of-Way Division, State Road Comm. of West Virginia; R. E. Corrigan, Reviewing Appraiser, Illinois Div. of Highways; Saul J. Corwin, General Counsel, New York Dept. of Public Works; Robert E. Crampton, Chief Right-of-Way Agent, Montana Highway Comm.; R. B. Cridlebaugh, Assistant Reviewing Appraiser, Illinois Div. of Highways; C. A. Curtis, Right-of-Way Engineer, State Highway Dept. of Georgia; W. D. Davis, Appraisal Associates, Kansas City, Mo.; Miss Beverly Dordick, National Assn. of Real Estate Boards, Chicago, Ill.; Edward V. Dwyer, Recreational Planner, Div. of Beaches and Parks, California Dept. of Parks and Recreation; James M. Eden, Superintendent, Blue Ridge Parkway; Truman Esmond, Truman Esmond Agency, Ottawa, Ill.; Joseph Garside, Chief of Right-of-Way Acquisition, Div. of Roads and Bridges, Rhode Island Dept. of Public Works; F. L. Gray, Bureau of Public Roads; George Halverson, Chief of Appraising, Wisconsin State Highway Comm.; Harry R. Hanley, Right-of-Way Engineer, Illinois Div. of Highways; Earl P. Hanson, Chief, Div. of Beaches and Parks, California Dept. of Parks and Recreation; H. L. Harper, Chief Review Appraiser, Tennessee Dept. of Highways; R. Burnell Held, Chief, Div. of Research and Education, Bureau of Outdoor Recreation, Washington, D. C.; William Hooper, Soil Conservationist, Blue Ridge Parkway; John D. Ingraham, John D. Ingraham & Associates, Council Bluffs, Iowa; Eugene R. Irlbeck, Supervisor, Land Economics Section, Wisconsin State Highway Commission; R. G. King, Bureau of Public Roads; Leo A. Korth, Director, Right-of-Way Operations, Minnesota Dept. of Highways; Wayne J. Levi, Right-of-Way Agent, Wisconsin State Highway Comm.; D. R. Levin, Deputy Director, Office of Right-of-Way and Location, Bureau of Public Roads; Joseph Lynch, Soil Conservationist, Natchez Trace Parkway; John B. Matheny, Asst. Chief Counsel, Div. of Contracts and Rights-of-Way (Legal), Dept. of Public Works, California Transportation Agency; Alvah S. Mattox, Right-of-Way Engineer, Virginia Dept. of Highways; J. Maurer, Asst. District Engineer of Right-of-Way, Illinois Div. of Highways; Louis J. Meyer, Consultant, Chicago, Ill.; D. H. Moehring, Right-of-Way Engineer, Oregon State Highway Dept.; LeRoy C. Moser, Chief Right-of-Way Engineer, Maryland State Roads Commission; Thomas J. Mracek, Chief Landscape Architect, Illinois Dept. of Public Works and Buildings; Ross D. Netherton, Counsel for Legal Research, Highway Research Board; T. K. Pease, Landscape Architect and Horticulturist, Blue Ridge Parkway; Clarence R. Pell, Parkway and Landscape Engineer, New Jersey Dept. of Transportation; O. E. Pettijohn, Chief, Real Estate Division, Kansas City District, Corps of Engineers, U. S. Army; Robert W. Pratt, Assistant Right-of-Way Planner, Iowa State Highway Comm.; L. W. Raabe, Jr., Assistant Right-of-Way Engineer, Virginia Dept. of Highways; Joseph C. Rumburg, Jr., Superintendent, Natchez Trace Parkway; Roland J. Schaar, Realty Officer, Bureau of Outdoor Recreation, Department of the Interior; A. A. Sousa, Head, Rights-of-Way Branch, Hawaii Dept. of Transportation; James L. Stober, Right-of-Way Engineer, Iowa State Highway Comm.; Neil J. Stout, Recreation Resource Specialist, Bureau of Outdoor Recreation, Department of the Interior; Marion Wallace, Des Moines, Iowa; W. J. Wheeler, National Park Service, Department of the Interior; Jerome B. Wolff, Chairman, Maryland State Roads Commission, and Director of Highways; and Clyde C. Wyatt, Soil Conservation Technician, Blue Ridge Parkway.

SCENIC EASEMENTS

LEGAL, ADMINISTRATIVE, AND VALUATION PROBLEMS AND PROCEDURES

SUMMARY This study was divided into two sections with two original goals: (1) the legal aspects of scenic easements and (2) the valuation aspects of scenic easements.

Legal Aspects

The scenic easement would appear to be an extremely useful device for implementing the highway beautification program. In rural areas where the land is not yet ready for development, the cost of scenic easements is quite low as compared to the cost of fee-simple acquisition. This is particularly true when scenic easements are acquired over wetlands, flood plains, and areas where the scenic restrictions do not interfere with the continued use of the land for agricultural purposes and where development potential for other than agricultural uses is limited. Even where the development potential of the land for other uses is greater, the cost of a scenic easement may be considerably less than the cost of fee-simple acquisition.

The experience of the Wisconsin Highway Commission indicates that it is possible to operate a program of scenic easement acquisition and maintenance quite successfully if (1) landowners are fully educated as to the objectives of the program and the rights they are relinquishing when they grant a scenic easement; (2) a system of periodic inspections is established, with prompt reporting of any violations of scenic restrictions; and (3) the local courts are well informed as to the objectives and the mode of operation of the scenic easement program.

It is likely that use of the power of eminent domain and the expenditure of State funds to acquire scenic easements will be sustained in most States, if challenged, on the ground that scenic easements promote a public purpose and make possible a public use of the servient land. In some States with constitutional anti-diversion provisions, the use of dedicated highway funds for scenic easement acquisition may present more of a problem. "Equal protection" may also raise problems, not with respect to scenic easement acquisition *per se,* but in connection with related police power restrictions on land use adjacent to highways.

In connection with the constitutional public purpose and public use requirements, it would seem desirable to include in scenic enabling legislation an express declaration that acquisition of scenic interests in land adjacent to highways is for a public purpose and will provide for a public use. Such a declaration is, of course, not conclusive on the issues of public purpose and public use, but it is accorded substantial weight by the courts. It could well be strengthened by an express declaration that the contemplated public use may be either active—as where there is a public right of entry on scenic overlook areas—or passive—as where the only public rights are negative and the public use consists of visual occupancy.

A few other conclusions as to scenic easement enabling legislation may be in order, as follows:

1. It is desirable to state in the enabling act—as most of the current acts do—that scenic interests may include the fee simple or any lesser interest, and to mention scenic easements expressly—as most of the current acts do not.
2. The enabling act should include some definition of a scenic easement—a feature conspicuously lacking in practically all of the current enabling legislation.
3. The enabling act should provide for acquisition of scenic interests (including easements) by condemnation, as well as by purchase, exchange, and gift, for without the power to condemn the State highway agency is severely handicapped in negotiating for the purchase of scenic interests and may, on occasion, find it impossible to preserve an especially significant scenic area at a reasonable price.
4. If the power to condemn scenic interests is given to the State highway agency, it should also be authorized to withdraw from a condemnation proceeding on payment of the landowner's costs, in the event the condemnation jury finds a value grossly in excess of what the highway agency believes the scenic interest is worth.
5. The enabling act should authorize not only acquisition of the fee simple and less-than-fee interests, but also the acquisition of the fee simple and resale of the fee subject to scenic restrictions.
6. The enabling act should expressly provide that all scenic easements acquired by the State highway agency adjacent to or in locations visible from the highway shall be deemed appurtenant to the highway, and that all scenic easements shall be binding upon and enforceable against the original owner of the servient land and all his heirs and assigns in perpetuity unless the scenic easement deed expressly provides for some lesser duration.
7. The enabling act should expressly provide that no court may declare a scenic easement to be extinguished or unenforceable on the ground of changed conditions or frustration of purpose.
8. The enabling act should expressly authorize the State highway agency, when it will not be contrary to the public interest, to grant an appropriate variance of the scenic easement restrictions.

In drafting scenic easement deeds, it would seem that the current Wisconsin practice has substantial advantages in terms of tailoring the land-use restrictions and the grant of affirmative rights to fit the particular situation. The current practice in Wisconsin is to select in advance from a substantial list of restrictions and affirmative rights those most appropriate for the particular scenic location. The highway agency's field committee or "team," consisting of an engineer, a right-of-way agent, and a wayside development specialist, which determines the content of the scenic easement "package" in each case, is given authority to add other provisions not contained in the standard list where necessary to deal with an unusual situation. But the highway agency's negotiator is not authorized to deviate from the proposed scenic easement package except where addition of a clarifying word or phrase, which does not change the basic intent of the easement, may resolve a misunderstanding or possible future question as to intent.

Valuation Aspects

To summarize the year's study pertaining to the valuation and acquisition of scenic easements, one of the most important aspects pertaining to the program at this particular time is the establishment of a scenic easement committee or acquisition

board within a specific State. In addition, a good public relations effort is needed to sell the program of scenic easements to the general public; and a good understanding of the program is necessary by the highway officials attempting to initiate such a program.

Pertaining to the valuation of scenic easements, it would appear that the appraisal application or valuation of scenic easements at this particular time is extremely lacking—there is no accepted methodology in the acquisition or in the appraisals for scenic easement acquisition. By and large, the appraisals that have been made to date are extremely poor and the thinking is extremely confusing. It appears that many appraisals are not justified and there is a lack of understanding by both the general public and the highway officials pertaining to the proper valuation of rights of the property lost to an acquisitioned scenic easement. In the court cases reviewed, the court rulings to a great extent are out of proportion to the actual compensation that should be awarded to a specific type of property.

It would appear at this particular time that various agencies are just originating programs for the acquisition of scenic easements in various areas. For the most part, the before and after sales information is lacking, due to the program being in the initial stages.

To summarize the findings of the project, recommendations have been made as to some of the initial steps that can be taken along the lines of acquisition and valuation for the scenic easement program. It is recognized that, inasmuch as this is the initial recommendation in this field, as time passes many of these recommendations will have to be changed or modified.

CHAPTER ONE

INTRODUCTION

Title III of the Highway Beautification Act of 1965 [1] provides for an allocation to each state of Federal funds equal to 3 percent of the funds appropriated to that state for Federal-aid highways for any fiscal year, on a non-matching basis, "for acquisition of interests in and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways, including acquisition and development of publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accomodate the traveling public." Although this provision obviously contemplates acquisition of land in fee simple for "development of publicly owned and controlled rest and recreation areas and sanitary and other facilities," the reference to "interests in . . . strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such [Federal-aid] highways" clearly contemplates that less-than-fee interests may be acquired for such purposes.

[1] 79 Stat. 1028 (1965), 23 U.S.C. §§ 131, 136, 319 (Supp. I, 1965).

Title III of the Highway Beautification Act of 1965 authorized an appropriation of up to $120 million for the fiscal year ending June 30, 1966, for landscaping and scenic enhancement, and a like appropriation for the fiscal year ending June 30, 1967. Public Law 89-309, approved October 1, 1965, appropriated $60 million for landscaping and scenic enhancement for the fiscal year 1966, and $59.5 million of this amount was actually obligated to the several states as of June 30, 1966. On January 10, 1967, the Bureau of Public Roads, pursuant to Title III of the Highway Beautification Act of 1965, submitted to Congress a detailed estimate of the cost of carrying out the provisions of the act, and a comprehensive study of the economic impact of such programs (including advertising control and junkyard control) on affected individuals and commercial and industrial enterprises, the effectiveness of such programs and the public and private benefits realized thereby, and alternate and improved methods of accomplishing the objectives of the act.

The Bureau of Public Roads report of January 10, 1967,[2] contains two sets of cost estimates. For a minimum program to be carried out over some ten years at a total cost in the range of $200 million per annum, a total of $189,-170,000 would be allocated for acquisition of scenic strips (or interests therein) adjacent to the highway right-of-way.[3] For an ultimate program to be undertaken at a total cost in the range of $300 million per annum for a 10-year period, a total of $391,435,000 would be allocated.

In view of the very substantial amounts of Federal funds made available on a non-matching basis under Title III of the Highway Beautification Act for the fiscal year 1966, and the additional amounts likely to be made available thereafter, both the Bureau of Public Roads and the state highway agencies became interested in the possibility of acquiring scenic easements adjacent to existing and planned Federal-aid highways. National Cooperative Highway Research Project 11-3 was an outgrowth of this interest. The original title of the proposed research project was "Valuation and Legal Implications of Scenic, Conservation and Roadside Easements." After the research work had proceeded for several months it became clear to the researchers that emphasis should be placed almost entirely on the problems associated with use of scenic easements for highway beautification purposes. At a meeting of the researchers and the advisory panel for the project early in May 1967, the decision of the researchers to concentrate their research on scenic easements was approved. Ultimately, a new title for the project—Scenic Easements: Legal, Administrative, and Valuation Problems and Procedures—was agreed upon.

The contractor and principal investigator for this project was Donald T. Sutte, Jr., and Associates. The legal consultant and co-principal investigator was Professor Roger A. Cunningham. In general, the division of responsibility between Mr. Sutte and Professor Cunningham was as follows:

1. Mr. Sutte assumed responsibility for investigation and analysis of administrative and valuation problems involved in the use of scenic easements.

2. Professor Cunningham assumed responsibility for investigation and analysis of past experience with and plans for future use of scenic easements; investigation and analysis of legal problems involved in the use of scenic easements; the drafting of proposed scenic easement enabling legislation; and preparation of a bibliography.

Most of Chapter 1, and all of Chapters 2 through 4, Appendices A through C, and Appendix G are the work of Professor Cunningham. Chapters 5 and 6 and Appendices D through F are entirely the work of Mr. Sutte. Mr. Sutte and Professor Cunningham collaborated on Chapter 7.

Professor Cunningham's contribution to this study is based on the collection and analysis of an enormous amount of material already in print and much unpublished material which is not generally available, extensive correspondence with state highway and conservation department personnel throughout the United States, and a few interviews.

Mr. Sutte's contribution to this study is based primarily on field investigation, consisting largely of interviews with state, Federal, and local highway officials involved in scenic easement acquisition for highway beautification. The area of the La Crosse District of the State Highway Commission of Wisconsin was a principal focus of the field investigation, because of the long experience and high degree of success attained in scenic easement acquisition in Wisconsin. In addition, Mr. Sutte was fortunate in having the opportunity to work as an appraiser for the State of Illinois at the very beginning of its program of scenic easement acquisition. Thus he obtained first-hand knowledge of the problems arising in the early stages of the Illinois scenic easement program.

Mr. Sutte gathered a great deal of written material, much of it unpublished, in the course of his investigation. He also obtained many case studies from Wisconsin, Mississippi, South Carolina, and elsewhere dealing with properties where scenic easements have been acquired and some useful, factual market information was available.

Among the case studies incorporated in this report, are three principal types: (1) cases where sales before and after the acquisition of a scenic easement in the land can be compared; (2) comparison sales of land encumbered by scenic easements; (3) exchanges of land encumbered by scenic easements for land not so encumbered. In these cases, Mr. Sutte or members of his staff personally interviewed the buyers, sellers, brokers, lawyers, and others directly involved in the scenic easement transaction who could supply factual information about it.

SOME PROBLEMS OF DEFINITION

Scenic Easements

Although the term "scenic easement" has been the subject of much writing and discussion during the last decade, it is used in only a few of the state statutes authorizing acquisition of less-than-fee interests in land adjacent to or near highways.[4] Only two of these statutes, the Arkansas and Missouri acts of 1939 providing for creation of a Mississippi River Parkway,[5] contain a definition:

> "Scenic, landscape, sightly or safety easement" shall mean a servitude devised to permit land to remain in private ownership for its normal agricultural, residential or other use consistent with parkway purposes determined by the secretary [United States Secretary of the Interior], and at the same time placing a control over the future uses of the area to maintain its scenic, landscape, sightly or safety values for the parkway in this state.[6]

[2] Dept. of Commerce, REPORT ON 1967 HIGHWAY BEAUTIFICATION PROGRAM, S. Doc. No. 6, 90th Cong., 1st Sess. (Comm. Print 1967).

[3] In addition to control of outdoor advertising and junkyards, this program would provide only "(1) acquisition or improvement of those scenic strips which have superior or inherent scenic value or those where there is a high probability that other uses of the land would soon destroy the inherent scenic value; (2) that landscaping and roadside development at minimum cost which will provide outstanding highway roadside beauty in conjunction with the adjacent environment (or because of a lack of any existing appropriate treatment), and (3) those safety rest areas or scenic overlooks which would have the highest probable use to the traveling public or are sites of outstanding interest and attractiveness." *Supra* note 2, at 5.

[4] See, e.g., CAL. GOV'T CODE § 7000 (Deering Supp. 1966), ILL. ANN. STAT. ch. 121, § 4-201.15 (Smith-Hurd Supp 1966); MO. ANN STAT. § 226 280 (1949).

[5] ARK. STAT. ANN. § 76-1801 to 76-1811 (1957); MO. ANN STAT. §§ 226 280 to 226 430 (1949)

[6] ARK. STAT. ANN § 76-1804(3) (1957); MO. ANN. STAT. § 226.280(3) (1949).

This definition is identical with the definition contained in the National Park Service's *Requirements and Procedure to Govern the Acquisition of land for National Parkways,* which appears to have been developed for use in connection with the Blue Ridge and Natchez Trace National Parkways.[7] Although the Congressional legislation authorizing appropriations to assist in creation of a Mississippi River Road—now called the Great River Road—did not define scenic easement, the report entitled *Parkway for the Mississippi,* which was transmitted to Congress by the Bureau of Public Roads and the National Park Service on November 28, 1951,[8] contained the following discussion of "scenic easements": [9]

> Outright purchase of the farm scene, widespread through the valley, would be unnecessary. Instead, scenic easements or reservations would be sought, averaging 300 feet wide, along both sides of the construction right-of-way. There would be purchased from the owner only his right to convert a certain part of his farm land to residential or commercial uses. While he could not add new houses or erect billboards, paralleling pole lines, or other structures, he would continue to exercise all other privileges of ownership and in no way would be restricted in his agricultural pursuits. Neither would the public have any right to enter upon these lands for any purpose. This method of scenic conservation should result in large savings over outright purchase, retire less farm land from the tax rolls, and attach the pastoral views permanently to the parkway without cost to the public for maintenance.

The *Appraisal and Terminology Handbook* of the American Institute of Real Estate Appraisers defines a scenic easement somewhat more broadly as "a restriction imposed upon the use of the property of the grantor for the purpose of preserving the natural state of scenic and historical attractiveness of adjacent lands of the grantee, usually the city, county, State or Federal government." In short, a scenic easement is a negative easement appurtenant designed to preserve scenic and historical values under the A.I.R.E.A. definition. It should be noted, however, that there is nothing in the nature of the interest requiring a scenic easement to be "appurtenant," although scenic easements designed to preserve scenic and historical values along highways will, normally, be appurtenant to the highway, with the highway constituting the dominant estate.

Inasmuch as one of the chief advantages of the scenic easement is flexibility, there is no one standard form. Within limits, the easements provisions are tailored to the needs of the servient landowner and the particular landscape qualities desired to be preserved. In general, however, scenic easement forms now in common use include the following: [10]

1. A restriction of new buildings and structures (or major alterations) to farm and residential buildings and structures only, plus a specific prohibition of further nonresidential buildings—with a saving clause permitting the continuance of existing nonconforming uses.
2. An authorization for necessary public utility lines and roads.
3. A prohibition against cutting mature trees and shrubs, but with a provision authorizing normal maintenance.
4. A prohibition against dumping.
5. A prohibition against outdoor advertising, except for activities located on the premises.

In addition to these restrictions or negative rights, a scenic easement may, of course, also include one or more affirmative privileges—e.g., a public right of entry to a limited area for a scenic overlook along a highway, or a public (i.e., highway department) right of entry to remove structures or plantings which are in violation of the restrictions, or to repair damage done to plantings or other vegetation in violation of the restrictions.

Conservation Easements

A "conservation easement" is somewhat more difficult to define. There is clearly a good deal of overlap between the scenic easement and the conservation easement. If, as is stated in the Missouri enabling legislation for the Mississippi River Parkway (now the Great River Road),[11] a scenic easement is "a servitude devised to permit land to remain in private ownership for its normal agricultural, residential or other use consistent with parkway purposes," the conservation of land for agricultural use is clearly one of the purposes, and one of the results as well, of a scenic easement acquisition program.

A proposed Pennsylvania statute defined "conservation easements" as follows: [12]

> An aggregation of easements in perpetuity designed to preserve in their natural state lands of cultural, scenic, historic, or other public significance. Such easements could include restrictions against erecting buildings or other structures; constructing or altering private roads or drives; removal or destruction of trees, shrubs or other greenery; changing existing uses; altering public utility facilities; displaying any form of outdoor advertising; dumping of trash, wastes, or unsightly or offensive materials; changing any features of the natural landscape; and any changes detrimental to existing drainage, flood control, erosion control, or soil conservation; any other activities inconsistent with the conservation of open spaces in the public interest. Conservation easements will permit all present normal and reasonable uses, not conflicting with the purposes indicated above, to be engaged in by the landowners, their heirs, successors and assigns.

Although the proposed statute from which the foregoing definition is taken was not enacted, Pennsylvania did enact, in 1964, a statute [13] authorizing "the [public] acquisition of lands for recreation, conservation and historical purposes before such lands are lost forever to urban development or

---

[7] See Whyte, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 12 at n. 3 (Urban Land Institute Tech. Bull. No. 36, 1959). Congressional enactments dealing with the Blue Ridge and Natchez Trace National Parkways may be found in 16 U.S.C. §§ 460 and 460a.

[8] This report was prepared pursuant to P.L 262, 81st Congress, 63 Stat. 626, which authorized the Department of Interior, through the National Park Service, and the Federal Works Agency, through the Public Roads Administration, "to make a joint survey of a route for a national parkway to be known as the Mississippi River Parkway." Congress appropriated an amount not to exceed $250,000 for this survey.

[9] Report, *supra* note 8, at 10.

[10] See University of Wisconsin, WORKSHOP MANUAL FOR CONFERENCE ON SCENIC EASEMENTS IN ACTION 10 (Madison, Wis., Dec. 16, 17, 1966), hereafter cited as WORKSHOP MANUAL. The scenic easement deed form now used in Wisconsin states that it "grants to the State of Wisconsin, and its agents, the right to enter upon the restriced area only for the purpose of inspection and enforcement of the terms of this easement."

[11] *Supra* note 5.

[12] This proposed statute is set out in full in Whyte, *supra* note 7, at 59.

[13] PA. STAT. ANN. tit. 72, §§ 3946.1 to 3946.22 (Supp. 1966).

become prohibitively expensive." [14] "Conservation purposes" was defined to mean "any use of land for water supply, flood control, water quality control development, soil erosion control, reforestation, wildlife reserves or any other uses that will maintain, improve or develop the natural environment of soil, water, air, minerals or wildlife of this Commonwealth so as to assure their optimum use." [15] "Lands" was defined to mean "real property, including improvements thereof or thereon, rights-of-way, water, riparian, and other rights, easements, privileges, and other physical property or rights or interests of any kind or description relating to or connected with real property." [16] Thus a conservation easement under the Pennsylvania statute would be an easement designed to further any of the "conservation purposes" listed.

New Jersey enacted a somewhat similar statute, the New Jersey Green Acres Land Acquisition Act of 1961,[17] which authorizes public acquisition of "lands for public recreation and the conservation of natural resources" [18] and defines "recreation and conservation purposes" to mean "use of lands for parks, natural areas, forests, camping, fishing, water reserves, wildlife, reservoirs, hunting, boating, winter sports and similar uses for public outdoor recreation and conservation of natural resources." [19] The definition of "land" or "lands" in the New Jersey statute [20] is substantially identical with the definition in the Pennsylvania act, and in addition the New Jersey act expressly states that it authorizes public acquisition of "an interest or right consisting, in whole or in part, of a restriction on the use of land by others including owners of other interests therein; such interest or right sometimes known as a 'conservation easement.' " [21]

It would thus appear that the objectives of conservation easements are somewhat broader than those of scenic easements, in that the conservation easement may be designed to conserve all kinds of natural resources such as agricultural land, water, forests, and wildlife, as well as scenic landscape values. Moreover, conservation easements may often be coupled with affirmative easements designed to promote public recreational use of private land (e.g., hunting, fishing, boating, and camping easements).[22] Viewed as a tool for use in a highway beautification program, the conservation easement offers an opportunity to achieve other objectives along with the scenic or beautification objective which is the primary objective of the Federal highway beautification program.

[14] *Id.* § 3946.2(4).
[15] *Id.* § 3946.3(2).
[16] *Id.* § 3946.3(3).
[17] N.J. REV. STAT. 13:8A-1 through 13:8A-18 (Supp. 1959-1961).
[18] *Id.* 13.8A-4.
[19] *Id.* 13:8A-3(c).
[20] *Id.* 13:8A-3(d).
[21] *Id.* 13:8A-12(b).
[22] See WORKSHOP MANUAL, *supra* note 10, at 47, defining "conservation easements" as follows: "hunting rights, right to enter and manage waters, right of access to lake, right to insist that cover and other habitat remain undisturbed (a negative right), right to fish from private land, etc." On the other hand, "the right to prevent any development in a flood plain or to protect wetlands from drainage and agricultural use" is given as an example of an "easement against development," with the further observation that "a saving clause may be included to allow normal farming practices at times when these areas [wetlands] are naturally dried out," and that "usually included in such an easement are a prohibition against draining the potholes or filling them, a prohibition against burning vegetation, and a right of entry for policing." For a good discussion of the use of conservation easements to protect watersheds and to conserve agricultural land, see Whyte, *supra* note 7, at 16-17.

Terminology Used in This Study

Inasmuch as Title III of the Highway Beautification Act of 1965 authorizes use of Federal funds for "acquisition of interests in and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways," [23] it is clear that scenic beauty must be the focus of any easement acquisition program financed with Federal funds. Federal funds cannot be used to acquire conservation easements unless such acquisition will contribute to "the restoration, preservation, and enhancement of scenic beauty" along the highways. Consequently, this study is primarily concerned with the legal, administrative, and valuation problems likely to arise in a scenic easement acquisition program. One should, of course, keep in mind the fact that scenic easements will, in almost every case, also be conservation easements, because the imposition of scenic easement restrictions on land use will result in the conservation of soil, water, natural vegetation, scenic structures, and (in some instances) existing agricultural land uses. Arguably, the dual character of the easements which are the subject matter of this study should be emphasized by using some term such as "roadside scenic and conservation easements." But for the sake of simplicity and brevity, the authors have decided to use the term "scenic easements" to denote the less-than-fee interests which may be acquired in pursuance of the purposes set out in Title III of the Highway Beautification Act of 1965.

The term "scenic easements" is used herein, therefore, to denote such interests whether they are acquired by gift, negotiated purchase, condemnation, resale subject to scenic restrictions after purchase in fee simple, or lease-back subject to scenic restrictions after purchase in fee simple.

Easements or Equitable Servitudes?

Under the definition of an easement given in the *Restatement of Property*,[24] six factors are stressed: (1) it is an interest in land which is in the possession of another, and therefore cannot be classified as an "estate" in land; (2) the essence of the interest is a limited privilege of use or enjoyment of the land in which the interest exists (the servient tenement); (3) the interest is legally protected against interference by third persons, as well as the possessor of the servient tenement; (4) the interest is not terminable at the will of the possessor of the servient tenement, but may continue in perpetuity, or for a designated lifetime, or for a term of years; (5) the interest is not a normal incident of a possessory estate in land; and (6) the interest is capable of creation by conveyance.

Easements can be classified as affirmative and negative. If the owner of an easement is privileged to enter on the servient tenement and to do acts thereon (e.g., to maintain a way across it, or to cause it to be covered with water), the easement is classified as affirmative, because it privileges

[23] Highway Beautification Act of 1965, Title III, 23 U.S.C. § 319(b) (Supp. I. 1965).
[24] RESTATEMENT OF PROPERTY § 450, and Comment thereon (1944). See also 3 Tiffany, REAL PROPERTY § 756 (3rd ed. 1939); 2 AMERICAN LAW OF PROPERTY §§ 8.4, 8.5 (Casner ed., 1952); 3 Powell, REAL PROPERTY ¶ 405 (recomp. ed. 1967).

the owner of the easement to do affirmative acts on the servient tenement which, but for the easement, would be unprivileged and tortious. Similarly, if the easement privileges a possessor of land to do acts on his own land, such as maintaining a factor that pollutes the air or causes excessive noise, which, but for the easement, would be tortious under the law of nuisance, the easement is classified as affirmative. A negative easement, on the other hand, essentially gives the owner of the easement a veto power. The owner of a negative easement has the power to prevent the possessor of the servient tenement from doing acts on his own land which, but for the easement, he would be privileged to do. Thus, e.g., a negative easement may assure to its owner the access of light to his windows over the servient tenement by giving him the power to prevent the erection on the servient tenement of structures that would obstruct such access; or it may assure the easement owner of more lateral support from the servient, or more benefit from a stream of water than he would otherwise be legally entitled to receive, by prohibiting the exercise by the possessor of the servient tenement of some of his "natural rights." [25]

It is clear from the foregoing that scenic easements must be classified, primarily, as negative easements, because the essence of such interests is a restriction of the uses that might otherwise be made of the servient tenement. Whenever a scenic easement includes a right of entry for any purpose, however, it is clearly, to that extent, an affirmative easement.

Recognizing that scenic easements are primarily restrictions on the use of the servient tenement, and therefore, in their most significant aspect, are negative rather than affirmative easements, the question must still be raised whether the Anglo-American common law recognizes such easements at all.

A negative easement of prospect or view seems to have been recognized by the civil law of Europe.[26] But in England it was held at an early date that, "although there can be an easement of light where a defined window receives a defined amount of light, there can be no easement of prospect (i.e., the right to a view)." [27] As the court rather quaintly said, "for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof . . . the law does not give an action for such things as delight." [28]

It is possible, of course, that if the question were raised today the English courts would overrule this old precedent and recognize the scenic easement as a species of legal easement. A refusal to recognize such easements at law could not be based on the theory that the list of permissible legal easements is closed, for the English courts have recognized that "the category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind." [29] Rather, such continued refusal would have to be based on the view that the list of easements is "not open to interests which do not conform to the rules about the general nature of easements," [30] and that "the extent of the right claimed must be capable of reasonably exact definition, for otherwise it could not be granted at all." [31] Where the content of a scenic or conservation easement is carefully defined—i.e., the restrictions on land use are carefully spelled out—it is hard to see any objection to regarding the easement as a legal interest in land.

In the United States there is substantial case law recognizing a common-law negative easement of prospect or view. Although there are dicta in Michigan [32] and South Carolina [33] cases to the effect that no such easement is recognized in those States, the dicta in both cases are based on cited earlier cases [34] that are clearly not in point. The Michigan court, moreover, suggested in another case [35] that there is such a thing as a "common-law negative easement of air, light, and view." And a common-law negative easement of prospect or view has been recognized in California,[36] Massachusetts,[37] and Rhode Island,[38] at least, and apparently also in New York,[39] Vermont,[40] and Wisconsin.[41] The Wisconsin case [41] recognizes scenic easements as such.

Moreover, there is substantial case law recognizing and enforcing negative easements somewhat similar to scenic easements; viz., clearance easements around airports and around the sites of guided missile (Nike) installations.[42] Clearance easements [43] around airports give the agency operating the airport (1) the right to prevent new buildings or structures from protruding up into the airspace above the glide angle prescribed by the Federal Aviation Agency; (2) the right to remove the projections of any buildings that do so; (3) the right to cut and trim any vegetation growing up into this space; and (4) a right of entry to enforce the above rights. Similar easements are obtained around the sites of guided missile (Nike) installations, authorizing the elimination of obstructions around such in-

[25] For support of statements in text, see 3 Powell, REAL PROPERTY 395-96 (recomp. ed. 1967).
[26] Washburn, EASEMENTS AND SERVITUDES 20 (4th ed 1885).
[27] William Aldred's Case, 9 Co. Rep. 57b (1610).
[28] *Id.* at 58b.
[29] Dyce v. Lady James Hay, 1 Macq. 305, at 312 (1852).
[30] Megarry & Wade, LAW OF REAL PROPERTY 808 (3d ed., 1966). The most famous statement of this general principle is Lord Brougham's assertion in Keppell v. Bailey, 2 My. & K. 517 (1834), at 535, that "It must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner." The original edition of GALE & WHATLEY ON EASEMENTS, published in 1840, lists as the principal negative easements (1) the right to receive a flow of water, (2) the right to receive light and air by ancient windows, and (3) the right to support of neighboring soil.
[31] Megarry & Wade, *supra* note 30, at 809.
[32] Hasselbring v. Koepke, 263 Mich 466, 475, 248 N.W. 869 (1993).
[33] Schroeder v. O'Neill, 179 S.C 310, 315, 184 S E. 679 (1936).
[34] The dictum in Hasselbring v. Koepke, *supra* note 32, is based on Hawkins v. Sanders, 45 Mich 491 (1881), and Kuzniak v. Kozminski, 107 Mich. 444, 61 Am. St. Rep 344 (1895), neither of which deals with easements of view or prospect. Schroeder v. O'Neill, *supra* note 33, bases its dictum on Bailey v. Gray, 53 S.C. 503, 515-17, 31 S.E. 354 (1898), which is also not in point.
[35] Johnstone v. Detroit, etc., R. Co , 245 Mich. 65, 79, 222 N.W. 325 (1928): "A restriction of the use of premises exclusively for residences, especially if with setback requirements, is not foreign to the principle of common-law negative easement of air, light, and view."
[36] Peterson v. Friedman, 162 Cal App 2d 245, 328 P 2d 264 (1958).
[37] Ladd v. Boston, 161 Mass. 585, 24 N.E. 858 (1890); Attorney General v. Williams, 174 Mass 476, 55 N.E. 77 (1899).
[38] Cadwalader v. Bailey, 17 R I. 495, 23 A 20 (1891).
[39] Lattimer v. Livermore, 72 N.Y 174 (1879).
[40] Fuller v Arms, 45 Vt 400 (1873); Hopkins v. Fleming, 112 Vt. 389, 26 A 2d 96, 142 A.L.R. 463 (1942).
[41] Kamrowski v. State, 31 Wis 2d 256, 142 N.W.2d 793 (1966).
[42] See Williams, LAND ACQUISITION FOR OUTDOOR RECREATION—ANALYSIS OF SELECTED LEGAL PROBLEMS 43 (ORRRC Study Report 16, 1962).
[43] These are sometimes known as "avigation easements" or "aviation corridor easements."

stallations in order to prevent interference with radar beams.[44] Most of the cases are concerned with the evaluation of clearance easements taken under the power of eminent domain, but they appear to recognize the clearance easement as a permissible type of property interest.

The attitude of American courts toward recognition of new types of easements is undoubtedly less restrictive than the attitude of English courts. As the *Restatement of Property* points out,[45] "even a novel privilege of use may be so definite in content and so obviously subject to the considerations which have led to the recognition of new easements in the past as to warrant its being presently considered an easement." It would seem that scenic easements of the type now under discussion would meet the requirement of definiteness of content suggested by the *Restatement* as a significant criterion for recognition of new types of easements. Indeed, the Michigan court has even suggested that all residential building restrictions might well be classified as creating legal easements.[46]

In any case, it seems clear that scenic easements will be recognized and enforced as equitable servitudes whether such interests are recognized and enforced at law or not. *Tulk v. Moxhay*,[47] the case generally considered as establishing the doctrine of equitable servitudes, really involved a scenic easement, although it was not argued that the scenic restrictions in that case created a legal easement. The principal argument against enforcement of the scenic restrictions against one who acquired the land from the covenantor with notice of the restrictive covenant was that the burden of the covenant could not "run with the land." In upholding an injunction against breach of the restrictive covenant, the Lord Chancellor said:

> That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. * * * It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in the manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.
>
> That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

The precise scope of the doctrine of *Tulk v. Moxhay* was the subject of dispute for some time in England, where the burden of covenants other than lease covenants cannot "run with the land at law." In 1882, it was stated in *London and South Western Railway Co. v. Gomm*,[48] that the doctrine of *Tulk v. Moxhay* was "either an extension in equity of the doctrine of Spencer's Case to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. . . . Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of the Common Law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement."

In *London County Council v. Allen* [49] the English Court of Appeal clearly adopted the easement analogy. In the *Allen* case, the London County Council had entered into a covenant with Allen, a builder, purporting to bind Allen, his heirs, and assigns not to "erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon" two plots owned by Allen which the Council intended to reserve "for the making of roads." Allen mortgaged one plot and transferred the equity of redemption to his wife, who built three houses on it. The Council then sought a mandatory injunction to pull down the houses. The trial judge found that neither Mrs. Allen nor the mortgagee had "satisfied him they had no notice, actual or constructive, of the covenant," and "apparently treated the duty and interest of the County Council in the matter of new streets as sufficient to make the covenant bind the land in the hands of assigns from Allen." On appeal, it was held that Mrs. Allen and the mortgagee were not bound, because, in order to affect them, the right created in the Council by the covenant must be in the nature of a negative easement; that an easement required both a dominant and a servient tenement; and that as the Council had no land to which the benefit of the covenant could attach, there could be no dominant tenement, and therefore no negative easement binding on a servient tenement, but only an easement in gross, which did not bind assigns of the land.

In view of the English courts' refusal to recognize easements in gross—i.e., refusal to allow the burden of an easement in gross to run with the land—the decision in *London County Council v. Allen* [49] is said to be logical, but subject to criticism because of its tacit admission that equity's concept of property interests must be restricted to the categories established by courts of law.

In the United States, the courts have generally recognized the concept of "equitable servitudes" created by covenant, even where the burden of the covenant would not run with the land at law. But because in most American jurisdictions the rules limiting the running at law of burdens created by covenant are much more liberal than in England,[50] many covenants are enforcible in the United States

[44] These are sometimes known as "electronic easements."
[45] RESTATEMENT OF PROPERTY § 450, Comment to Clause (e) (1944).
[46] Johnstone v. Detroit, etc., R. Co., 245 Mich. 65, 222 N W. 325 (1928).
[47] 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).
[48] 20 Ch. Div. 562 (1882).
[49] L.R. [1914] 3 K.B. 642.
[50] In England, the burden of a covenant will run with the land only as between landlord and tenant at law; it will not run as between owners of adjacent land in fee simple because there is no privity of estate between

either on the ground that the burden runs with the land at law or on the ground that the covenant creates an equitable servitude. Although the courts tend to speak in terms of equitable servitudes when the equitable remedy of injunction is sought, in many instances the injunction could be granted on the theory that the burden of the covenant runs with the land at law but the legal remedy of damages is inadequate. Hence it is understandable that some American courts tend to enforce restrictive covenants primarily as contracts concerning land, while other courts tend to enforce them on the ground that they create equitable interests analogous to easements, while still other courts waver back and forth between the contract and the easement theories.[51]

Under the contract theory, the contract provision which embodies the restriction is specifically enforced against both the promisor and those who take land intended to be subject to the restriction from him with notice thereof. Those who may enforce the promise include not only the promisee but also those who take land intended to be benefitted by the restriction from him, and also those in the neighborhood who may be considered third-party beneficiaries of the contract. The easement theory results in the benefit being considered as appurtenant to all land intended to be benefitted—e.g., all the land in a subdivision subject to a general plan of restrictions—so as to run with it, or any parts thereof on division, as does a legal easement on division of the dominant estate. The burden, under the easement theory, runs with all the land intended to be subject to the restriction as a servient estate, and the restriction is enforcible against all subsequent takers of the servient estate or any part thereof who do not qualify as purchasers for value and without notice. In the case of a subdivision subject to a general plan of restrictions, all lots are subject to mutual cross-servitudes.

It would seem that, under the contract theory, there is less reason for American courts to insist on a dominant tenement to which the benefit of the equitable servitude can be appurtenant. On the other hand, because American courts have uniformly recognized legal easements in gross,[52] there is reason to suppose that equitable servitudes in gross will also be recognized and that the doctrine of *London County Council v. Allen* [49] will be rejected in the United States. It must be admitted, however, that recognition of legal easements in gross has been limited to affirmative easements; and, as a matter of fact, it is difficult if not impossible to imagine an easement of light and air, or of support, or any other negative easement recognized at common law which could be enjoyed except by one who possesses a dominant tenement. There are very few American cases dealing with enforcement of restrictive covenants where the benefit is in gross and the decisions are in conflict.[53]

In any case, as shown later, the question whether the burden of scenic restrictions will run with the servient land is not likely to turn on whether the interest of the party seeking to enforce the restrictions is classified as a legal easement or an equitable servitude. In the great majority of cases, moreover, the equitable remedy of injunction will be the one sought when violation of scenic restrictions occurs; and this remedy will be available whether the interest of the plaintiff is classified as a legal easement or an equitable servitude. In the relatively few cases where the legal remedy of damages is sought, the recovery will be possible in most States either on the theory that the plaintiff has a legal easement or that the burden of the scenic restrictions runs with the servient estate at law as well as in equity.

---

such owners. Webb v. Russell, 3 T.R. 393, 100 Eng Rep 639 (K.B. 1789). No American jurisdiction except New Jersey has adopted the strict English rule, however. In most states, privity of estate may exist by virtue of a conveyance of some interest between the parties to the covenant, the covenant being contained in the deed and relating in some way to the use of the land conveyed to the grantee or land retained by the grantor In Massachusetts, the existence of an easement will supply the necessary privity of estate so that the burden of a covenant in aid of the easement will run with the land at law. The RESTATEMENT OF PROPERTY § 534 asserts that either type of privity is sufficient to allow the burden of the covenant to run with the land at law. For criticism of the privity of estate requirement, and an argument that most American jurisdictions do not in fact impose such a requirement at all, see Clark, COVENANTS AND INTERESTS RUNNING WITH LAND 111-43, 206-59 (2nd ed. 1947).

[51] For a fuller discussion of the contract and easement theories of enforcement, see 3 Tiffany, REAL PROPERTY § 861 (3d ed. 1939); 2 AMERICAN LAW OF PROPERTY § 9.24 (Casner ed. 1952); Clark, COVENANTS AND INTERESTS RUNNING WITH LAND 171-77 (2d ed. 1947); 5 Powell, REAL PROPERTY 145-46 (1962).

[52] That is, American courts have held that the burden of an easement in gross passes with the servient estate when it is transferred, so that the original owner of the easement, at least, can enforce it against any subsequent possessor of the servient estate. In contrast, the English court will enforce the easement in gross only as a personal contract between the original parties. As shown later, however, American courts have not uniformly regarded the benefit of an easement in gross as transferable

[53] Cases holding that burden of equitable servitude in gross will run with the servient land: Van Sant v. Rose, 260 Ill 401, 103 N.E. 194 (1913); Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955). Contra: Foreman v. Sadler's Executor, 114 Md. 574, 80 A. 298 (1911); Genung v. Harvey, 79 N.J. Eq. 57, 80 A. 955 (1911); Kent v. Koch, 166 Cal. App.2d 579, 333 P 2d 411 (1958).

CHAPTER TWO

PAST EXPERIENCE AND PLANS FOR FUTURE ACTION

NATIONAL PARK SERVICE EXPERIENCE AND CURRENT POLICY [54]

Blue Ridge Parkway and Natchez Trace Parkway

During the 1930's the National Park Service embarked on a program to build scenic parkways along the Blue Ridge between the Shenandoah and Great Smoky Mountains National Parks in Virginia and North Carolina, and along the old Natchez Trace in Tennessee, Alabama, and Mississippi between Nashville and Natchez. Started in 1933, the 469-mile Blue Ridge Parkway is now about 96 percent complete. About 60 percent of the Natchez Trace Parkway has been completed. These parkways are essentially elongated parks encompassing scenic and historic values of national significance. They contain a motor road designed for slow or moderate speed within a right-of-way averaging 125 acres per mile. There is partial to complete control of access and commercial traffic is prohibited.

When the Blue Ridge Parkway and the Natchez Trace Parkway were planned, partly in order to keep costs down and partly because the primary public use of adjacent land was to be the observation of scenic beauty, it was decided that only a portion of the land needed for the parkways would be purchased in fee simple and that scenic easements would be purchased in the remaining land. The actual formula was 100 acres in fee simple and 50 acres subject to scenic easements per mile of parkway. The parkways have been constructed entirely with Federal funds on land acquired by the States and donated to the Federal Government. The proposed scenic easements were also acquired by the States and then transferred to the National Park Service. Ultimately, the scenic easements acquired along the Blue Ridge Parkway covered nearly 1,500 acres,[55] and the scenic easements acquired along the Natchez Trace Parkway covered more than 4,500 acres.[56] In general, the scenic easements along these parkways included the land use restrictions listed in Chapter One. No public right of entry was acquired.

The National Park Service's experience with the scenic easements along the Blue Ridge and Natchez Trace Parkways was rather unhappy. The purchase of the easements was negotiated by State agents. It has been suggested that this procedure resulted in the landowners not being fully apprised of the rights they were relinquishing, because the State agent tended to be concerned only with getting the landowner's signature on the easement deed. Moreover, there were no set standards for appraising the rights acquired. The States were given a lump sum and instructed to buy as many scenic easements as possible. Consequently, there was much dickering and little uniformity in the prices paid. The net result was that many landowners did not understand just what rights they had sold, and many were bitter at what they regarded as unfair treatment when they discovered that they had been paid less than others for the same easement over similar land. The difficulty was compounded when the original owners of the servient land were succeeded by their heirs or grantees, who had not signed the easement deeds. These successors of the original grantors of the scenic easements often were ignorant of, or did not feel bound by, or were inclined to minimize the importance of, the easements granted by their predecessors in title. As a result, friction between the National Park Service and the servient land owners increased; the number of violations steadily increased; and the cost of policing the scenic restrictions became substantial.

Difficulties with the scenic easements along the Blue Ridge and Natchez Trace Parkways arose chiefly from two causes: either the landowner wanted to harvest standing timber or to subdivide and develop his land for resort or residential use. The National Park Service had particular difficulty in enforcing the usual scenic easement restriction against cutting mature trees and shrubs. It was often difficult to obtain an injunction to prevent anticipated violations because of judicial reluctance to issue injunctions in advance of actual damage. After a violation occurred, however, it was often difficult to prove damages.

In at least two cases a United States District Court ultimately issued an injunction. In *United States v. Darnell*,[57] the issues were (1) whether certain trees and shrubs —some allegedly already cut, and others which the servient landowner was allegedly threatening to cut—were in fact mature trees and shrubs, and (2) whether the United States could prove the likelihood of irreparable injury from cutting so as to warrant injunctive relief. In *United States v. Bedsaul*,[58] another case before the same judge to enforce

[54] The discussion of National Park Service experience with scenic easements is based largely on the following sources: E Disque, "The Great River Road—A Model for America's Scenic Routes," HWY. RES. RECORD NO. 161, at 34-49 (Highway Res Board 1967); W. Matuszeski, "Less Than Fee Acquisition for Open Space: Its Effect on Land Values," 4-7 (unpubl. paper, Inst of Legal Research, Univ. of Pennsylvania, Jan. 1966); Netherton and Markham, ROADSIDE DEVELOPMENT AND BEAUTIFICATION: LEGAL AUTHORITY AND METHODS, Part I, 68-69 (Highway Research Board 1965); U.S. Dept. of Commerce, A PROPOSED PROGRAM FOR SCENIC ROADS AND PARKWAYS 98-99, 125-127 (prepared for the President's Council on Recreation and Natural Beauty, June 1966); Univ. of Wisconsin, WORKSHOP MANUAL FOR CONFERENCE ON SCENIC EASEMENTS IN ACTION 11-12 (Madison, Wis , Dec. 16, 17, 1966); W. Whyte, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 12 (Urban Land Institute Tech Bull. 36, 1959); N. Williams, LAND ACQUISITION FOR OUTDOOR RECREATION—ANALYSIS OF SELECTED LEGAL PROBLEMS 44-45 (ORRRC Study Report 16, 1962); P. Wykert, "Environmental Easements" 38-43 (unpubl. paper to fullfill course work requirements at Univ. of Michigan, Sept. 1965).

[55] This is the figure given by Matuszeski, Wykert, and WORKSHOP MANUAL, *supra* note 1. Williams and A PROPOSED PROGRAM FOR SCENIC ROADS AND PARKWAYS, *supra* note 1, both give 2,500 acres.

[56] This is the figure given by Matuszeski, Wykert, and WORKSHOP MANUAL, *supra* note 1. Williams and A PROPOSED PROGRAM FOR SCENIC ROADS AND PARKWAYS, *supra* note 1, both give 5,000 acres.

[57] Civil No. 100-W, M.D.N.C., May 30, 1949.

[58] Civil No. 138-W, M.D.N.C., December 19, 1951.

another series of scenic easement rights, the court issued detailed instructions on the methods to be followed (in the words of the easement involved) "in accordance with good farming practice" to thin and trim white pines, to remove scrub pines, and to remove and clear thickets; and also enjoined cutting of mature trees and shrubs.

As a result of the friction with servient land owners, difficulty in policing scenic easements, and difficulty in getting local State courts and United States District courts to grant complete injunctive enforcement, the National Park Service practically discontinued the purchase of scenic easements and turned to a full fee simple purchase program for both the Blue Ridge and Natchez Trace Parkways in the 1950's.[59] As a result of this change in policy, the Department of Interior requested and obtained legislation in 1961 to authorize (*inter alia*) the exchange of scenic easements over certain lands along the Blue Ridge and Natchez Trace Parkways for smaller areas in fee simple.[60]

Great River Road

The Great River Road—a scenic highway on both sides of the Mississippi River from New Orleans to Lake of the Woods in Canada—was originally conceived and planned as the Mississippi River Parkway in the late 1930's, along lines similar to the Blue Ridge and Natchez Trace Parkways. Thus, for example, the Missouri enabling legislation of 1939 [61] provided expressly that the State highway department was authorized and directed "to acquire by gift, purchase, condemnation or otherwise, as public property and convey to the United States such Parkway areas and easements as and when required by . . . [an act of Congress of the United States heretofore or hereafter to be enacted, with respect to parkway areas within the State for a national Mississippi River Parkway] and as determined by surveys and maps hereafter approved by the Secretary of the Interior." (As has already been noted, this Missouri statute is one of the few statutes which defines a scenic easement.) Wisconsin adopted similar legislation in 1939.[62] But because of the intervention of World War II, no State actually acquired any land for the proposed parkway until the post-war period.

Through the efforts of the Mississippi Parkway Commission,[63] Federal funds were provided in 1949 for a study to determine the feasibility of developing a Mississippi River Parkway.[64] The study was conducted jointly by the Bureau of Public Roads and the National Park Service and presented as a report to Congress in 1951.[65] The report recommended against development of a completely new traffic facility patterned after the Blue Ridge and Natchez Trace Parkways. Such Federal parkways are "scenic routes for pleasure travel in the ideal sense of the words." [66] But along the proposed route of the Mississippi River Parkway, many desirable riverside locations were already pre-empted by existing highways, railroads, cities, and commercial and industrial development. Acquisition of new rights-of-way in these areas, and in highly productive agricultural areas, would have been prohibitively expensive and would have resulted in duplication of existing highways at least potentially adequate for traffic purposes. The report concluded that Federal development, administration, operation, and maintenance of a Mississippi River Parkway along the lines of the Blue Ridge and Natchez Trace Parkways would be too difficult and too expensive to be justified.

The 1951 report to Congress did, however, recommend a plan by which the ten Mississippi River states could improve existing highways close to the river to give them a parkway-like character and connect them where necessary with newly constructed parkway sections to form a continuous route. Many of these existing highways were already units of state Federal-aid systems, and improvements to them could be made through ordinary Federal-aid procedures. The report proposed a scenic route having the following characteristics:

1. Ownership and control by the individual States.
2. Design and construction by the States with Federal advisory service furnished when requested.
3. Federal assistance in financing through the usual Federal-aid channels plus additional Federal aid to provide parkway features.
4. Partial or complete control of access.
5. An adequate scenic corridor protected by land-use control of the adjacent roadside through acquisition of wider right-of-way and the use of scenic easements.
6. Adequate interpretive and public-use facilities to portray scenic, recreational, historical, cultural, geographic, and other features along the route.
7. Use of existing highways where these have parkway potential or where no reasonably available route of parkway calibre exists.
8. Use of new location wherever conditions warrant.
9. Commercial traffic excluded or regulated in sections on new location, wherever reasonably available alternate traffic facilities exist.

This scenic route plan was endorsed by the Mississippi River Parkway Commission in 1952. Congress indicated its support of the plan when it approved, as part of the Federal-Aid Highway Act of 1954,[67] an authorization for the Secretary of Commerce to spend up to $250,000 to assist the ten States bordering the Mississippi River in "expediting the interstate planning and coordination of a

[59] Cron, "Scenic Easement—The Vital Ingredient of the Great River Road" 4 (unpubl. speech before Mississippi River Parkway Planning Commission, St. Louis, Mo., Feb. 9, 1960, quoted in Williams, *supra* note 54, at 45.

[60] 16 U S C. § 460a-5 (1964). As to the reasons for this legislation, see H.R. Rep. 5765, 87th Cong., 1st Sess. (1961).

[61] MO. ANN. STAT. §§ 226.280 to 226.430 (1949).

[62] WIS. STAT. § 84.105 (1962).

[63] This commission now consists of ten persons from each of the ten States bordering on the Mississippi, plus ten persons from each of the Canadian provinces of Manitoba and Ontario. Appointments are made by the governor of the State or premier of the Province, as the case may be.

[64] 63 Stat. 626 (1949). This legislation appropriated up to $250,000 to be expended by the Department of Interior (through the National Park Service) and the Federal Works Agency (through the Public Roads Administration) to "make a joint survey of a route for a national parkway to be known as the Mississippi River Parkway." It further provided: "The survey shall follow, in general, the route of the Mississippi River. . . A report of the survey, upon its completion, shall be transmitted to the Congress by the Secretary of the Interior and the Administrator of the Federal Works Agency, together with their recommendations thereon."

[65] This report, entitled *Parkway for the Mississippi*, was transmitted to Congress on November 28, 1951, by the U.S. Bureau of Public Roads and the National Park Service.

[66] Disque, *supra* note 54, at 41.

[67] 68 Stat. 70 (1954) (codified in scattered sections of U.S. CODE, tit. 23).

continuous Great River Road and appurtenances thereto traversing the Mississippi Valley from Canada to the Gulf of Mexico." [68] Under this Congressional authorization, and a similar authorization in 1964 to spend up to $500,000 for the same purpose,[69] the ten States have available to them the services of highway engineers of the Bureau of Public Roads and landscape architects of the National Park Service who are highly skilled and experienced in parkway development and land-use planning.

Since 1954, the highway agencies of all ten Mississippi River States have requested and obtained advisory service reports from Bureau and Park Service consultants. These reports have recommended routes consisting in part of existing roads and in part of new roads, with recommendations for development of areas adjacent to the routes for scenic, recreation, and other public uses.[70] Additional studies containing detailed recommendations for land acquisition, scenic easement acquisition, and control of access have been completed for some States and are in process for others.[71] More specifically, studies to identify lands where scenic easements should be acquired to provide a parklike corridor and stabilize the existing agricultural land uses along the Great River Road have been completed for five States and are in process in three others.

No special Federal funds have been available for the construction or right-of-way acquisition for the Great River Road, but a substantial part of the total mileage of the road is coincident with routes of the Federal-aid primary and secondary highway systems. Thus, a considerable amount of construction on the Great River Road has been carried out with Federal-aid primary and secondary highway funds. Moreover, the section extending south from St. Louis to West Memphis, Ark., is in the traffic corridor of Interstate Route 55. Consequently, this section of the Great River Road will be constructed with Interstate Highway funds. Such landscaping as may be desirable will be eligible for Interstate Highway funds on the regular basis of 90 percent Federal and 10 percent State funds. The acquisition of scenic easements along any part of the Great River Road will be eligible for non-matching Federal-aid funds (the so-called "3 percent funds") under Title III of the Highway Beautification Act of 1965.[72]

Prior to passage of the Highway Beautification Act of 1965, only six of the ten Mississippi River States [73] had adopted legislation to authorize acquisition of scenic easements and other action necessary for development of the parkway features of the Great River Road, and only Wisconsin had actually carried out any substantial part of the proposed program of scenic easement acquisition along its part of the Great River Road. As a result of the failure of the other States to take effective action, it is estimated that at least one-half of the scenic values available when the Great River Road was proposed in the 1930's have been lost by diversion of land to adverse uses. But passage of Title III of the Highway Beautification Act of 1965 [72] has stimulated several other Mississippi River States to enact enabling legislation which will authorize the acquisition of scenic easements along all Federal-aid Interstate, primary, and secondary roads.[74] This legislation, of course, will provide a basis for scenic easement acquisition along the Great River Road, as well as other highways in these States. Minnesota has already worked out a plan to obtain scenic easements covering its part of the Great River Road with "3 percent funds" under Title III of the Highway Beautification Act of 1965.

The Great River Road as now conceived, with the cooperation of the Canadian provinces of Manitoba and Ontario, will be a continuous scenic route extending generally along both sides of the Mississippi from Lake Itasca to the Gulf of Mexico, with two extensions northward through Minnesota into Manitoba and Ontario to form a loop around the Lake of the Woods. Its total length will be nearly 3,800 miles. The Canadian loop will connect with the 5,000-mile Trans-Canadian Highway.

Other National Park Service Experience

The experience of the National Park Service with scenic easements along the Blue Ridge and Natchez Trace Parkways was unsatisfactory, as previously noted. Although the Service has continued to encourage the Mississippi River States in carrying out the Great River Road project, which utilizes the scenic easement device on a large scale, its disillusionment with the scenic easement led the National Park Service to oppose the use of scenic easements in connection with the proposed Ozark Rivers National Monument on the ground that 20 years of experience with scenic easements had demonstrated that such easements breed misunderstandings, cause administrative difficulties, are difficult to enforce, and cost only a little less than the fee simple. The principal evidence as to cost, however, was derived from the very different problem of flowage easements acquired by the Corps of Engineers.

The Park Service was unsuccessful in its opposition to the use of scenic easements along the Ozark National Scenic Riverways. As finally adopted in 1964, the enabling legislation [75] authorized the Secretary of Interior, within the designated Riverways area, to "acquire lands and interests therein, including scenic easements, by such means as he may deem to be in the public interest: *Provided*, That scenic easements may only be acquired with the consent of the owner of the lands or waters thereof.[76]

Since 1964, the National Park Service has apparently adopted a policy more favorable to the use of scenic ease-

[68] 68 Stat. 70, 75 (1954). This changed the name of the proposed road from Mississippi River Parkway to Great River Road and extended the northern terminus from Lake Itasca in Minnesota to the Canadian border. The latter change permitted the Canadian provinces of Manitoba and Ontario to participate in the development of the Great River Road. Ontario and Manitoba are now members of the Mississippi Parkway Commission.

[69] 78 Stat. 1092 (1964).

[70] These are the Phase 1 reports.

[71] These are the Phase 2 reports.

[72] 79 Stat. 1032 (1965), amending 23 U.S.C. § 319

[73] See ARK. STAT. ANN. §§ 76-1801 to 76-1811 (1957), and §§ 76-1812 to -1818 (Supp. 1967); IOWA CODE ANN. §§ 308.1-308.5 (Supp. 1966); MINN. STAT. ANN. §§ 161 1419 to 161.145 (1960 and Supp. 1966); MISS. CODE §§ 5964-5974, 5978-84 (1952); MO. STAT. ANN. §§ 226.280-226.430 (1949); WIS. STAT. § 84.105 (1965). The cited Iowa and Minnesota statutes were not enacted until 1959; the other statutes were enacted in 1939 and 1940.

[74] It would appear that all of the Mississippi River States except Tennessee now have enabling legislation for scenic easement acquisition along the Great River Road, or along all Federal-aid highways, or both.

[75] 16 U.S.C. §§ 460m through 460m-7 (1964).

[76] 16 U.S.C. § 460m-1 (1964).

ments. The 1964 *National Parkways Handbook*, under the heading "Land Acquisition Considerations," lays down a general requirement for national parkways of 125 acres of land in fee simple per mile of parkway, in varying widths, plus scenic easements covering up to an additional 25 acres per mile where needed. Scenic easements on land adjoining national parkways are to be designed to permit the land to continue in its current use, with the following restrictions: [77]

1. New construction requires approval by the National Park Service.
2. Timber or shrubs are not to be removed without permission of the National Park Service; good farming practices are to be followed.
3. No offensive material is to be dumped on the land.
4. Outdoor advertising signs other than for sale of the land where the sign is located or for sale of produce therefrom are prohibited.

The National Park Service in recent years has made significant use of the scenic easement in special situations to which it seems particularly well adapted. For example, the Park Service has obtained a 48-acre scenic easement at Cumberland Gap National Historical Park,[78] a 46-acre scenic easement at Harper's Ferry National Historical Park,[79] a 21-acre scenic easement at Manassas National Battlefield Park,[80] and scenic easements covering at least 325 acres in the Piscataway Park area on the Potomac River shoreline opposite Mount Vernon. The latter were acquired under a 1961 Congressional Joint Resolution [81] which authorized the Secretary of Interior to acquire scenic easements and other interests in land in a defined area along the Maryland shore opposite Mount Vernon by donation or other appropriate means, and also to enter into agreements and covenants with property owners for the purpose of preserving the scenic beauty of the area. Of a total of 3,834 acres within the designated area, 2,682 are to be acquired by donation of scenic easements by the present owners (some 150 to 160 of them). The remainder of the area, comprising 1,152 acres immediately adjacent to the Potomac and the stage front of the Mount Vernon overlook, are to be acquired in fee simple either by gift or by purchase. To date, 166 scenic easement tracts have been donated in the scenic easement area, and 64 acres in scenic easements have been donated in the fee simple area.

More dramatic and controversial was the recent action of the National Park Service in taking a scenic easement on 47 acres of the Merrywood Estate adjacent to the George Washington Memorial Parkway in Virginia. This scenic easement was acquired by the Service to block the plans of a group of builders for high-rise apartments on the adjacent land. The builders had purchased the tract and had succeeded in getting the local zoning changed to permit high-rise apartments. The National Park Service then invoked a Federal statute [82] to condemn a scenic easement which would preclude any development for other than single-family dwellings and thus protect the scenic quality of the Potomac River palisades which form the frontage of the tract. The purchase price to the builders had been $650,000 before the rezoning. As plaintiffs in a suit against the government, they claimed the easement had reduced the value of the land from $2,354,700 to $295,000. The United States contended that $500,000 was a fair price for the easement. The condemnation jury awarded the plaintiffs $744,500, which was in excess of the original cost before the zoning change but well below the difference between the original cost and the estimated value when zoned for high-rise apartments.

The area adjacent to the Merrywood tract, totaling about 215 acres, is composed of some 69 private holdings. Donations of scenic easements from the owners of these private holdings are now being solicited by the National Park Service. Such easements, generally similar to those obtained in the Piscataway Park area, will restrict lot size to one acre or larger, permit only single-family residential development with homes limited to 40 ft in height, and prohibit all industrial and commercial development.

The National Park Service has also been authorized to acquire scenic easements at Antietam National Battlefield Site [83] and it has drawn up a document especially for this purpose. To date, however, the Park Service has not been able to acquire any scenic easements at Antietam.

Under its present policy, it would seem that the National Park Service may acquire some scenic easements along the Foothills Parkway, the George Washington Memorial Parkway, and the Palisades Parkway. The Foothills Parkway in Tennessee was authorized in 1944 and, when complete, will provide not only a scenic panorama of the Great Smoky Mountains National Park but also numerous recreational developments. When completed, the Foothills Parkway will extend approximately 68 miles along the northern boundary of the Great Smoky Mountains National Park. It is now about 50 percent completed. The George Washington Memorial Parkway, authorized in 1930, will be approximately 48 miles long when completed. It is now about 65 percent completed. The Palisades Parkway in Washington, D.C., will be 3 miles long, but as of now is still in the design and planning stage. It will follow the top of the palisades overlooking the Potomac River and connect with the George Washington Memorial Parkway at the Maryland line.

In closing this discussion of the National Park Service's experience, it might be noted that the Park Service has approximated the effect of a scenic easement in some areas adjacent to the Blue Ridge and Natchez Trace Parkways where it has acquired the land in fee simple, by giving neighboring landowners special use permits, which authorize use of the parkway land for grazing or the growing of crops. The neighboring landowners pay a small fee for

[77] These are substantially the restrictions imposed by the original scenic easements along the Blue Ridge and Natchez Trace National Parkways

[78] Authorized by 16 U.S.C. §§ 261-265 (1964).

[79] Authorized by 16 U.S.C. §§ 450bb to 450bb-6 (1964). This park was originally established as Harper's Ferry National Monument in 1944; the name was changed in 1963.

[80] Authorized by 16 U.S.C 429b (1964).

[81] 75 Stat 780 (1961). This was a Congressional Joint Resolution entitled "Land Preservation—Maryland." It did not expressly designate the area as Piscataway Park.

[82] 16 U.S.C. § 1b(7) (1964).

[83] 16 U.S.C §§ 430nn-430oo (1964).

the privilege, and also relieve the Park Service of the cost of maintaining some of the land adjacent to the parkways (a cost estimated in 1959 at $4.50 per acre per year).

STATE ENABLING LEGISLATION

A number of States had highway legislation authorizing scenic easement acquisition [84] prior to enactment of the Highway Beautification Act of 1965.[85] Some of this pre-Beautification Act legislation rather specifically authorizes acquisition of scenic easements; [86] some of it simply authorizes the acquisition of any kind of property interest for purposes so broadly defined as to include, on a reasonable construction of the statutory language, acquisition of scenic easements; [87] and some of it authorizes acquisition of property for very narrowly defined scenic purposes in connection with highways.[88] The only substantial program of scenic easement acquisition initiated under any of the pre-Beautification Act state statutes is the Wisconsin program.

Since enactment of the Highway Beautification Act of 1965, at least 24 States [89] have adopted scenic highway legislation inspired by Title III of the Beautification Act.[90] In almost every case the new legislation is broad enough to permit State highway agencies to acquire scenic easements adjacent to Federal-aid highways. In California and Missouri the new legislation supplements earlier legislation authorizing acquisition of scenic easements adjacent to State highways.[91] Elsewhere the new legislation provides authority for scenic easement acquisition that was previously lacking. In Louisiana the new scenic legislation has been buttressed by a constitutional amendment.[92]

A majority of the post-Beautification Act state statutes simply authorize the State highway agency, in substance, to acquire "interests in . . . strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to . . . [Federal-aid] highways," using either the exact language of the Highway Beautification Act of 1965 or language of similar import.[93] Most of these statutes authorize acquisition of the fee simple or any lesser interest for scenic purposes.[94] Only three States have statutes which define what may be acquired ("strips of land") so narrowly as to raise a serious question whether scenic easements may be acquired.[95]

The California statute [96] expressly declares that "the acquisition of interests in real property for the preservation, maintenance or conservation of scenic lands or areas adjacent to" Interstate and Federal-aid primary highways "constitutes a public use and purpose." The North Dakota and Virginia statutes [89] expressly declare that acquisition of scenic interests is in the public interest.

A number of the post-Beautification Act statutes declare variously that acquisition of scenic interest shall be deemed for a highway purpose,[96] that such interests shall constitute part of the highway,[97] that the cost of acquisition shall be deemed a highway cost,[98] or that

[84] See, e.g., ALASKA STAT. § 19.05 040(7) (1962);, ARK. STAT. ANN § 76-532(f) (1957), CAL. CIV. PROC. CODE § 1238(18) (Deering 1957); CAL. GOV'T CODE §§ 191-192 (Deering 1958), and §§ 7000-7001 (Deering Supp 1966); CAL. STS. & H'WAYS CODE § 104 3 (Deering 1965); DEL. CODE ANN. tit. 17, § 132(b)(4) (1953) (semble); ILL. ANN. STAT. title 121, § 4-201.15 (Supp. 1966); IND. ANN. STAT. § 36.2946 (Supp. 1967); IOWA CODE ANN. § 313.67 (Supp. 1967); MINN STAT. ANN. §§ 161 20, 173 01-173 05, 173 31-173.35 (Supp. 1966); MO. STAT. ANN. §§ 226.280-226.430 (1949); NEB. REV. STAT. § 39.1320(f) (1960); ORE. REV. STAT. § 366.345 (1965); TEX. REV. CIV. STAT. art. 6674w-3, § 1(a) (1960); WIS. STAT. § 84 09 (1965)
See also the Great River Road enabling statutes, *supra* note 73. In addition to statutes authorizing State highway agencies to acquire scenic easements, there are a number of pre-Highway Beautification Act statutes which authorize acquisition of scenic easements by State park, recreation, or conservation agencies. See, e.g., CAL. PUB RES CODE § 5006 (Deering 1963), CAL. STS. & H'WAYS CODE §§ 887 2-887.3 (Deering Supp 1966), KY. REV. STAT. § 148.061 (1962); N J. STAT. ANN. §§ 13·1B-15.9 (semble), 13:8A-6, 13:8A-8, 13:8A-12(b) (Supp. 1966); N Y CONSERV. LAWS § 676-a(1) (1967); PA. STAT. ANN. tit. 72, §§ 3946 3-3946.22 (Supp. 1966); TENN. CODE ANN. § 11-105 (1956); VA. CODE ANN. § 10-21 (1964); WIS. STAT. §§ 23 09(16), 15.60(6)(k) (1965).

[85] 79 Stat 1028, amending 23 U.S C. §§ 131, 136, and 319.

[86] See, e g, CAL. STS. & H'WAYS CODE §§ 887.2-887.3 (Deering Supp. 1966); CAL. GOV'T CODE §§ 7000, 7001 (Deering Supp. 1966), WIS. STAT. §§ 84.105, 15.60(6)(1) (1965). See also the statutes of Illinois, Indiana, and Missouri, *supra* note 84.

[87] See, e g., statutes of Alaska (acquire property and preserve and maintain the scenic beauty along State highways), Iowa (construction, reconstruction, improvement, and maintenance of . . . scenic beautification areas along the primary roads of the State including the acquisition of such property and property rights needed to accomplish said purposes), Minnesota (all rights in property . . . necessary to carry out the purposes which, broadly defined, are to conserve the natural beauty of areas adjacent to certain highways), Nebraska (State highway purposes . . . shall include . . . preservation of objects of attraction or scenic value adjacent to, along, or in close proximity to highways and the culture of trees and flora which may increase the scenic beauty of such highways), Oregon (may acquire . . . any right or interest . . deemed necessary for the culture of trees and the preservation of scenic or historic places and other objects of attraction or scenic value adjacent to, along, or in close proximity to State highways), and Texas (Any land in fee simple or any lesser estate or interest . . . necessary or convenient for . . . any . . . purpose related to the laying out, construction, improvement, maintenance, beautification, preservation and operation of state highways), *supra* note 84.

[88] See, e g., the Arkansas statute, *supra* note 84 ("For culture and support of trees and shrubbery which benefit any State highway by aiding in the maintenance and preservation of the roadbed, or which aid in the maintenance and *promote the attractiveness of the scenic beauties associated with any State highways*"). (Emphasis added).

[89] ARK. STAT. ANN. §§ 76-2520, 76-2521 (Supp. 1967); CAL. STS. & H'WAYS CODE §§ 895-896 (Deering Supp. 1966); COLO. REV. STAT. ANN. § 120-3-10(2) (1963), as amended by Colo. Acts 1966, ch. 38, p. 178; CONN. GEN. STAT. ANN. § 13a-85a (Supp. 1966); Ga. Laws 1967, No. 270; HAWAII REV. LAWS § 129-12 (1955), as amended by Hawaii Acts 1966, No. 43; IDAHO CODE ANN. §§ 40-2801, 40-2802 (Supp. 1967); KY. REV. STAT. § 177.090 (Supp. 1966); LA. REV. STAT. § 48 269 (Supp. 1966); ME. REV. STAT. ANN. tit. 23, §§ 153, 154 (Supp. 1966); MD. CODE ANN. art. 89B, §§ 236-238 (Supp 1967); MASS. GEN. LAWS ch. 81, § 13B, added by Mass. Acts 1967, ch. 397; MICH COMP. LAWS §§ 252 251-252.253 (Supp. 1966); MICH. CODE ANN. § 8023.3 (Supp. 1966); MO. ANN. STAT. §§ 226.750-226.770 (Supp. 1966); MONT. REV. CODES ANN. §§ 32-2422 to 32-2425 (Supp. 1967); N.J. STAT. ANN. §§ 27:7-22.4, 27:7-22.5 (Supp. 1966); N.M. STAT. ANN. § 55-11-14 (Supp 1967); N.Y. H'WAY LAW § 21 (McKinney Supp. 1967); N.D. CENT. CODE § 24-17-09, para. 4 (Supp. 1967); OHIO REV CODE ANN. §§ 5529.03, 5529.04 (1954), as amended by Ohio Laws 1967, S.B. 66, §§ 1-3; PA. STAT ANN. tit. 36, § 670-413.1 (Supp. 1966); R.I. GEN LAWS ANN. §§ 37-6.2-1 to 37-6 2-4 (Supp. 1966), S.C. CODE ANN. § 33-74 1 (Supp 1966); S D. Laws 1966, ch. 85; UTAH CODE ANN §§ 27-12-109.1 to -109.3 (Supp 1967); VT. STAT. ANN. tit. 10, §§ 261, 262 (Supp. 1967); VA. CODE ANN. §§ 33-133, 33-134 (Supp. 1966); WASH REV. CODE § 47.12.250 (Supp. 1965); W. VA. CODE § 17-2A-17(h) (Supp 1967).

[90] Amedning 23 U.S.C. § 319 to provide "3 percent nonmatching funds" for scenic "restoration, preservation, and enhancement" of lands adjacent to Federal-aid highways.

[91] See California and Missouri statutes, *supra* note 84.

[92] LA. CONST. Art. 6, § 19.3, adopted by popular referendum on Nov. 8, 1966. This amendment, in substance, authorizes the legislature to implement the Highway Beautification Act of 1965, and validates the advertising control, junkyard control, and scenic preservation legislation enacted in Louisiana in 1966.

[93] This is true of the statutes of California, Colorado, Georgia, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, and West Virginia, *supra* note 89.

[94] This is true of the statutes of California, Colorado, Georgia, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Jersey, New Mexico, New York (very broad definition), North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, and West Virginia, *supra* note 89. The Ohio statute does not permit fee acquisition more than 300 ft from the right-of-way, however

[95] See Connecticut, Mississippi, and South Carolina statutes, *supra* note 89.

[96] See New Mexico statute, *supra* note 89.

[97] See Utah statute, *supra* note 89.

[98] See New Jersey and West Virginia statutes, *supra* note 89.

highway construction and maintenance shall include acquisition of such interests.[99] A few States provide expressly that only Federal funds may be used for acquisition of scenic interests,[100] or that State funds may be used only when they will be fully reimbursed from Federal funds.[101] Pennsylvania authorizes the expenditure of up to 110 percent of the amount that can be reimbursed from Federal funds.[102]

Most of the post-Beautification Act state statutes expressly authorize acquisition of scenic interests by condemnation as well as by other methods.[103] The most popular formula is "purchase, gift, exchange, or condemnation." [104] A few statutes omit the reference to exchange,[105] and a few add lease.[106] Although one statute only mentions purchase or condemnation,[107] it is almost certain that gift and exchange would be considered to fall within a broad definition of purchase. Only three States completely bar the use of condemnation,[108] while one State allows condemnation only to a distance of 100 ft from the edge of the right-of-way,[109] and another allows condemnation only to a distance of 500 ft from the edge of the right-of-way.[110] One State prohibits acquisition of any commercial building,[111] while another prohibits acquisition of any dwelling.[112] Two States prohibit condemnation of scenic interests within any industrial or commercial area,[113] and one State prohibits acquisition by any means at all in areas zoned industrial or commercial.[114]

One State limits acquisition for scenic purposes to strips of land of limited width.[114] One State authorizes acquisition of land "not to exceed 1,000 feet from the right-of-way," [115] and another of land "parallel to and contiguous with the highway and . . . not exceed[ing] a width of 1,000 feet from the adjacent right-of-way." [116] On the other hand, one State expressly authorizes acquisition of scenic interests extending more than 660 ft from the edge of the highway right-of-way.[117]

At least two States expressly authorize acquisition in fee simple for scenic purposes, followed by resale or lease "subject to such reservations, conditions, convenants or other contractual arrangements . . . as will preserve the scenic character or beauty of the area traversed by the highway." [118]

In at least three States, authorization for acquisition of scenic interests is tucked away in the statute dealing with control of outdoor advertising along the highways.[119]

STATE EXPERIENCE AND PLANS FOR FUTURE USE

Wisconsin

As previously indicated, Wisconsin is the only state with any substantial experience in the use of scenic easements to preserve scenic beauty along highways.[120] At present, Wisconsin has acquired approximately 1,125 scenic easement parcels [121] covering about 12,500 acres of land and protecting some 282 miles of highway.[122] To date, all of the scenic easements have been acquired either as part of the Great River Road project or in certain limited areas specified by statute.

GREAT RIVER ROAD

Wisconsin enacted enabling legislation in 1939 [123] to permit participation in the Great River Road project, then known as the Mississippi River Parkway, but the expected Federal legislation was not forthcoming until after World War II and Wisconsin did not acquire any land for the proposed parkway until after World War II. Original plans provided for purchase in fee simple of an 825-ft wide right-of-way for the Great River Road to preserve scenic views. But it soon became apparent that fee-simple purchase of such a right-of-way would mean the taking of many farm houses and other farm

[99] See South Carolina statute, *supra* note 89.
[100] See Mississippi and Montana statutes, *supra* note 89.
[101] See California and Colorado statutes, *supra* note 89.
[102] See Pennsylvania statute, *supra* note 89.
[103] This is true of the statutes of Colorado, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, New Jersey, North Dakota, Ohio, Pennsylvania, South Dakota, Virginia, and West Virginia, *supra* note 89.
[104] See statutes of Georgia, Idaho, Kentucky, Michigan, Missouri, New Mexico, North Dakota, and West Virginia, *supra* note 89.
[105] See statutes of Maryland, New Jersey, Ohio, and Virginia, *supra* note 89.
[106] See, e g., Louisiana statute, *supra* note 89. See also statutes of Massachusetts (eminent domain, purchase, or otherwise) and Mississippi (gift, purchase, or otherwise), *supra* note 89.
[107] See Colorado statute, *supra* note 89.
[108] See statutes of Connecticut (purchase only), Montana, (gift, purchase, or exchange only), and Utah (same), *supra* note 89
[109] See Virginia statute, *supra* note 89.
[110] See Pennsylvania statute, *supra* note 89, which allows acquisition of "property . . . or any lesser estate or interest" by gift or purchase to a distance of 1,000 ft from the right-of-way, and authorizes acquisition by condemnation in base fee to a distance of 500 ft from the right-of-way.
[111] See California statute, *supra* note 89.
[112] See Georgia statute, *supra* note 89.
[113] See Michigan and New York statutes, *supra* note 89.
[114] See Connecticut statute, *supra* note 89.
[115] See Pennsylvania statute, *supra* note 89. See also note 110, *supra*.
[116] See Idaho statute, *supra* note 89.
[117] See North Dakota statute, *supra* note 89.
[118] See California and Ohio statutes, *supra* note 89.
[119] See Minnesota statutes, *supra* note 84, and Michigan and North Dakota statutes, *supra* note 89.
[120] The discussion of Wisconsin's scenic easement program is largely drawn from the following sources: E. Disque, *The Great River Road—A Model for American Scenic Routes*, HIGHWAY RES. RECORD NO. 161, at 34-39 (1967); H Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343-365 (1963); R. Leverich, *Appraisal, Communication, Negotiation, Administration*, PROCEEDINGS OF CONF. ON SCENIC EASEMENTS IN ACTION 35-48 (Madison, Wis, Dec. 16, 17, 1966); W. Matuszeski, "Less Than Fee Acquisition for Open Space: Its Effect on Land Values" 17-18 (unpubl. paper, Inst. of Legal Research, Univ. of Pennsylvania, Jan. 1966); B. Mullen, *Scenic Easements. Wisconsin Progress* (report to 1966 Conf., Am. Assn of State Highway Officials, Wichita, Kans., Nov 30, 1966); B. Mullen, *Scenic Easements: Techniques of Conveyancing* (report to Am. Bar Assn National Inst., "Junkyards, Geraniums and Jurisprudence· Aesthetics and the Law," Chicago, Ill., June 3, 1967); Netherton and Markham, ROADSIDE DEVELOPMENT AND BEAUTIFICATION· LEGAL AUTHORITY AND METHODS, Part I, 68-70 (Highway Res. Board 1965), Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L REV 352-373; R Sawtelle, *Scenic Easements for the Great River Road*, PROCEEDINGS OF CONSERVATION EASEMENTS AND OPEN SPACE CONFERENCE 47-52 (Madison, Wis., Dec. 13, 1961); Univ of Wisconsin, WORKSHOP MANUAL FOR CONFERENCE ON SCENIC EASEMENTS IN ACTION 12-25 (Madison, Wis., Dec. 16, 17, 1966); W. Whyte, OPEN SPACE ACTION 71-89 (ORRRC Study Report 15, 1962), P. Wykert, "Environmental Easements" 36-38 (unpubl. paper to fulfill course requirements at Univ. of Michigan, Sept. 1965).
[121] Letter dated June 19, 1967, from B J. Mullen, Director of Right-of-Way, State Highway Commission of Wisconsin.
[122] Mullen, *Scenic Easements. Wisconsin Progress*, *supra* note 120, at 3
[123] The 1939 legislation, in modified form, is now part of WIS. STAT. § 84.105 (1965). Para (6) of that section provides (in part) "All lands for right-of-way to be acquired in fee simple and all easements necessary to be acquired for the purposes of the proposed national parkway development shall be acquired by the state highway commission in the name of the state, as may be required by the act of the United States Congress applicable thereto. . . . The commission may acquire such lands by gift, purchase agreement, or by exercising the right of eminent domain in any manner that may be provided by law for the acquirement of lands for public purposes. . . ."

buildings which the State did not want, and which abutting farm owners would not wish to relinquish. Consequently, the State highway commission decided to acquire scenic easements along the Great River Road right-of-way,[124] on the assumption that, with proper restrictions to preserve scenic beauty, the landowners affected (mostly farmers) could continue to use the land as before, the local tax base would not be substantially reduced, and the State could save a great deal of money by not purchasing the full fee simple.

Rather surprisingly, in connection with the first nine projects for scenic easement acquisition along the Great River Road, it was necessary to condemn only 28 percent of the parcels. And overall, it has been possible to purchase about 90 percent of the desired scenic easements by negotiation, without resort to condemnation. To date, no landowner has successfully argued to a Wisconsin court that the taking of a scenic easement over his land by condemnation was unnecessary or not for a public use. Recently, the Supreme Court of Wisconsin, in *Kamrowski v. State*,[125] squarely rejected the landowner's contention that the public enjoyment of scenic beauty adjacent to a highway is not a public use of land which justifies use of the power of eminent domain. The court accepted the legislative determination that "protection of scenic resources along highways is a public purpose," and rejected the landowner's argument that a negative easement cannot be a public use because public use requires physical occupancy by the public. In so doing, the court accepted the trial judge's view that a scenic easement permits "visual occupancy" by the motoring public. The court also pointed out that, "Whatever may be the law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purpose." And the court rejected the landowner's contention that he was denied equal protection of the laws because scenic easements were not to be taken from the owners of all lands abutting the Great River Road.

By September 1, 1961, Wisconsin had acquired scenic easements adjacent to 53 miles of the Great River Road right-of-way at an average cost of $575.26 per mile.[126] Of this amount, payments to landowners averaged $484.13 per mile.[127] The average cost per acre had been $19.17 [128] as compared to a fee-simple cost of $41.29 per acre for land acquired for the right-of-way itself.[129] Considering only the payments to landowners, the average cost per acre for scenic easements was only $16.25.[130] On September 1, 1961, Wisconsin embarked on a history-making, 10-year, $50-million resource development and conservation program (ORAP) financed by a $0.01 tax on the sale of each package of cigarettes.[131] Two million of the $50 million were earmarked for acquisition of scenic easements, with first priority given to completing scenic easement acquisitions along the Great River Road.[132] The total amount budgeted for scenic easement acquisition along the Great River Road for the period 1961-65 was $693,000.[133] By November 30, 1966, the Wisconsin highway commission had acquired scenic easements over some 571 parcels covering 6,189 acres of land and extending for a distance of 122 miles for the Great River Road.[134] A majority of these scenic easements were acquired with ORAP funds under the 1961 statute.[135] By June 3, 1967, it was estimated that the number of scenic easements along the Great River Road had increased to 575.[136]

Although the average cost of scenic easements acquired for the Great River Road between September 1, 1961 and December 31, 1964 was $40.99 per acre,[128] the average payment to landowners for scenic easements in this period was only $20.50 per acre,[137] as compared to $16.25 per acre in the period prior to September 1, 1961.[138] The cost figure of $40.99 per acre reflected to a large extent a change in accounting procedure by which the costs of engineering surveys and preparation of detailed plats required by the State highway commission were included.[137] These costs were not included prior to 1961. In addition, the cost figure of $40.99 per acre included appraisal fees, negotiation costs, and title examination, as well as the amount paid to the landowner.[137]

During the 1950's, easements along the Great River Road in Wisconsin were generally acquired over strips extending 350 ft back from the center line of the highway right-of-way. It is now recognized, however, that a uniform strip running 350 ft back from the center line of the right-of-way is not necessarily sufficient to preserve the scenic views most worth preserving. For example,

[124] This could be accomplished either under WIS. STAT. § 84.105 (1965), *supra* note 89, or under the general highway acquisition enabling act, which is now WIS. STAT. § 84.09 (1965); this statute provides (in part): "(1) The state highway commission may acquire by gift, devise, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways, . . . or interests in lands in and about and along and leading to . . . the same. . . ."

[125] 31 Wis.2d 256, 142 N.W.2d 793 (1966).

[126] Note, 1965 WIS. L. REV. 352, 354. Data were provided by the Wisconsin Highway Commission. The $575.26-per-mile figure was obtained by dividing the total cost of $30,569 by the number of "highway miles" (53), which are defined as "miles which have easements protecting at least one side of the highway." *Id.* at 355 n. 14.

[127] See *supra* note 126. The $484.13-per-mile figure was obtained by dividing the total payments to land owners of $25,569 by the number of "highway miles" (53).

[128] Note, 1965 WIS. L. REV. 352, 354.

[129] WORKSHOP MANUAL, *supra* note 120, at 15.

[130] See *supra* note 126. The $16.25 figure was obtained by dividing the total payments to landowners of $25,669 by the number of acres (1,579).

[131] This was authorized by the Resources Development and Outdoor Recreation Act (1961), WIS. STAT. § 15.60 (1965). The entire development and conservation program initiated under this act is generally known as the "ORAP program."

[132] WIS. STAT. § 15.60(6)(i) (1965).

[133] Disque, *supra* note 120, at 47. $293,000 was budgeted for scenic easement acquisition from 1961-63, and an additional $400,000 for the period 1963-65.

[134] Mullen, *Scenic Easements: Wisconsin Progress, supra* note 120, at 3.

[135] As of December 31, 1961, 234 scenic easement parcels had been acquired. Sawtelle, *supra* note 120, at 51. Prior to September 1, 1961, only 1,579 acres along the Great River Road were subject to scenic easements, and only 53 miles of the highway were protected by scenic easements. Note, 1965 WIS. L. REV. 352, 354. The scenic easements acquired since September 1, 1961, have all been acquired with ORAP funds.

[136] Mullen, *Scenic Easements: Techniques of Conveyancing, supra* note 120, at 1.

[137] WORKSHOP MANUAL, *supra* note 120, at 15.

[138] See note 130 *supra*, and accompanying text.

there are along the Great River Road many coulees which run back from the highway far beyond the 350-ft easement line, and many of these coulees present some of the most beautiful views along the entire Great River Road: steep bluffs reaching skyward on both sides of a lush valley and sudden outcroppings of rock bursting out through heavy cover of trees and brush. Because the 350-ft easements do not restrict land use beyond the easement line, many of these lovely vistas may be spoiled by future development. Since 1965, therefore, the Wisconsin Highway Commission has adopted a more flexible approach to the depth of scenic easements, under which the easement is to be designed to fit the topography.

OTHER LOCATIONS

Wisconsin's 1961 Resource Development and Outdoor Recreation Act, authorizing expenditure of $50 million for resource development and conservation over a 10-year period, provided, with respect to scenic easements, that first priority should be given to completing scenic easement acquisition along the Great River Road.[139] It further provided that scenic easements should be acquired along Lake Michigan, Green Bay and Lake Superior; along the Chippewa, Wisconsin, Fox, Milwaukee and Wolf rivers; in the lake and forest country of northern Wisconsin; and through the Menominee Indian reservation and the Kettle Moraine area.[140]

Jordahl, in November 1963,[141] reported that, pursuant to this authority, State highway commission right-of-way agents had appraised 13 scenic easement parcels encompassing 163 acres in a project in southeastern Wisconsin at $7,690 (or $46.56 per acre), and 13 scenic easement parcels encompassing 90 acres in northern Wisconsin, along Lake Superior, at $2,485 (or $27.61 per acre). Five scenic easement parcels encompassing 48 acres in the southeastern Wisconsin project had actually been acquired for $4,950, or $103.12 per acre (the amount paid to landowners for the easements.) The relatively high cost reflected development pressures on rural and semirural land in this part of the State. One scenic easement parcel in the northern Wisconsin project had been acquired, encompassing 14.6 acres, at a cost of $75, or about $5 per acre (again the amount paid to the owner).

A later report[142] indicates that the total cost of scenic easement acquired for the protection of Wisconsin highways other than the Great River Road during the period 1961-64 averaged $214.40 per acre. This, of course, included all field expenses, including appraisal fees, cost of negotiation, precise engineering surveys, preparation of detailed plats, and preparation of detailed descriptions. On the average, only $53.50 per acre was paid to the landowners for the scenic easements. This figure is substantially higher than the figure for Great River Road scenic easements, however, and apparently resulted from the fact that many of them were acquired in areas where development pressures were much greater than along the Great River Road.

The percentage of cases where it is necessary to condemn scenic easements has been about the same elsewhere as along the Great River Road; i.e., condemnation has been necessary in only about 10 percent of all acquisitions.[143] Of all the condemnations for scenic easement acquisition throughout Wisconsin, only twelve had resulted in litigation as of June 3, 1967.[144]

As of February 1, 1967, the Wisconsin Highway Commission estimated that it had acquired approximately 570 scenic easement parcels in the priority areas listed in the 1961 ORAP legislation, exclusive of the Great River Road.[145] These scenic easement parcels encompassed about 6,300 acres of land along some 160 miles of highway.[146] Most of these scenic easement parcels were grouped together in locations where, by purchasing from six to ten scenic easements, a single significant scenic objective such as a view of a lake from the highway could be preserved.

SCENIC EASEMENT "PACKAGE"

When Wisconsin's scenic easement program along the Great River Road was started in 1952, the easements acquired by the State highway commission imposed substantially the same land-use restrictions as did the scenic easements along the Blue Ridge and Natchez Trace Parkways. Signs and billboards were prohibited, except for signs 1 ft square advertising goods sold on the premises; dumping of offensive or unsightly materials was prohibited; and cutting of trees and shrubs was prohibited, except as incidental to permitted uses.[147] Easement deed forms used in the 1950's expressly permitted the following principal uses: (a) single-family residences on tracts of not less than 5 acres; and (b) general farming, including farm buildings; except fur farms and farms used for disposal of garbage, rubbish, or sewage. In addition, (c) telephone, telegraph or electric lines or pipes, or pipe lines, or microwave radio relay structures, for the purpose of transmitting messages, heat, light or power were permitted, along with (d) uses incidental to any of the permitted principal uses. Moreover, the easement deed form provided (e) that "any use existing on the premises at the time of the execution of" the easement was permitted, and that "existing commercial and industrial uses of lands and buildings" could be "maintained and repaired," but not expanded or struc-

[139] WIS. STAT. § 15.60(6)(i) (1965).
[140] *Ibid.* General authority to acquire easements "along" highways is granted by WIS. STAT. § 84.09 (1965), *supra* note 124.
[141] Jordahl, *supra* note 120, at 356.
[142] Note, 1965 WIS. L. REV. 352, 354.
[143] This is the figure given by Mullen, *Scenic Easements: Wisconsin Progress, supra* note 71, at 3. The same author, in *Scenic Easements: Techniques of Conveyancing, supra* note 71, at 5, gives 25 percent; but this is apparently erroneous. In a letter dated Nov. 1, 1967, Mullen states: "Our best information is that we are still acquiring approximately 90 percent of our scenic easement areas by negotiated purchase and that condemnation is necessary in only about 10 percent of the cases."
[144] Mullen, *Scenic Easements: Techniques of Conveyancing, supra* note 120, at 5. The figure was only 9 as of Nov. 30, 1966. See Mullen, *Scenic Easements: Wisconsin Progress, supra* note 120, at 3.
[145] This information was supplied by letter from B. J Mullen, Director of Right-of-Way, State Highway Commission of Wisconsin, dated June 19, 1967. Both in that letter and a letter dated Nov. 1, 1967, he indicated by implication that the figure of 700 scenic easements given in *Scenic Easements: Wisconsin Progress, supra* note 120, at 1, is not correct.
[146] As of November 30, 1966. Mullen, *Scenic Easements: Wisconsin Progress, supra* note 120, at 3.
[147] See scenic easement deed form in W. Whyte, OPEN SPACE ACTION 71 (ORRRC Study Report 15, 1962).

turally altered. It was expressly stated that the easement did not "grant the public the right to enter . . . for any purpose." [147]

The 5-acre lot restriction soon proved impractical in most locations.[148] The Wisconsin highway commission then changed its policy so as to permit single-family residences in urban fringe areas on lots with a minimum frontage of 300 ft.[149] Such spacing not only prevented an excessive number of entrances to the highway, but also permitted a reasonable return to the servient landowner in areas ripe for residential development and reduced the cost of acquiring scenic easements in such areas—without, in the usual case, interfering unduly with the scenic value of the landscape. More recently, the highway commission has tried limiting the permitted single-family residences to a stated number per tract, especially where high land is interspersed with low, marshy land. It is hoped that this will concentrate residential development into compact subdivisions instead of encouraging ribbon development, as does the 300-ft frontage requirement.[148]

The Wisconsin scenic easement forms used in the 1950's and early 1960's provided,[150] in effect, that all existing uses on the servient land other than agricultural and residential uses were to be treated like "nonconforming uses" under a zoning ordinance; they were allowed to continue but could not be expanded, and buildings in which such uses were carried on could not be structurally altered. In 1961, however, the Wisconsin highway commission changed its attitude toward existing commercial uses,[151] for it had become apparent that rigid enforcement of the prohibition against expansion or structural alteration prevented modernization of structures and often resulted in roadside blight. Easements obtained since 1965 have allowed commercial property owners to remodel their buildings to prevent decay and blight and to provide the quality of services currently desired by highway travelers. In some cases, also, existing industrial land uses have been permitted to continue as conforming uses by virtue of specially drawn easement deed provisions. For example, easements acquired from owners of land on which sand and gravel mining sites or rock quarry sites are located may expressly allow continuance of mining and quarrying without the limitations on expansion normally imposed on nonconforming uses.[152] Otherwise, scenic easements covering such land would cost as much as the fee simple title.

The Wisconsin scenic easement forms originally used in the 1950's attempted both to state the restrictions imposed on land use and to spell out the permitted uses the landowner could make of his land consistently with the scenic objectives sought to be achieved.[153] This turned out to be confusing and troublesome. Within a few years landowners started to besiege the highway agency with questions as to whether some use not specifically mentioned in the scenic easement deed would be permissible. Hence, the scenic easement deed form was changed so as to state only the use restrictions to be imposed on the servient land, without any attempt to specify permitted uses.

During the 1950's the Wisconsin highway commission generally considered that it was only necessary to purchase restrictive scenic easements—i.e., land development restrictions—without acquiring any affirmative or positive rights. But this policy proved inadequate.[154] Some of the easements purchased in the 1950's are in areas which have now produced trees so large as to block the entire scene sought to be preserved. The highway commission has been helpless to deal with this problem because the scenic easement form used at the time of purchase did not grant to the commission the right to enter the easement area to cut and prune trees selectively to preserve the view. Moreover, the scenic easement deeds used in the 1950's granted the highway commission no right to enter the easement area to restore its scenic value when necessary—e.g., to remove and replace elm trees killed by the Dutch elm disease. In recent years, therefore, the scenic easement deed forms used in Wisconsin have been changed to provide expressly that highway department personnel may enter the easement area to "plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures." [155]

In recent years, the Wisconsin highway commission has also decided that a more flexible approach to the scenic easement restrictions to be imposed on servient land is desirable, inasmuch as each scenic easement site differs from all others.[156] One site may cover a 40-acre tract for the purpose of preserving the beauty of a wooded hillside. Another site may be acquired for the purpose of cutting a "window" in a wall of trees to open up a scenic view. And still another site may require acquisition of the right to plant trees to enhance scenic beauty.

[148] Letter dated May 9, 1967, from B. J. Mullen, Director of Right-of-Way, State Highway Commission of Wisconsin.

[149] *Ibid.* See also WORKSHOP MANUAL, *supra* note 120, at 13, in re the 300-ft frontage requirement.

[150] Forms used in the early 1960's dropped the express reference to existing commercial and industrial uses and buildings, but imposed essentially the same restriction by including in the list of permitted uses: "Any use not heretofore specified which exists upon or within the restricted area as of the time of execution of this easement, including normal maintenance and repair of existing buildings, structures and appurtenances, but such use shall not be expanded nor shall any structures be erected or structural alterations be made within the restricted area." See scenic easement form in WORKSHOP MANUAL, *supra* note 120, at 81. The same form is given in PROCEEDINGS OF CONSERVATION EASEMENTS AND OPEN SPACE CONFERENCE, *supra* note 120, Appendix A. In this form, "construction, erection, maintenance and repair of buildings incident to" general crop or livestock farming is specially permitted. Residential use is not expressly permitted, but there is a blank space which could be filled in so as to make residential use a permitted use.

[151] The discussion in the text here is based on WORKSHOP MANUAL, *supra* note 120, at 13, 22. Permission to remodel, however, is subject to limitations designed to prevent construction which would block the scenic view from the highway. *Id.* at 22.

[152] See Sawtelle, *supra* note 71, at 49; Whyte, *supra* note 106, at 88.

[153] See text *ante* accompanying note 147.

[154] The discussion in the text here is based on Mullen, *Scenic Easements: Wisconsin Progress*, *supra* note 120, at 4. Deeds used in the early 1960's contained the following provision: "This easement grants to the State of Wisconsin, and its agents, the right to enter upon the restricted area only for the purpose of inspection and enforcement of the terms of the easement."

[155] See text *infra* following note 157, "Specific Rights Conveyed," items (b) and (c).

[156] The discussion in the text here is based on WORKSHOP MANUAL, *supra* note 120, at 20-22; Mullen, *Scenic Easements: Wisconsin Progress*, *supra* note 120, at 6-9; Mullen, *Scenic Easements: Techniques of Conveyancing*, *supra* note 120, at 3-5, including Exhibits 2 and 3.

In order to provide the needed flexibility, a new scenic easement instrument was developed several years ago which listed all the conceivable scenic restrictions and affirmative rights which it might be desirable to include in any scenic easement package. In particular cases, the restrictions and affirmative rights not to be included were simply crossed out. But experience with this form of instrument indicated that it made scenic easement acquisition unnecessarily difficult because it created apprehension in the minds of the landowners, who were suspicious of items Xed out on the instrument they were subsequently asked to sign.[156a] To deal with this problem, it was recently proposed that scenic easement forms be standardized in three or four groups—e.g., those which protect a view located above the highway level, those protecting a view on the same level as the highway, and those protecting a view below the highway level. This proposal was rejected, however, and it was decided instead to use a simple one-sheet scenic easement deed form with ample blank space for typing in the restrictions and affirmative rights agreed on in each particular case. The highway commission negotiators now work from the following list: [157]

Specific Rights Conveyed

The right of the State of Wisconsin, its agents and contractors, to enter upon the easement area:

(a) To inspect for violations of the provisions of this easement and to remove or eliminate advertising displays, signs and billboards, stored or accumulated junked automobiles, farm implements or parts thereof, and other salvage materials or debris, and to perform such scenic restoration as may be deemed necessary or desirable.

(b) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures.

(c) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures. The area excluded from this provision is described as follows: (Then describe excluded areas such as the residence, etc.)

Specific Rights Relinquished

1. The right to erect, display, place or maintain upon or within the scenic area any signs, billboards, outdoor advertising structures or advertisement of any kind, except that one (1) on-premise sign of not more than _____ square feet in size may be erected and maintained to advertise the sale, hire, or lease of the property, or the sale and/or manufacture of any goods, products or services upon the land. Any existing signs, other than the one on-premise sign, and/or advertisements as described above shall be terminated and removed on or before _____.

2. The right to dump or maintain a dump of ashes, trash, rubbish, sawdust, garbage, offal, storage of vehicle bodies or parts, storage of farm implements or parts, and any other unsightly or offensive material.

3. The right to cut or remove any trees or shrubs.

4. The right to cut or remove any trees except marketable timber and then in accordance with standard forest cropping practices existent in the area, and at no time will the scenic area be denuded of trees.

5. The right to park trailer houses, mobile homes, or any portable living quarters.

6. The right to quarry, or remove, or store any surface or subsurface minerals or materials.

7. All rights except general crop and/or livestock farming (agricultural) within the first _____ feet of the scenic area as measured normal to the (center line) (reference line) (nearest edge of pavement) (right-of-way line) of the highway.

8. All rights except general crop and/or livestock farming (agricultural).

9. The right to develop the easement area except for limited residential development consistent with applicable State and local regulations. Such limited rights retained by the owner are as follows:

(a) Each single family residential lot fronting on and abutting (*identify highway*) shall be limited to a minimum width of _____ feet as measured parallel to the highway;

(b) A total of _____ single family residential lots is the maximum number authorized for the easement area.

10. The right to change the use of the easement area from residential to any other use.

11. The right to change the use of the easement area from commercial to any other use.

In drafting a scenic easement deed, the right to enter to inspect for and eliminate violations (item (a) under "Specific Rights Conveyed") will normally be included, and in most cases either item (b) or item (c) will also be included. If, in view of the characteristics of the particular parcel, no right of entry is desired for any purpose, no provision for a right of entry is included in the deed. In every case, however, the deed form will contain two printed paragraphs assuring the landowner that the public has no right of entry in the easement area and that the State has no right of entry except for the specific purposes set forth in the deed. These paragraphs are included to assure the landowner that the public will not be permitted to use the scenic easement area as a park, and that the highway commission will not have the right to use it for highway construction purposes; they make the scenic easement more "salable" from the State's viewpoint.

The list of restrictions ("Specific Rights Relinquished") is to be used as guide by the highway agency's field committee or team, consisting of an engineer, a right-of-way agent, and a wayside development specialist, in developing the scenic easement package best suited for a particular location. Any combination of the listed restrictions may be used, depending on the character of the scenic easement site and the objective sought to be accomplished. Some of the restrictions are alternatives, both of which would not be included in the same scenic easement deed—e.g., items 3 and 4; items 7, 8, and 9; items 10 and 11. Item 9, dealing with residential development, leaves some room for negotiation with the landowner as to the number of residential lots and the minimum width of lots to be permitted in the easement area. It is important to note

[156a] Mullen, *Scenic Easements: Techniques of Conveyancing, supra* note 120, at 4. It should be noted, however, that R. C. Leverich, Chief of Right-of-Way, District 5, Wisconsin Division of Highways, has recently stated to the authors an opposing view, as follows: "The mere crossing out of items did not create apprehension in the minds of landowners; in fact, a pre-printed form which embodies understandable standard restrictions is far superior to one which is individually tailored. One concern of landowners is that they are treated reasonably alike, and a pre-printed form creates this assurance in their minds."

[157] This list is set out in WORKSHOP MANUAL, *supra* note 120, at 20-22; Mullen, *Scenic Easements: Wisconsin Progress, supra* note 120, at 7-8; Mullen *Scenic Easements: Techniques of Conveyancing, supra* note 120, in Exhibits 2 and 3.

that the list of restrictions is not intended to be all-inclusive and that, if the field team decides that some additional restriction is desirable, it is authorized to include such restriction in the proposed scenic easement deed.

The flexible approach embodied in the foregoing listing of "Specific Rights Conveyed" and "Specific Rights Relinquished" obviously requires that the highway commission's field representatives shall be capable of exercising an informed judgment in determining which affirmative rights and restrictions to include in the scenic easement deed. It also requires the enforcement agent to become familiar with the varying provisions of each scenic easement deed. To aid the enforcement agent, it has been suggested [158] that a book of scenic easement plats be kept for each highway maintenance area, showing the restrictions on each parcel and the affirmative rights granted to the highway commission.

SITE SELECTION, APPRAISAL, AND NEGOTIATION

As part of the ORAP program, a resource value inventory of the entire State of Wisconsin has been made on a county-by-county basis. When the resource values disclosed by the inventory, including streams, lakes, forests, and hilly areas, are placed on a map of the State and then overlaid with a map of the highway transportation network, natural lineal scenic highway corridors can be recognized. Delineation of these natural corridors has apparently provided some aid in scenic easement site selection at times. But in areas where enough scenic easements to create a complete scenic highway corridor cannot be acquired, the resource value inventory provides only a very general guide to scenic easement site selection. The usual practice is to make site selections on the basis of a careful field viewing by a committee in each highway district, with all selections subject to review by the staff of the highway commission.

It should be noted that the policy of the Wisconsin highway commission has been to acquire scenic easements mainly in rural and semirural areas, and never within the limits of cities or villages. Moreover, the Wisconsin highway commission from the beginning of its scenic easement program has applied one lesson derived from the experience of the National Park Service with the Blue Ridge and Natchez Trace Parkways: that a fee-simple title rather than a scenic easement should be obtained in forest lands having commercial value, because the cost of an easement which prohibits the harvesting of timber will approximate the cost of fee-simple purchase.

Before the Wisconsin highway commission acquires a scenic easement, the right-of-way agent reviews the marketability of the title by examining the local public land records. Abstracts are not obtained unless the fee-simple title is to be acquired instead of a scenic easement. After the appraised value of the scenic easement has been determined, the highway commission offers the landowner this value; there is no dickering over price, although there may be some give-and-take with respect to the exact content of the scenic easement package. Condemnation is resorted to only when the landowner will not sell at the appraised value.

An appraisal of each parcel is made on site, the appraiser conferring with the owner to learn of his immediate plans for any change in the use of the land and to discover any items that might have been overlooked. Such appraisals are required by statute to be made on a before and after basis. Thus each appraisal must consider both the whole and the remainder value. If the appraiser, after analysis, decides there is no damage to back lands, his report may so state and may consequently be abbreviated to a degree, but he must still base his opinion on a before and after valuation, considering the whole property in reaching his determination of both the before and after values.

Recently, the Wisconsin highway commission has adopted a general policy of buying a fee-simple estate rather than a scenic easement at those locations where the cost of a scenic easement will approximate the value of the fee simple. This may be the case in two different situations. First, where the land-use restrictions sought to be imposed will cut deeply into the value of the land because it has substantial development value. (In such cases, the landowner, faced with the prospect of giving up a major part of the land's value, often requests that the full fee simple be purchased.) Second, where the limited future development potential of the site, its low value, and the desire of the highway commission to acquire the affirmative rights to enter the scenic area for the purpose of cutting and cleaning up trees and brush, all lead to the conclusion that the full fee-simple estate should be acquired. For example, there are many cases in Wisconsin where a trunk highway borders a major river, with only a strip of land 50 ft or less in width separating the highway from the water. Such a strip of land is usually too narrow to permit residential development and it is generally overgrown with scrub vegetation that tends to block the view of the river from the highway. In such cases, the value of the fee simple is so low that it will not exceed the cost of a scenic easement by much; and the tax assessment of the land is so low that little financial harm is done to the local township when it is removed from the tax rolls by fee-simple purchase.

Under the current policy in Wisconsin, about 5 percent of the scenic parcels acquired are purchased in fee simple.

ENFORCEMENT OF RESTRICTIONS

During the early years of the scenic easement acquisition program for the Great River Road, enforcement problems seem to have arisen mainly from uncertainty as to just what restrictions were imposed on the servient land. No doubt the language of the early easement deeds, with their intermingling of restrictions and permitted uses, was a major cause of this uncertainty. One remedy has been to have the easement purchasing agent state, restate, clarify, and reclarify the rights and duties of the parties at the time of acquisition of the easement. In this connection, all Wisconsin scenic easement purchas-

[158] Mullen, *Scenic Easements: Wisconsin Progress, supra* note 120, at 14.

ing agents are required to keep a "negotiator's diary" containing summaries of all conversations with the landowner, signed by the agent, and stating in detail exactly what was discussed at each meeting or during each telephone conversation with the landowner. This makes it more difficult for the landowner to say, as landowners have frequently said in the past, "I know it's not in the deed, but Mr. so-and-so told me that I could do this" in order to excuse a violation of easement restrictions. And, of course, it is hoped that the new easement deed forms, containing a clearer statement of the restrictions imposed on the landowner, will help to eliminate uncertainty which may give rise to unintentional violations.

In general, enforcement of scenic easement restrictions along Wisconsin's Great River Road has not encountered much difficulty.[159] Enforcement is the responsibility of highway department personnel, who work closely with field representatives from the district office of the State highway commission. Periodic inspections are conducted and easement violations are quickly reported. The servient landowner is first given a notice requiring him to take corrective action—e.g., to remove signs erected or maintained in violation of the easement restrictions. Failure of the landowner to take corrective action may result in entry on the servient land by highway department personnel to abate the violation—e.g., to remove signs erected or maintained in violation of the easement restrictions—or a suit for injunction. The local courts have been fully educated with respect to the Wisconsin scenic easement program, and are much less hostile to State highway commission agents seeking injunctive relief than were the courts of the southern States toward Federal agents seeking injunctive relief against scenic easement violations along the Blue Ridge and Natchez Trace Parkways.[159a]

One recurrent problem in enforcement has arisen from the placing of house trailers on residential lots which meet the 300-ft minimum frontage requirement. For the future, at least, this problem has been resolved by placing in the easement deed form an express prohibition against house trailers.

PLANS FOR FUTURE USE

The Wisconsin highway commission plans to complete acquisition of scenic easements for the Great River Road with ORAP funds in the near future. A proposed statutory amendment which would remove the location restrictions on scenic easement acquisition imposed by the ORAP priorities was to have been presented to the 1967 legislative session, but has been withheld until the ORAP committee can complete its recommendations for changes in the legislation. If this amendment is ultimately adopted, making ORAP funds available for acquisition of scenic easements along highways in any part of Wisconsin, the highway commission plans to use State ORAP funds, as far as possible, for acquisition of scenic easements and scenic overlook sites, and to use Federal 3 percent funds for development of scenic overlook sites, for removal of billboards, and for removal or screening of junkyards pursuant to the Highway Beautification Act of 1965.[160] For the time being, it would appear that only Federal 3 percent funds are available for scenic easement acquisition outside the Great River Road and the other priority areas listed in the 1961 ORAP legislation.

In response to the Highway Beautification Act of 1965, a new Scenic Beauty Bill [161] was introduced in the 1967 legislative session and is still pending. This bill would expressly authorize acquisition of "the fee simple or any lesser interest, as determined by the state highway commission to be reasonably necessary to accomplish the purposes of" the bill, which are "to promote the safety, convenience and enjoyment of travel on, and protection of the public investment in, the state trunk system, and to provide for the restoration, preservation and enhancement of scenic beauty within and adjacent to such highways." It is doubtful whether such authorization is really necessary, inasmuch as the Wisconsin highway commission has for several years been acquiring scenic easements in the priority areas listed in the ORAP legislation under an earlier statute.[162] However, another provision of the proposed Scenic Beauty Bill is designed to meet a clearly demonstrated need of the State highway commission for variance-granting power.

No scenic easement instrument, however well drafted, can anticipate all the changes that may take place in the future. Conditions affecting the scenic easement site may change radically in a period of 10 or 20 years. Yet the scenic easement normally imposes restrictions that will operate "in perpetuity." Wisconsin has already had substantial experience with requests from landowners for a release of or variance from the restrictions imposed on their lands by scenic easements. Under present Wisconsin law,[163] if the highway commission decides to grant a landowner's request and release or modify some scenic easement right previously acquired, it must classify such right as "excess," have it appraised, and obtain the approval of the Governor in order to dispose of the excess right in question. This statutory procedure presents no particular problem in disposing of excess realty when the highway commission initially acquired a fee-simple estate. Indeed, the procedure is probably desirable, because the transaction is open for all to see. But the procedure is time-consuming, cumbersome, and unneces-

[159] In a letter dated May 9, 1967, Mr. Mullen reported as follows: "We have approximately six violations involving signs at the present time. We have had good results so far with voluntary action of the landowner. We may have to go to the courts to clear some of the above signs but have not taken this step to date."

[159a] Matuszeski, *supra* note 120, at 14. It should be noted, however, that R. C. Leverich, Chief of Right-of-Way, District 5, Wisconsin Division of Highways, has recently made the following comment to the authors: "How have our courts been educated with respect to our scenic easement program? To my best knowledge we have never gone to court on an easement encroachment, and your statement on hostility may prove overly optimistic. You may be right, but my administrative experience forces me to ask that question."

[160] The information with regard to the proposed statutory amendment and the plans of the Wisconsin Highway Commission for use of State ORAP and Federal funds if the amendment is adopted is derived from letters from B. J. Mullen, dated May 9, June 19, and Nov. 1, 1967.

[161] The proposed Scenic Beauty Bill, Assembly Bill 323, would become WIS. STAT. § 85.03; a copy supplied by B. J. Mullen.

[162] WIS. STAT. § 84.09 (1965).

[163] *Id.* § 84.09(5) (1965).

sary when applied to a release of or variance from scenic easement restrictions.

The proposed Scenic Beauty Bill contains a provision,[164] drafted in the Attorney General's office with the counsel of the late Professor Jacob H. Beuscher, which would authorize the State highway commission "to grant variances or releases of conditions, terms or restrictions contained in easements secured for highway beautification or in conveyances containing any reservations or restrictions regarding the use or occupation of property conveyed by the commission" whenever this "shall be determined by the commission to be in the public interest." It has been further suggested that the highway commission should be required to determine whether the right to be released has a significant market value and, if so, to require the landowner requesting the release to pay such market value to the commission.[165]

California

Since 1933 the California Department of Parks and Recreation or a predecessor agency has from time to time acquired scenic easements over land in or immediately adjacent to State parks. The first scenic easement, acquired in 1933, covered lands adjacent to Point Lobos State Reserve. By its terms, the grantors agreed as follows: [166]

> That, other than farm buildings, they will not (without the permission of the State Park Commission first obtained) allow any new structures upon said described property for strictly business or commercial purposes, and that any new buildings other than farm buildings shall not be constructed upon said premises nearer than 250 feet from the west line of the State Highway and that so far as reasonably feasible the natural growth of trees and forest thereon will not be destroyed or materially altered.

The second scenic easement, covering lands adjacent to Pfeiffer-Big Sur State Park, was acquired in 1934.[166] It imposed significantly greater restrictions on the servient land than did the Point Lobos scenic easement of 1933. The Pfeiffer-Big Sur restrictions were essentially a prototype of the restrictions included in a 1946 scenic easement deed form approved by the California Attorney General for general use in scenic easement acquisition.[167]

This 1946 scenic easement deed form was used in the acquisition of nine scenic easements at Columbia State Historic Park.[168] At Columbia, the aim of the park is to preserve and interpret the looks and life of a California gold rush town as authentically as possible. The acquisition program has proceeded on a piecemeal basis and scenic easements have been acquired to preserve the original character of the buildings and their surroundings until funds are available for fee-simple purchase. Subsequently, about one-half of these scenic easement areas (including buildings) have been acquired in fee simple. The restrictions contained in the scenic easement deeds at Columbia Historic Park are as follows:

> 1. That no structures of any kind will be placed or erected upon said described premises until application therefor, with plans and specifications of such structures, together with a statement of the purpose for which the structure will be used, has been filed with and written approval obtained from the said State Park Commission;
>
> 2. That no advertising of any kind or nature shall be located on or within said property without written approval being first obtained from the State Park Commission;
>
> 3. That no painting or exterior surfacing which, in the opinion and judgment of the said State Park Commission, are inharmonious with the landscape and general surroundings, shall be used on the exterior of any structure now located on such property, or which may, as hereinbefore provided be constructed thereon;
>
> 4. That all new plantings by the Grantors shall be confined to native plants characteristic of the State Park region, except flowers, vegetables, berries, fruit trees and farm crops;
>
> 5. That the general topography of the landscape shall be maintained in its present condition and that no excavation or topographic changes shall be made without the written approval of the State Park Commission;
>
> 6. That no use of said described property, which in the opinion and judgment of said State Park Commission, will or does materially alter the landscape or other attractive scenic features of said land, or will be inconsistent with State Park rules and regulations, or with the proper operation of a State Park, other than those specified above shall be done or suffered without the written consent of the said State Park Commission.

There is a further provision excepting and reserving to the grantor, *inter alia,*

> The right to maintain all of the buildings now existing and if all or any of them shall be destroyed or damaged by fire, storm, or other casualty, to restore the same in conformity with the design and type of building of the historic period which the State Park has been established to commemorate; the plans to be submitted and approved by the State Park Commission as provided in Paragraph I hereof.

The State of California also has what might be considered a scenic easement in the area adjacent to the Monterey Custom House.[169] The scenic easement was contained in a stipulated judgment defining the interests of the State and the City in a described area adjacent to the Custom House building and stating that the State should have an easement for light and air.

---

[164] A copy of this part of the Scenic Beauty Bill is set out in B. Mullen, *Scenic Easements: Techniques of Conveyancing, supra* note 120, at 6-7. The text is also given, in slightly different form, in C. Neumann, *Legislative Problems in Wisconsin's Scenic Easement Program,* 1967 HIGHWAY LAW COMMENT 14. As of the week ending November 4, 1967, the bill provided for a variance fee of only $1.00 to accompany each application, as indicated by Neumann, rather than $25 as indicated by Mullen; but it also provided that decisions of the Highway Commission should not be reviewable (judicially) under WIS. STAT. ch. 277, as indicated by Mullen, and contrary to Neumann's version of the bill.

[165] See Neumann, *supra* note 164, at 21.

[166] A copy of this scenic easement deed was furnished by F. C. Buchter, Departmental Counsel, California Department of Parks and Recreation.

[167] Copies of this 1946 scenic easement deed were furnished by F. C. Buchter, Departmental Counsel, and by Earl P. Hanson, Chief, Division of Beaches and Parks, Department of Parks and Recreation. The same scenic easement deed is reprinted in W. Whyte, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 60-61 (Urban Land Institute Tech. Bull. 36, 1959). Presumably the Department would use this form at the present time in acquiring additional scenic easements in or adjacent to State parks.

[168] Information about the Columbia State Historical Park and the scenic easements obtained in connection therewith was furnished by Earl P. Hanson, Chief, Division of Beaches and Parks, in a letter dated Aug. 10, 1967; by Ed V. Dwyer, Recreational Planner, Division of Beaches and Parks, in a letter dated Aug. 16, 1967; and by F. C. Buchter, Departmental Counsel, Department of Parks and Recreation, in a letter dated Sept. 8, 1967.

[169] Information about the Monterey Custom House easement was furnished by F. C. Buchter in his letter referred to *supra* note 168.

Scenic easement acquisitions by the California Department of Parks and Recreation (or its predecessor agency) have been carried out under authority of a 1927 statute which, in its present form, provides as follows: [170]

> The department, with the consent of the Department of Finance, may acquire by purchase or condemnation proceedings brought in the name of the people of the State of California title to or any interest in real and personal property which the department deems necessary or proper for the extension, improvement, or development of the state park system. The department shall attempt to purchase property by negotiation with the owner before it commences condemnation proceedings. * * * *

Since 1963 the California Department of General Services has been responsible for the acquisition program for the Department of Parks and Recreation, operating under authority of the Property Acquisition Law.[171] However, no scenic easements have been acquired since 1963.

It would appear that all or most of the scenic easements now administered by the California Department of Parks and Recreation were gifts to the State.[172] As one official of the Department puts it:

> We have not had any particular problems of policing the scenic easements acquired by gifts since in each case the donations were made by persons who were sympathetic with the program undertaken. Whether problems will be encountered when the principals involved are no longer in active ownership of the properties is hard to imagine.[173]

It should be noted, however, that each park has a resident ranger "who is in constant observation of the easement." [174]

The only enforcement problem to arise so far has involved the Monterey Custom House easement, where the City of Monterey wished to construct a marina which would encroach on the defined easement area.[175] The issue was whether a seawall, which was invisible from the plaza of the Custom House, was a violation of the easement.

In general, it would appear that substantial further acquisitions of scenic easements adjacent to State parks in California are unlikely. One official of the Department of Parks and Recreation says:

> We have never used condemnation in acquiring scenic easements nor have we contemplated doing so. We have looked at the possibility of attempting to buy scenic easements and have found that the problems of valuation are so great as to be unworkable.[176]

Another official has expressed the following opinion:

> The difficulty of determining how much control a scenic easement gives reduces their value to the Department. Another aspect which has toned down our interest in scenic easements is that there is not a satisfactory method for the appraisal of the value, and unless the landowner is cooperative in accepting a nominal consideration, the cost of the easement is so high where land is restricted for park compatible uses that acquisition [in fee] is more practicable, since this will insure the public the use of the land as well as the scenic attraction. Land value in California is so high and the desirability of land for subdivision near State Parks makes it unlikely that scenic easements will be acquired for nominal consideration.[177]

Although the Department of Parks and Recreation is given broad new authority to acquire scenic easements under the California Parkway Act of 1965,[178] at present the implementation of that act is still in the early planning stage.

Prior to 1963, California had both a constitutional provision and legislation which authorized the State or any city or county to acquire land in excess of the land actually needed or used for public purposes in connection with the establishing, laying out, widening, enlarging, extending, or maintaining of streets and parkways, "providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements," and after the completion of such improvements to "convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works." [179] Under this authorization, it would have been possible for the California highway agency to acquire excess land adjacent to State highways and to resell it subject to scenic easement restrictions; but there is no evidence that any scenic easements were ever established along State highways in this way.

In 1963, the Westside Freeway Park and Development Act [180] expressly authorized the acquisition of the fee simple or any lesser interest in certain scenic areas in conjunction with the construction of the new Interstate Route 5, which runs the length of the State. The Departments of Water Resources, Parks and Recreation, Fish and Game, Finance, and Public Works were empowered to "acquire, by purchase, gift, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary" [181] to "protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve for public use and enjoyment any land" in certain designated areas adjacent to the Westside Freeway, Interstate Route 5, and the California Aqueduct "which have significant scenic values." [182] The departments specified were also authorized to "acquire the fee to any

[170] CAL. PUB. RES. CODE § 5006 (Deering 1963).
[171] CAL. GOV'T CODE §§ 15850 to 15866 (Deering 1958).
[172] There is some conflict on this point. Both Messrs. Hanson and Dwyer, in their letters referred to *supra* note 168, state that all the department's scenic easements were acquired by gift, without any cost to the State. On the other hand, Mr. Buchter, in his letter referred to *supra* note 168, states: "As a general rule, the property owners [at Columbia State Historic Park] required payment for the easements, although the prices were not excessive. A few were gift deeded to us."
[173] Letter from Earl P. Hanson, *supra* note 168, and confirmed in letter from Ed V. Dwyer, *supra* note 168.
[174] Letter from Ed V. Dwyer, *supra* note 168.
[175] Information furnished by F. C. Buchter in his letter referred to *supra* note 168.
[176] Letter from Earl P. Hanson, *supra* note 168.
[177] Letter from F. C. Buchter, *supra* note 168.
[178] CAL. STS. & H'WAYS CODE §§ 885-887.5 (Deering Supp. 1966).
[179] The constitutional provision is CAL. CONST. Art. 1 § 14-½. The implementing legislation is CAL. STS. & H'WAYS CODE § 104.3 (Deering 1965).
[180] CAL. GOV'T CODE §§ 7000-7001 (Deering Supp. 1966).
[181] CAL. GOV'T CODE § 7001 (Deering Supp. 1966).
[182] *Id.* § 7000.

of the property for the purpose of conveying or leasing said property back to its original owner or another person under such covenants or other contractual arrangements as will conserve the scenic character and value of the property in accordance with the purposes of" the statute.[181] And the Department of Public Works was expressly empowered to:

> . . . acquire scenic easements along said Westside Freeway, provided that funds for such easements are obtained pursuant to the provisions of Section 319 of Title 23 of the United States Code relating to the purchase of interests in lands adjacent to highway rights-of-way, provided further that the Federal Government reimburses the State for the cost of such scenic easements and also provided that the use of money for this purpose shall not reduce the amount of funds which would otherwise be available to the State for highway purposes.[183]

1963 also saw the enactment of legislation establishing a Master Plan for State Scenic Highways in California.[184] While the State's role as planner, catalyst, and active participant should not be minimized, it is apparent that the statute gives local governmental agencies the primary responsibility for controlling land use outside the highway right-of-way and within the scenic highway corridor. Consequently, the major efforts of the Advisory Committee on a Master Plan for Scenic Highways and other State agencies involved in the scenic highway program were initially devoted to development of planning and design standards for scenic corridor protection. These efforts resulted in a publication entitled *The Scenic Route: A Guide for the Designation of an Official Scenic Highway*.[185] The Advisory Committee reviewed this publication and recommended its adoption on an interim basis, subject to further review by other public agencies and concerned citizens. The Director of Public Works adopted the *Guide* on this interim basis, and it is currently being followed in designating official scenic highways in California.

Highways designated by the State Legislature to be within the Master Plan for Scenic Highways are eligible to become Official Scenic Highways when (1) the roadway and right-of-way meet scenic highways standards set forth in the *Guide*, or the State has developed a plan and program to bring a specific road and right-of-way into conformity with such standards; and (2) protection of the scenic corridor has been assured by the local jurisdictions through which the highway runs and by public agencies owning land within the corridor.

The *Guide* broadly states that "land-use controls consistent with the general plan should be in effect over the entire corridor,"[186] and follows this with a rather detailed set of guidelines in regard to urban development in both rural and urban areas; building heights and setbacks; signs and outdoor advertising; placement of utility lines; cover and screening of earthwork operations; erosion control; preservation of the natural condition of edges of lakes, rivers, and creeks; preservation and restoration of plant material; clearing for views; site planning and architectural and landscape design in private developments; property maintenance on private properties; and public uses within the highway corridor. The particular land-use controls to be employed by local governmental agencies for protection of the scenic highway corridor include zoning ordinances, subdivision regulations, building codes, housing codes, fire protection codes, anti-litter ordinances, weed and insect controls, water quality controls, and forestry regulations—all based on the police power delegated to local governmental agencies.

The *Guide* also states[187] that "every opportunity for acquisition of corridor land in fee should be thoroughly explored by public agencies" to provide for "such public uses as information centers, roadside rests, vista stations, parks, playgrounds, wild areas, wildlife refuges, schools, colleges, cultural centers, administrative centers, fairgrounds, even airports"; and that "when public uses are not contemplated, the acquisition of development rights or scenic easements should be actively pursued by public agencies." With respect to "these lesser property rights," it is asserted that they "retain the land on the tax rolls—if at a lower rate—leave responsibility for maintenance with the private owner, allow private uses compatible with the scenic highway program, and are acquired at a lower cost than outright purchase."

It is not clear whether the *Guide* contemplates acquisition of development rights or scenic easements by State agencies, by local governmental agencies, or by both. It would appear, however, that acquisition by local governmental agencies is contemplated, since at the time of the *Guide's* publication the power of the Department of Public Works to acquire scenic easements adjacent to State highways was very limited.

Although acquisition of scenic easements is one of the methods suggested for implementing the Master Plan for Scenic Highways, it is pretty clear that this was not initially viewed as one of the major features of the California scenic highway program. But passage of the Highway Beautification Act of 1965 stimulated interest in acquistion of scenic interests, and in 1966 the California legislature adopted a new Scenic Areas Act[188] authorizing the Department of Public Works, "if Federal funds are available for reimbursement therefor," to "acquire, either in fee or in any lesser estate or interest, real property adjacent to any highway included in the National System of Interstate and Defense Highways or the Federal-aid primary highway system, which the de-

[183] *Supra* note 182. The limitation to expenditure of Federal-aid funds for acquisition of scenic easements by the Department of Public Works is apparently controlling, despite the broader authorization in § 7001 for expenditure of public funds for "acquisition of interests or rights in real property." But the specific authorization in § 7000 for the Department of Public Works to acquire scenic easements apparently does not limit the broader power conferred by § 7001 on "any of the state departments specified in this chapter" to acquire "the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter."

[184] CAL. STS. & H'WAYS CODE §§ 227 to 229.1, 260 to 264 (Deering Supp. 1966).

[185] This publication (hereafter referred to as GUIDE) was prepared by the Interdepartmental Committee on Scenic Highways, composed of representatives from the Departments of Public Works, Parks and Recreation, and Water Resources, and the State Office of Planning, and was based on policy directions from the Advisory Committee on a Master Plan for Scenic Highways.

[186] GUIDE 29.

[187] *Id.* 44.

[188] CAL. STS. & H'WAYS CODE §§ 895-897 (Deering Supp 1966).

partment considers necessary for the preservation, maintenance or conservation of scenic lands or areas adjacent to such highways or which it considers necessary to preserve, improve or enhance the scenic beauty of or points of interest in the lands or areas traversed by such highways." Currently, the Department of Public Works is engaged in planning for scenic area acquisition, both in connection with the State Scenic Highway system and in connection with other State highways which are eligible for Federal 3 percent funds under Title III of the Highway Beautification Act of 1965.

Pursuant to a legislative mandate appended to the 1966 Scenic Areas Act, the California Department of Public Works recently reported to the Legislature on the progress made and the program developed for the acquisition of scenic areas adjacent to highways under the 1966 act. This report[189] covers the following matters: Federal participation and controls, State progress, criteria for selection of scenic areas, criteria for property interest to be acquired, coordination with other scenic programs, the 1966-67 program, and maintenance problems. Inasmuch as only Federal-aid funds are to be used for acquisition of scenic areas under the 1966 act, it was decided that Federal policies and procedures would be the basic controls in the acquisition program. The policies and procedures are set out in Bureau of Public Roads "Policy and Procedure Memorandum No. 21-4.6," dated January 24, 1966.

Pursuant to this memorandum, and to the directive contained in Title III of the Highway Beautification Act of 1965 with respect to the making of a detailed estimate of the cost of carrying out the provisions of the Act, preparations for making the required estimate were started in California in late May 1966. The completed estimate encompassed several facets of the beautification program, including junkyard and billboard control, costs of landscaping, rest area and scenic overlook construction, in addition to the costs of scenic area acquisition. A part of the estimate is an inventory of scenic areas which have an intrinsic scenic beauty and which are desirable to preserve against future alteration or destruction. Selection teams chose a total of 136 areas adjacent to the Interstate System, and 658 areas adjacent to the Primary. Interstate scenic areas totaled approximately 27,300 acres to be protected at an approximate cost of $7,644,000. Primary system areas covered 94,400 acres, to be protected at an estimated cost of $55,826,000.[190]

The teams which selected the scenic areas contained in the inventory and estimate consisted of a right-of-way agent experienced in dealing with land values, a planning engineer experienced in location and highway layout, and a design engineer or, if available, a landscape architect experienced in the integration of a highway into its environment. The three-man teams were backed up by a landscape architect from the Bureau of Public Roads who spot checked the area selections. The teams covered every mile of Interstate and Primary System highways, in both directions. The teams were guided in scenic area selection by the following criteria, in addition to those formulated by the Bureau of Public Roads:[191]

1. The area should contain features which would attract the eye of a passing motorist, such as:
   (a) Typical pastoral scenes containing an expanse of open land and interesting cultural elements;
   (b) Attractive or interesting growth of natural shrubs, vines, trees, or timber stands;
   (c) Views of water or wetlands, such as lakes, stream beds, or ocean shores;
   (d) Interesting rock outcroppings or other geologic formations, such as bluffs or cliff faces;
   (e) Mountain or alpine valley views;
   (f) Selected desert views;
   (g) Attractive urban landscape views;
   (h) Historically interesting and appealing sites.
2. The area should be outlined, if possible, by natural features.
   (a) In the absence of natural boundaries, the area should be long enough to hold the attention of a motorist traveling 50 mph, or approximately 73 ft per sec, for at least 30 sec (roughly 2,200 ft).
   (b) The maximum width of the area should generally be limited to that in which billboard controls may be exercised, although it may be narrower or wider in special circumstances.
3. The areas should be spaced so as to make a trip interesting and pleasant, assuming that the features of intervening spaces may be altered considerably.
   (a) Along highways having heavy traffic volumes, areas may be closer together than along highways having a lighter traffic volume.
   (b) In continuous forest, areas may be spaced at fairly long intervals and selection should be governed by interesting terrain points.
   (c) In open country, areas may be infrequent.
   (d) In any long mileage of similar terrain, selection shoud be dictated by points of interest.
4. Consideration should be given to areas having possible sites for scenic overlooks and rest areas.
5. Areas which will involve heavy and continuous maintenance expenditures for brush control, erosion control, or tree trimming should be avoided.
6. Areas containing cultivated trees and vines should be avoided because of the impossibility of enforcing a continuation of the same use.
7. Sites otherwise qualified and in danger of imminent adverse development should receive highest priority.
8. Prior to the acquisition of scenic areas, each proposed location will be reviewed by the Division of Highways' Landscape Architect for general conformance to these criteria. The Landscape Architect will also establish a Statewide priority list within the framework of these criteria and Federal Standards.

In California, the following general criteria have been established for determining the property interest to be acquired in scenic lands or areas adjacent to highways with Federal "3 percent funds":[192]

> This interest may range from an easement for one specific purpose which will not interfere at all with the owner's use of the land to the complete fee title which

[189] State of California, Dept. of Public Works, Div. of Highways, *Report on Acquisition of Scenic Areas Adjacent to State Highways* (December 1966), prepared pursuant to Stats. 1966, 1st Ex Sess., ch. 125, § 3 (hereafter cited as REPORT).

[190] REPORT 8-9. Bureau of Public Roads estimate requirements included establishment of a class of area designated as "top quality," generally defined as including the most desirable areas from a scenic viewpoint. The California totals of the "top quality" scenic areas showed 63 areas aggregating 9,238 acres at an estimated cost of $5,262,000 for the Interstate System and 273 areas aggregating 38,531 acres at an estimated cost of $28,066,000 for the Primary System.

[191] REPORT 11-13.

[192] *Id.* 14-15.

will transfer all the owner's rights to the State. The present or potential use of the land and its natural features will dictate the interest to be acquired.

The property interest to be acquired can range from a fee-simple interest to minimal controls on scenic lands adjacent to the highway. In any event only the minimum property interest necessary to preserve the scenic attributes of the highway will be acquired.

An example of fee acquisition might be where the value of the land depends upon its timber resource potential, and the owner will be prevented from harvesting any trees.

Essentially, remaining value to the owner determines whether or not fee title should be taken. When the acquisition of lesser interest is indicated, consideration will be given to the taking of only negative rights or to both negative and positive rights.

In the instance of an acquisition to preserve a view of open farmland, only a negative right may be necessary; e.g., to prevent the farmer from developing an unsightly materials pit, or prevent the cutting of trees or other natural growth, or erecting signs.

In the instance of an acquisition of a site which is necessary to preserve an alpine valley view, it may be necessary to acquire negative rights to prevent the owner from taking the above-mentioned actions, and a positive right to allow the State to trim trees and brush to open up the view.

It should be noted that the scenic area acquisition program under the 1966 Scenic Areas Act, which is to be entirely funded by Federal "3 percent funds" under the Highway Beautification Act of 1965, is not designed to supplant or conflict with California's scenic highway program under the 1963 Scenic Highways Act.[193] At present these are separate programs, but in the future as more funds become available they are likely to become more integrated.[194]

Several hundred miles of the proposed scenic highway system are now included in the Interstate System, so that Federal "3 percent funds" can be used for scenic interest acquisition along this part of the scenic highway system pursuant to the Bureau of Public Roads Memorandum of January 24, 1966, which sets the highest priority on "the acquisition of interests in strips of land necessary for the . . . purposes [stated in the Highway Beautification Act] that are adjacent to Interstate System highways." Inasmuch as all or most of the remaining mileage of the proposed scenic highway system consists of primary highways, Federal "3 percent funds" can ultimately also be used for scenic interest acquisition along these primary highways, which constitute the second highest priority under the Bureau of Public Roads Memorandum of January 24, 1966.

For the 1966-67 fiscal year, the Bureau of Public Roads made an exception to its general priorities for the use of Federal "3 percent funds" and approved a balanced program for the use of some $5 million appropriated for use in California. This balanced program includes roadside planting and acquisition of rest areas, vista points, and scenic areas.[195]

[194] *Id.* 17.

[195] Letter dated June 22, 1967, from John B. Matheny, Asst. Chief Counsel, Div. of Contacts and Rights-of-Way (Legal), Dept. of Public Works, State of California Transportation Agency

[195] The balanced program is set out in REPORT 20; confirmation of Federal approval is contained in letter, *supra* note 194.

As previously indicated, the Department of Parks and Recreation has broad authority to acquire scenic easements under the California Parkway Act of 1965.[196] Preliminary plans for development of a State parkway system [197] include the following policy statement:[198]

> Scenic easements must be obtained along the corridor to retain the present character of the land or assure the scenic quality of future development through setback, height, lot size, landscaped buffers, use of land, tree cutting and other types of restrictions. No arbitrary acreage is recommended to be included in easements (the national parkway standards call for an average of 25 acres per mile).

However, the California Parkway Act of 1965 expressly provides:[199]

> The cost of parkway construction shall be expended from funds other than those available for State highway construction. The Department of Parks and Recreation may also accept grants on behalf of the State and may accept financial or other assistance for, or in aid of, the State parkway system.

Under this limitation it is not clear whether Federal "3 percent funds" could be used for scenic easement acquisition in connection with the development of the proposed parkway system. Of course, such funds could not be used unless the parkway roads were part of the Federal-aid primary or secondary system, which is unlikely to be the case except where parkways are established along existing State highways superseded by freeways or along existing county highways.

Arkansas

Arkansas had no experience with scenic easements prior to the passage of the Highway Beautification Act of 1965, and has not acquired any scenic easements to date.[200] There has been a Statewide inventory of scenic locations, principally on the Interstate and primary systems. The Beautification Section of the highway department has used the inventory to establish priorities for the first scenic area acquisitions. These priorities are based on several criteria—e.g., scenic beauty, traffic count, urgency of acquisition, and related factors. Although the highway beautification program is based largely on strip acquisition in selected locations, there is also a Statewide plan for scenic corridors.

To date, the Arkansas Highway Department has acquired a number of scenic areas in fee simple, but has not yet acquired any scenic easements. The Department presently feels that the control and policing of scenic easements is likely to present a serious problem, and that in many cases an area can be acquired in fee simple for the same costs as a scenic easement. Apparently, however, acquisition of some scenic easements is contemplated, in

[196] *Supra* note 178.

[197] State of California Resources Agency, Dept. of Parks and Recreation, *California Parkways: Preliminary Report* (Dec. 1966), prepared pursuant to CAL. STS. & H'WAYS CODE § 886 (Deering Supp. 1966).

[198] *Id.* 30.

[199] CAL. STS. & H'WAYS CODE § 887.5 (Deering Supp. 1966).

[200] Information about the Arkansas program is drawn from a letter dated Nov. 27, 1967, from Otha Hewitt, Chief, Right-of-Way Div., Arkansas Highway Dept.

which case the Department will acquire only those rights necessary to preserve the scenic quality of the easement area. The Department's present plans call for acquisition of a total of 3,226 acres of scenic areas. Total Federal funds obligated for scenic enhancement in Arkansas were $677,342 for fiscal 1966 and $633,747 for fiscal 1967. The highway department neither obligated nor spent any funds for scenic enhancement in 1966; for 1967, $56,750 was obligated, but only $5,788.01 has been spent. No information is available as to how much of the available money will be spent on acquisition of scenic easements.

Georgia

Georgia had no experience with scenic easements prior to the passage of the Highway Beautification Act of 1965. The legislature adopted enabling legislation in 1967 and is now in the process of planning for scenic easement acquisition.[201]

An on-site inspection by the Landscaping Division of the State highway department was made on the major Federal-aid highways and the desirable scenic easement locations were plotted on maps designed for the purpose. The criterion used in selection was scenic value "to the average motorist." To date, approximately $1.500,000 in Title III funds has been obligated to Georgia for scenic enhancement, but only about $75,000 of this will be used for scenic easement acquisition. None of this has been expended to date, and no scenic easements (or other scenic interests) have yet been acquired. The only restrictions to be placed on the land by the scenic easements will be those necessary to prevent any substantial change in the present use of the land. Permission will have to be obtained for any new construction on the land. It is anticipated that a checklist type of scenic easement deed will be used so that the scenic easement package can be adapted to the individual tract in question. At present the Georgia highway department does not plan to condemn any scenic easements. If the owner will not accept the department's offer to purchase, another site will be selected for scenic easement purchase.

Hawaii

Hawaii had no experience with scenic easements prior to the passage of the Highway Beautification Act of 1965. Enabling legislation was passed in 1966 and an inventory of scenic areas was made pursuant to the requirements of Title III of the Highway Beautification Act.[202] A survey team consisting of a representative from the Bureau of Public Roads, a landscape specialist, the District Engineer, and a beautification coordinator traveled along most of Hawaii's Federal-aid highways and selected areas qualifying under the criteria and guidelines provided by the Bureau of Public Roads. In addition, information was obtained from other State agencies involved in previous highway beautification programs.

Federal funds obligated for Hawaii's highway beautification program for the fiscal years 1965-66 and 1966-67 total $852,402, of which approximately $573,874 will be used for the acquisition of scenic easements. The inventory of scenic areas indicates that scenic easements should be acquired for 166 acres of land along primary and secondary Federal-aid highways in Hawaii. The first major project will encompass some four miles along the Volcano Road on the Island of Hawaii. Although plans have been completed, acquisition has not yet begun.

The proposed scenic easement deed to be used in Hawaii is similar to the scenic easement deed used in Wisconsin in the early 1960's, containing a list of scenic area restrictions and a list of scenic area uses. The special character of Hawaiian natural vegetation is recognized by a provision which confines all new plantings by the landowner to native plants characteristic of the area covered by the scenic easement. The landowner is permitted, under a special condition clause, to reserve certain rights within the scenic easement area in addition to the printed list of scenic area uses, subject to review and approval by the Bureau of Public Roads. The grantee (State of Hawaii) is expressly authorized to enter on the scenic easement area "for the purpose of inspection and enforcement of the terms and covenants contained" in the deed, and to "cause the removal from the Scenic Area of any advertising devices or unauthorized materials." In addition, the grantee is given the right to cut and remove brush, undergrowth, and dead or diseased trees, to "perform selective tree cutting and trimming in the Scenic Area," and to "plant within the Scenic Areas trees, shrubs and other native plants characteristic of" the scenic easement area.

The Hawaii Department of Transportation expects to appraise scenic easements by the before-and-after method, giving special consideration to permitted uses. In certain cases, such as where the land is presently in agricultural use and will continue in such use indefinitely, it is anticipated that the landowner will suffer no actual loss from the granting of a scenic easement. In such cases, it is proposed that he be compensated at a nominal rate per acre. It is estimated that condemnation should not be necessary in more then 10 percent of the cases.

Scenic easements in Hawaii will be policed by the District Engineers, who will report specific violations to the Chief of the Highways Division. If legal action is necessary, the latter will request the Attorney General to initiate such action. No problems in obtaining injunctions are anticipated.

Iowa

Iowa, like Georgia and Hawaii, had no experience with scenic easements prior to passage of the Highway Beautification Act of 1965. Enabling legislation was passed in 1965, allowing Iowa to get an early start in scenic easement acquisition.[203] The highway commission has already acquired scenic easements covering more than 500 acres, as well as almost 100 acres in fee simple, at a total cost

[201] Information about the Georgia program is drawn from a letter dated Oct 23, 1967, from A C. Curtis, Right-of-Way Engineer, State Highway Dept of Georgia

[202] Information about the Hawaii program is drawn from a letter dated Nov. 14, 1967, from A. A. Sousa, Head, Rights-of-Way Branch, Hawaii Dept. of Transportation.

[203] Information about the Iowa program is drawn from a letter dated Nov. 7, 1967, from Robert W. Pratt, Assistant Right-of-Way Planner, Iowa State Highway Commission.

of $44,000 exclusive of engineering and negotiation costs. The Iowa highway commission is planning for the ultimate acquisition of 377 scenic parcels (58 on the Interstate System and 319 on the primary system). In a majority of these scenic parcels an easement rather than a fee simple will be acquired. Of the total of $1,810,216 in Federal funds obligated to Iowa for 1966 and 1967, $380,270 will be used to acquire scenic easements and the remainder will be used to acquire highway rest areas.

To date, all scenic easements in Iowa have been acquired by negotiated purchase, and the highway commission plans to avoid use of its condemnation power during the first five years or so of the acquisition program. The scenic easement "package" acquired by the Iowa highway commission is similar to the scenic easement "package" acquired by the Wisconsin highway commission in the late 1950's and early 1960's. The scenic easement contract form used in Iowa contains a list of permitted uses, as well as a list of restrictions, and authorizes the highway commission to enter the easement area for the purpose of inspection and enforcement of the terms and conditions of the easement and to cause to be removed from the scenic area any unauthorized advertising devices or unauthorized materials. In addition, the highway commission is granted "the right to cut and remove brush, undergrowth, dead or diseased trees and to perform selective tree cutting and trimming in the scenic area," and "if it becomes necessary to revegetate (grass or trees) for conservation purposes . . . to enter upon the scenic area for such purposes."

The Iowa highway commission appraises scenic easements on the basis of before-and-after values, with the after value established by determining the percentage by which the scenic easement restrictions reduce the before value of the tract. Payments to landowners have run between 20 and 35 percent of the value of the unencumbered fee simple so far, and the use of nominal payments has not been necessary.

Maryland

Maryland had at least a brief experience with scenic easements prior to passage of the Highway Beautification Act of 1965.[204] Scenic easements—under the name of "highway protective easement areas"—were acquired along the Baltimore-Washington Expressway during the early stages of construction. It was found, however, that the prohibition against billboards, auto junkyards, etc., was so restrictive that it was necessary to pay practically the full fee-simple value of the land for the highway protective easement areas. Consequently, the scenic easement approach was soon dropped and the right-of-way was widened to include "highway protective areas."[205]

Maryland in 1966 adopted enabling legislation which is broad enough to permit the highway agency to acquire scenic easements. The highway beautification program is still in the planning stage and there have been no acquisitions to date. It is not clear whether the Maryland program will utilize the scenic easement device to a substantial extent or not. The Chairman of the State Roads Commission has indicated the Commission believes that, "with the exception of large areas such as wetlands and hillside or mountain areas, the cost of acquiring an easement will very nearly approach the cost of securing the land in fee simple." The conclusion is that, "if the State, in acquiring easements, has to pay a price approximating that of its fee-simple value, then the most reasonable approach for the State to take is to acquire such land in fee simple, thus shedding itself of the necessity for perpetual policing of land retained in private ownership, the cost of which could well exceed the value of the land secured."[204]

The problem of policing scenic easements has clearly been regarded as a serious one by the Maryland highway agency. The Chairman of the State Roads Commission has stated the Commission's belief that "policing of areas acquired as easements . . . will prove to be infinitely more difficult than those obtained in fee simple because it will be virtually impossible to include in any agreement every facet of every possible restriction that might be made on the property."[204]

In those wetland or mountainous areas where scenic easements are likely to be acquired, fishing, hunting, boating, and related activities will be permitted. In farming areas, grazing and other "non-injurious" agricultural land uses will be allowed to continue. So far as possible, an individual approach will be made to each scenic easement site and the restrictions imposed will vary from site to site. In wetlands and mountainous areas, it is anticipated that a scenic easement will often cause no real loss to the landowner, and that compensation may be offered on a nominal basis rather than on the basis of a full-blown before-and-after appraisal.

Michigan

Michigan had no scenic easement program prior to passage of the Highway Beautification Act of 1965. Enabling legislation was adopted in 1966, and a substantial highway beautification program is now under way in Michigan.[206] Although no accurate figures as to acquisition are currently available, some 223 scenic acquisitions, involving sites averaging 5 acres, have so far been programmed. For 1968, $760,000 has been budgeted for the acquisition of scenic strips—175 strips on the Interstate System and 12 on the primary system—and 75 sites have already been selected on the Interstate System. Acquisition of scenic strips in southern Michigan has been given priority because that is where most of the State's population is located. In general, wooded areas—especially along lakes and streams—have been selected for scenic strip acquisition

[204] Information about the current Maryland program is drawn from a letter dated Nov. 13, 1967, from Jerome B. Wolff, Chairman, Maryland Roads Commission, and Director of Highways.

[205] Moser, *Methods Used to Protect or Reserve and Acquire Rights-of-Way for Future Use in Maryland,*" in HWY. RES. BOARD BULL. 77, at 52 (1953).

[206] Information about the Michigan program is derived from an interview with J. E. Burton, Director of Roadside Development, and Jay Bastian, William Schlichting, and William Mitchell, all of the Department of State Highways, on Sept. 19, 1967. Additional information is drawn from a letter dated Nov. 21, 1967, from J. E. Burton

in southern Michigan. To date, most scenic strip acquisition has been for the purpose of preserving a scenic foreground or opening up a more distant view.

Scenic strip acquisition is now beginning in northern Michigan, where, initially, most acquisitions will be in fee simple for scenic overlooks or turnouts. Later, it is hoped that more use can be made of the scenic easement device. It is recognized, however, that where the only value of the land is for timber, a scenic easement which precludes cutting of timber will cost practically as much as the fee simple; and that in such a case the fee simple should be purchased. But where the land belongs to individuals or associations who use it for recreational use only (e.g., hunting and fishing), it is believed that scenic easements will be considerably less costly than fee-simple purchase.

Even in southern Michigan, the highway department has a policy of acquiring scenic strips in fee simple whenever the cost of the fee is not greatly in excess of the cost of a scenic easement. To date, the highway department's experience has been that fee-simple purchase is not much more expensive than scenic easement purchase along some of the expressways (Interstate and primary system controlled-access highways), because the land has relatively little value to the owner. In some cases where the highway department has acquired the fee (e.g., in wooded areas) the owner has been allowed to retain a limited interest such as a hunting and fishing right. Most of the scenic acquisitions to be made in the future will be along free-access highways, and extensive use of scenic easements is planned in such acquisitions.

To date, most scenic acquisitions in Michigan have been by negotiated purchase. The highway department normally will not revise the price set after appraisal, and will condemn if the owner will not accept the offer at that price. But the negotiator has authority to make minor changes in the scenic easement package in order to satisfy the owner's objections and complete the purchase. In some cases where condemnation in fee simple has been instituted, it is possible that settlements may be made on the basis of a negotiated purchase of a scenic easement.

The Michigan scenic easement package is quite similar to the Wisconsin scenic easement package of the early 1960's. It contains the usual set of scenic restrictions, in the form of covenants, and confers on the highway department substantially the same affirmative rights as the Wisconsin and Iowa scenic easements. It also provides expressly that "no rights are granted to the general motoring public to enter upon the scenic area for any purpose." So far, all scenic easements have been limited to strips extending no more than 660 ft from the edge of the highway, but it is anticipated that wider easements may later be acquired pursuant to plans to create full-scale scenic corridors in some parts of northern Michigan.

Minnesota

The Minnesota Highway Department did not acquire any scenic easements in the strict sense of the word prior to enactment of the Highway Beautification Act of 1965.[207] It might be noted, however, that in much of the area between Winona and LaCrescent, Minn., along Trunk Highway No. 61, the Department has acquired an easement for highway purposes over an extra-wide right-of-way in connection with the Great River Road project. Some of this excess right-of-way is for the protection of wooded slopes, although it was not acquired solely for the protection of scenic values.

Since 1965, the Minnesota Highway Department has conducted a Statewide inventory of scenic areas adjacent to Interstate and trunk highways in connection with the allocation of Federal highway beautification funds for the fiscal years 1966 and 1967. In general, the purpose was to determine the areas with outstanding scenic values and most urgently in need of preservation. Some priority was given to scenic areas along the Great River Road. Factors that were important in determining precise locations for scenic easement acquisition were (a) topography of land (rolling, ravine, flat, bluff, wooded, or open scene); (b) land use (present and future) and the effect of change in land use on the highway scene; (c) presence of wooded areas adjacent to curves on the highway.

The total amount of Federal "3 percent funds" obligated to date for scenic enhancement in Minnesota under the Highway Beautification Act of 1965 is $1,204,047, of which $1,042,866 is to be used for scenic easement acquisition and the remainder for acquisition of highway rest areas. The total planned program of scenic easement acquisition in Minnesota calls for acquisition of easements covering approximately 8,872 acres and protecting about 218 miles adjacent to the Interstate and trunk highway system. At present, a total of 6 scenic easement parcels has been purchased (2 on the Interstate and 4 on the trunk highway system). Offers to purchase have been made on 34 parcels (6 on the Interstate and 28 on the trunk highway system). Some 157 parcels are in the appraisal stage (71 on the Interstate and 86 on the trunk highway system), and title information has been ordered on 385 parcels (52 on the Interstate and 333 on the trunk highway system).

The Minnesota Highway Department has not run into any serious problems with the before-and-after value test in appraisals. The usual practice is to value the scenic easement only. If the land is rugged and without development potential, a percentage of fee-simple value is generally used. If the land is level and could be cleared for another use, consideration is given to the value of comparable cleared land and to the cost of clearing. Where it appears that the owner really suffers no loss, the highway department intends to pay a nominal amount ($50 to $100) for a scenic easement.

The Minnesota scenic easement package is almost identical with the Michigan scenic easement package discussed previously.

Montana

Montana had no experience with scenic easement acquisition prior to passage of the Highway Beautification

[207] Information about the Minnesota program is drawn from letters dated May 5, 1967, and Oct. 25, 1967, from Leo A. Korth, Director of Right-of-Way Operations, Minnesota Dept. of Highways.

Act of 1965. Enabling legislation was not adopted until 1967.[208] But the Montana Highway Commission had already made an inventory of locations for scenic strip acquisition in 1966. This inventory was prepared on a Statewide basis covering the Interstate, primary, and secondary road systems. The principal criteria used in deciding the locations for scenic strip acquisition were: (a) urgency of acquisition; (b) scenic quality of the highway corridor or individual strip; (c) remaining life of the total highway; (d) correlation of spacing with other strips; (e) potential for a rest and recreational facility; (f) cost to maintain; (g) volume and type of traffic; (h) proximity to centers of population; (i) type of view; and (j) existing improvements.

The decision has been made in Montana to proceed along quite different lines from most other States in the acquisition of scenic strips. Because the highway commission is uncertain about the restrictions that will be required to maintain adequate control of scenic strips, a fee-simple title in such strips will be acquired initially, and the highway commission will "live with them for a period of about two years." At the end of that period, the highway commission will attempt to sell the scenic strips subject to whatever restrictions it then believes to be necessary. The grantor will be permitted to use the land for agricultural or grazing purposes for a nominal fee during the period of fee-simple ownership by the State, if he so desires.

It is believed that this purchase-and-resale method has the following advantages: (a) the appraisal problem will be minimized; (b) there is less likelihood of disagreement as to value; (c) the chance for successful negotiation of a purchase is increased by permitting the owner a low-cost use of the land during the period of fee-simple ownership by the State, with a probable opportunity to repurchase a substantial interest in the land at a reasonable price later on; (d) the danger of acquiring an inadequate property interest at the outset is avoided; (e) the highway department will have adequate time to determine what restrictions will be necessary for proper control of each individual site; (f) a public resale of the excess property rights should result in the lowest net cost of the scenic interest to be retained by the State. The former owner will have the right to match the high bid in the public sale unless he voluntarily relinquishes this right in advance.

New Jersey

New Jersey had no experience with scenic easements prior to passage of the Highway Beautification Act of 1965.[209] Enabling legislation was passed in 1966, but the highway beautification program is still in the planning stage. The New Jersey Department of Transportation has prepared an inventory of scenic areas, but no determination as to the total areas to be controlled by scenic easements has been made, and no scenic easements have been acquired yet. The total amount of Federal funds so far obligated for scenic enhancement in New Jersey pursuant to Title III of the Highway Beautification Act of 1965 is $3,184,054. None of this money has been expended to date.

New York

In 1959 Whyte wrote:[210]

> In New York State . . . it is the present policy of the State Department of Public Works to acquire easements restricting the erection of billboards on all controlled-access State highways. (In the past such easements have had a width of 750 ft from the edge of the actual roadway . . . .)
>
> The New York State Thruway Authority, whose enabling legislation has a provision similar to Section 676-A of the N.Y. Conservation Law, has protected its right-of-way through a combination of police power and easements. Up to 500 ft from the edge of the roadway, signs are prohibited by the State's police power. Beyond this point the Thruway Authority has purchased in scattered areas 1,000-ft easements from property owners to prohibit billboards. These were acquired at the same time as the rights-of-way.

Unfortunately, however, the New York scenic easement program developed in the late 1950's was halted by a decision of the New York Court of Appeals before it really got well started. On July 17, 1961, in *Schulman v. People*,[211] the court held that the New York Department of Public Works had no general statutory authority to condemn negative easements to prohibit billboards adjacent to State highways. This holding was based on the conclusion that the enabling statute, N.Y. Highway Law § 30, subdivision 2, which authorizes the condemnation ("appropriation") of property for specified purposes, and "for other purposes to improve safety conditions on the State highway system," was not "designed or intended to authorize the condemnation of easements of this character."[212]

Although N.Y. Highway Law 30, subdivision 15-a, also authorizes acquisition of property for highway purposes "by grant or purchase," the Department of Public Works took the position that acquisition by such methods is only authorized in cases where property could be condemned ("appropriated").[213] And since the acquisition of negative easements prohibiting billboards within 1,000 ft of the New York Thruway was based on language in N.Y. Highway Law § 347 which is practically identical with the language in § 30 which has been held not to authorize acquisition of such easements, the Department also decided that it had no power to acquire such easements along the Thruway.[213] The net result of all this is that acquisition of scenic easements by any method, along either the Thruway or any other State highway, was halted in 1961. The disposition of those easements prohibiting billboards acquired prior to July 7, 1961, is not known.

New York Conservation Law § 676-a, subdivision 1 (b), defines the property which may be acquired for parks

[208] Information about the Montana program is drawn from a letter dated Oct. 27, 1967, from Robert E. Crampton, Chief Right-of-Way Agent, Montana Highway Commission.

[209] Information about the New Jersey program is drawn from a letter dated Nov. 20, 1967, from Clarence R. Pell, Parkway and Landscape Engineer, New Jersey Department of Transportation.

[210] Whyte, "SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS" 13 (Urban Land Inst. Tech. Bull. 36, 1959).

[211] 10 N.Y.2d 249, 176 N.E.2d 817 (1961).

[212] *Id.* at 255, 176 N.E.2d at 818.

[213] Letter dated May 22, 1967, from Saul J. Corwin, General Counsel, New York Dept of Public Works.

and parkways so as to include "lands, . . . rights in lands, . . . and also any and all interests less than full title such as easements . . . ." This certainly seems broad enough to permit acquisition of scenic easements. But it does not appear that any scenic easements adjacent to parks or parkways have been acquired under this provision. It should be noted, however, that N.Y. Conservation Law § 676 prohibits "signs and advertising structures and devices within 500 feet of any State park or parkway." This statutory prohibition is likely to be held a valid exercise of the State's police power, in view of the holding in *New York Thruway v. Ashley Motor Court, Inc.*,[214] which sustained the prohibition of billboards within 500 ft of the Thruway under N.Y. Public Authorities Law § 361-a.[215]

In response to the Highway Beautification Act of 1965, the New York legislature enacted a statute in 1966 [216] authorizing the superintendent of public works "to acquire property for the restoration, preservation and enhancement of natural or scenic beauty of areas traversed by State highways, in order for the State to comply with any Federal-aid highway acts." The term "property" as used in the statute is defined very broadly and clearly includes scenic easements. Condemnation ("appropriation") of property for scenic purposes is prohibited "in areas zoned industrial or commercial under authority of State law or areas which are used predominantly for industrial or commercial activities."

To date, the New York scenic easement program appears to be only in the planning stage. Extensive studies have been undertaken, and a total of $3,030,484 in Federal "3 percent funds" was obligated to New York for landscaping and scenic enhancement as of June 30, 1966.[217]

Ohio

Prior to passage of the Highway Beautification Act of 1965, Ohio had designated certain roads as scenic highways.[218] These were not, however, selected with the idea of purchasing scenic easements to preserve or enhance scenic beauty. Most of these roads were on Ohio's secondary highway system. New enabling legislation was enacted in 1967. The total amount of Federal funds obligated for scenic enhancement in Ohio pursuant to Title III of the Highway Beautification Act of 1965 was $3,762,400 for the fiscal year 1966 and $3,955,200 for the fiscal year 1967. Of these amounts, $2,626,000 for fiscal 1966 and $667,000 for fiscal 1967 will be used for scenic easement acquisition. To date, Ohio has actually expended only $55,500 for scenic easement acquisition.

Ohio has a State-wide plan for scenic corridors along Federal-aid highways, but it has not made a general inventory of all the scenic areas adjacent to Federal-aid highways to be preserved by the acquisition of scenic easements. A few scenic easements have been acquired, on the basis of recommendations from each of the twelve field divisions of the highway department, but no figures as to the acreage covered or lineal highway miles protected by scenic easements are currently available. To date, nearly all scenic easements have been acquired by negotiated purchase. The highway department expects that the percentage of cases where condemnation is necessary will not be any greater than is normally experienced in acquiring right-of-way for highway purposes (i.e., less than 10 percent). The highway department expects to adhere to the before-and-after appraisal method in purchasing scenic easements, and has had no experience in offering a flat nominal payment where the landowner suffers no actual loss by reason of granting a scenic easement.

The scenic easement deed form now in use in Ohio is essentially the same as the form used in Wisconsin in the early 1950's, with the addition of "the right to enter upon the restricted area only for the purpose of inspection and enforcement of the terms of" the easement.

Oregon

Under a statute [219] authorizing the Oregon Highway Commission to "acquire by purchase, agreement, donation or by exercise of the power of eminent domain real property, or any interest therein, deemed necessary for the culture of trees and the preservation of scenic or historic places and other objects of attraction or scenic value adjacent to, along or in close proximity to State highways," the Commission in 1946 acquired an interest somewhat analogous to a scenic easement for the purpose of preserving a grove of myrtle trees along the Oregon Coast Highway.[220] But the highway commission does not propose to use any "3 percent funds" under Title III of the Highway Beautification Act of 1965 for acquisition of scenic easements.[221] This is because most scenic areas are located in forested areas, and the highway commission will have to pay for the standing timber whether it acquires a fee simple or only a scenic easement. If the department should acquire only a scenic easement, it would be in the position of paying full value for the standing timber—which would approximate the value of the fee simple—without acquiring title to the timber. Moreover, the problems of managing the standing timber under a scenic easement arrangement would be extremely difficult. On the other hand, acquisition of forest land in fee simple will allow the highway department to develop the land for public recreational use.

Rhode Island

Rhode Island had no experience with scenic easements prior to passage of the Highway Beautification Act of 1965.[222]

[214] 10 N Y 2d 151, 176 N E 2d 566 (1961).

[215] When the *New York Thruway* case was instituted, the prohibited distance was 500 ft, it was later increased to 660 ft by N Y LAWS 1960, ch 904

[216] N Y H'WAY LAW § 21 (McKinney Supp. 1967)

[217] Dept. of Commerce, REPORT ON 1967 HIGHWAY BEAUTIFICATION PROGRAM, S. Doc. No 6, 90th Cong., 1st Sess 39 (Comm. Print 1967).

[218] Information about the Ohio program is drawn from a letter dated Nov 20, 1967, from T. H Bovard, Deputy Director, Division of Right-of-Way, Ohio Dept. of Highways

[219] ORE REV. STAT § 366 345 (1965).

[220] For the terms of the easement, see Lindas, *Western Experience with Scenic View and Protection Easements,*" in HWY. RES. CIRC. NO. 23, at 10 (Apr 1966)

[221] Information about the current Oregon program is drawn from a letter dated Oct 23, 1967, from D H. Moehring, Right-of-Way Engineer, Oregon State Highway Dept

[222] Information about the Rhode Island program is drawn from a letter dated Nov. 15, 1967, from Joseph S. Garside, Chief of Right-of-Way Acquisition, Rhode Island Dept. of Public Works, Div. of Roads and Bridges.

Enabling legislation was passed in 1966, and an inventory of all Federal-aid highways was made for the estimate required by the Highway Beautification Act of 1965. The Rhode Island highway agency now believes, however, that this inventory is inadequate and plans a re-study of the scenic corridor potential of the State. The current planned program calls for acquisition of scenic easements covering some 362 acres, but no scenic easements have been acquired as yet. The total amount of Federal funds so far obligated to Rhode Island for scenic enhancement pursuant to Title III of the Highway Beautification Act of 1965 is $582,506, of which only $32,000 will be used for scenic easement acquisition under the current plans. It is expected that most scenic easements will have to be acquired by condemnation because public feeling in Rhode Island "is such that rural land owners are seldom willing to part with any land for reasons of beautification." In addition, the funds allocated to Rhode Island are so small as to make it difficult for the highway agency to negotiate on a solid footing.

Texas

The Texas Highway Department has received an allocation of slightly more than $6,570,000 to date under the Highway Beautification Act of 1965, but it is doubtful that any appreciable sum will be used for scenic easement acquisition.[223] No inventory of scenic locations has been prepared as no determination has been made as to what the criteria therefor should be. Consequently, no funds have been expended to date for the acquisition of scenic easements. Scenic easements covering eleven parcels totaling 98.54 acres have been acquired by gift along some 4.3 miles of Ranch Road 1, which is bounded on one side by President Johnson's ranch and on the other side by an area under development by the Texas Parks and Wildlife Department as the Lyndon B. Johnson State Park.

West Virginia

In West Virginia, the Turnpike Commission acquired scenic areas by purchase in connection with construction of the West Virginia Turnpike in the early 1950's, but it acquired either a complete simple estate or a fee simple in the surface of the land.[224] This procedure was followed because it was determined that acquisition of the complete fee or fee in the surface would ordinarily cost no more than acquisition of a scenic easement. Prior legislation gave the State Road Commission sufficient authority to acquire scenic easements by purchase along Federal-aid roads, and a 1967 statute removes any possible question concerning the right to acquire such easements by condemnation. But the State Road Commission plans to acquire most of its scenic strips by purchase or condemnation of the entire surface interest rather than merely a scenic easement. This decision is based on the same factors as the similar decision by the Turnpike Commission in the 1950's. The scenic strips acquired to date have generally been long, narrow areas between highways and adjacent streams, areas of woodland, and areas with particularly spectacular mountain or valley views. To date, all scenic strips have been acquired by negotiated purchase.

The West Virginia highway agency does recognize that there are some scenic areas of a pastoral character where the existing agricultural and residential land uses can be preserved by acquisition of scenic easements. These areas will be subject to individual consideration and scenic easements and scenic easement restrictions to be imposed will be specifically tailored to fit the individual case. Standard scenic easement forms will not be used.

Illinois

Illinois had not had any experience with scenic easements prior to passage of the Highway Beautification Act of 1965.[225] After the passage of that Act, approximately $6 million of Federal funds were obligated for scenic enhancement in Illinois pursuant to Title III. Of this amount, about $750,000 has been allocated for scenic easement acquisition. At the inception of the Illinois scenic easement acquisition program, each of the ten highway districts selected a number of sites for scenic easement acquisition, dispersed rather widely over the entire State. Currently, however, the question of location is under reconsideration. Present thinking is that the highway agency should acquire scenic easements along both sides of the highway for substantial distances in the most scenic areas of Illinois. If this approach is adopted, it may result in acquisition of scenic easements along highway stretches of 15 miles or more adjacent to rivers or extending through rolling and hilly areas which offer a panoramic view.

To date, the Illinois highway agency has acquired only three scenic easements, none of which exceed ¼ mile in length. The total amount expended for these scenic easements, all acquired by negotiated purchase, is about $61,000. Scenic easement restrictions are designed to preserve scenic beauty and to prevent changes in use of the land. The highway agency obtains the right to enter the land for the purpose of clearing brush, opening views, removing dead trees, etc. A number of different scenic easement deed forms have been prepared, designed to deal with different situations (e.g., a woodland scenic easement, a cropland scenic easement, and a grazing land scenic easement). The restrictions are quite extensive in all the deed forms.

North Dakota

North Dakota had no scenic easement program prior to enactment of the Highway Beautification Act of 1965.[226] Since then, North Dakota has prepared an inventory of scenic areas, the criteria for selection being in accordance

[223] Information about the Texas program is drawn from a letter dated Nov 1, 1967, from A. H. Christian, Right-of-Way Engineer, Texas Highway Dept. It should be noted that the Texas enabling statute does not give the highway department the power to condemn for scenic acquisition.

[224] Information about the West Virginia program is drawn from letters dated May 8, 1967 and Aug. 3, 1967, from O. R. Colan, Director, Right-of-Way Division, State Road Commission of West Virginia.

[225] Information about the Illinois program is drawn from a letter dated Nov. 29, 1967, from Allen R. Austin, Engineer of Right-of-Way, Div. of Highways, Illinois Dept. of Public Works and Buildings.

[226] Information about the North Dakota program is drawn from a letter dated Nov. 30, 1967, from Robert E. King, Right-of-Way Engineer, North Dakota State Highway Dept.

with the Instruction Manual issued by the Bureau of Public Roads for preparation and submission of the 1967 estimate of the costs of carrying out the provisions of the Highway Beautification Act of 1965. The total planned program of scenic easement acquisition includes 3,147.87 acres. One scenic easement has been acquired to date, covering 152.74 acres. In addition, seven parcels have been acquired in fee simple for scenic purposes, covering a strip of 2.2 miles along Interstate Route 94. A total of $791,658 in Federal funds has been obligated for use in North Dakota in fiscal 1966 and 1967. Of this amount, $97,809.80 will be used for scenic easement acquisition.

The one scenic easement acquired so far was acquired by negotiated purchase. Of the seven parcels acquired in fee simple, three had to be condemned. In the past, in connection with right-of-way acquisition, about 7 percent of the acquisitions produce condemnation appeals and about 3 percent result in litigation. It is not expected that the percentages will run any higher in connection with scenic easement acquisition.

The North Dakota highway department plans to prepare a scenic easement deed with appropriate restrictions to fit each location where a scenic easement is to be acquired. The deed used in the one scenic easement acquisition completed to date is generally similar to the deeds used in Wisconsin in the 1950's, but contains some provisions not found in the Wisconsin scenic easement deeds or any other deeds which have come to the authors' attention.

CHAPTER THREE

LEGAL PROBLEMS IN ACQUISITION AND ENFORCEMENT

CONSTITUTIONAL AND STATUTORY PROBLEMS

Public Purpose and Public Use Requirements for Use of Eminent Domain and Expenditure of Public Funds

Although Title III of the Highway Beautification Act of 1965 [227] provides for allocation to each State of Federal funds equivalent to 3 percent of the funds apportioned to that State for Federal-aid highways for any fiscal year, to be "used for landscape and roadside development within the highway right-of-way and for acquisition of interests in and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways, . . . without being matched by the State," many States presumably will want to supplement the Federal funds available under Title III with additional funds of their own. But expenditure of State funds for other than a public purpose is generally prohibited by the State constitutions.[228] Hence, it will be important in many States (those which desire to use State funds for acquisition of scenic easements) to determine whether acquisition of scenic easements in connection with the highway beautification program involves a public purpose.

Moreover, although most scenic easements will undoubtedly be acquired by negotiated purchase, ability of the State highway agency to exercise the power of eminent domain will be absolutely necessary to the success of any scenic easement acquisition program. Without that ability, it may prove impossible to persuade many landowners to sell at a reasonable price, and in any case it will be impossible to deal with the inevitable few hold-outs. But almost all State constitutions allow the taking of private property by eminent domain only for public use,[229] and a statute authorizing the taking of private property for other than public use will violate the Fourteenth Amendment's prohibition against deprivation of property without due process of

[227] Pub Law 89-285, 89th Congress, § 301(a), amending 23 U.S. CODE § 319

[228] Some State constitutions expressly prohibit expenditure of public funds or levying of taxes for other than "public purposes." (See, e.g., ALASKA CONST. Art. IX, § 6; HAWAII CONST. Art. VI, § 6; LA. CONST. Art. IV, § 8; MO. CONST. Art. X, § 3; TEX CONST Art. VIII, § 3.) Other State constitutions prohibit either a grant of public money or a loan of the State's credit to private individuals, associations, or corporations (See, e g , ALA. CONST. Art. IV, § 94; ARIZ. CONST. Art. IX, § 7; CAL. CONST. Art. IV, § 31; COLO. CONST. Art. XI, §§ 1 and 2; DEL. CONST. Art VII, § 8; NEV. CONST. Art 8, § 9; N.J. CONST. Art. VIII, § III, para. 3; N. MEX. CONST. Art. IX, § 14; N.Y. CONST. Art. VII, § 8.) And many State constitutions simply prohibit the giving or lending of the State's credit to private individuals, associations, or corporations (See, e g., ARK CONST. Art. XVI, § 1; FLA. CONST. Art. IX, § 10, GA. CONST. Art. VII, § III, para. IV; IDAHO CONST. Art. VIII, § 1; IOWA CONST. Art VII, § 1, KY. CONST. § 177; ME. CONST. Art. IX, § 14; MD. CONST. Art. III, § 34, MINN CONST. Art. IX, § 10; MISS. CONST. Art. 14, § 258; N.J. CONST. Art. VIII, § II, para 1; OHIO CONST. Art. VIII, § 4; OKLA. CONST. Art. X, § 15; PA. CONST Art. IX, § 6; S. CAR. CONST. Art. X, § 6; TENN CONST Art. II, § 31, TEX. CONST. Art. III, § 50; UTAH CONST. Art. 6, § 31; VA. CONST. Art XIII, § 185; WASH CONST. Art. VIII, § 5, W. VA. CONST. Art. X, § 6; WIS. CONST. Art. VIII, § 3. Provisions of the latter type, merely prohibiting the giving or lending of the State's credit to private persons, have generally been construed to prohibit expenditure of public funds for any purpose which is not public in nature.

[229] Both the Federal and all but three of the State constitutions contain provisions which have been construed to protect the owner of private property from an exercise of the power of eminent domain for purposes which do not involve a public use. In some cases the State constitutions expressly forbid the taking of private property *in invitum* for private uses. In a majority of cases, the negative implication of the conventional condemnation clause—that private property shall not be taken for public use without payment of just compensation—is used to protect a property owner from a taking for private uses. Even in the three States which have no express constitutional provision as to eminent domain, it has been held that other constitutional provisions preclude the taking of private property for private use or without payment of just compensation. Moreover, most State constitutions contain a clause prohibiting the taking of property without due process of law, or some equivalent provision, and in some instances the State courts have relied upon the State due process clause in holding a taking for private use unconstitutional, either because the eminent domain clause had not then been adopted in the State in question or because the court was not satisfied with the implied prohibition contained in that clause. For a more extended discussion, with citation of authorities, see 2 Nichols, EMINENT DOMAIN § 7.1 (rev. 3d ed., 1963).

law.[230] Hence it becomes important to determine whether the taking of a scenic easement by eminent domain is a taking for public use as that term is judicially defined.

It should be clear, of course, that if the taking of a scenic easement by eminent domain meets the public use test, the expenditure of public funds to pay the landowner for the easement acquired will necessarily satisfy the public purpose test. On the other hand, however, a determination that the taking serves a public purpose does not self-evidently mean that the taking is for public use. The major difficulty in this regard arises from the fact that a scenic easement is essentially a set of land-use restrictions imposed on private property, and that the public does not acquire any affirmative use privileges in the conventional sense.

For present purposes the two most important cases on the public purpose and public use requirements are *Berman v. Parker*[231] and *Kamrowski v. State*.[232] In *Berman v. Parker*, the United States Supreme Court sustained a Congressional act authorizing urban redevelopment in the District of Columbia against constitutional attack on the ground (*inter alia*) that the statute authorized the taking by eminent domain of private property and the sale or lease thereof to other private persons for private rather than public uses. The court explained its decision in the following terms: [233]

> The power of Congress over the District of Columbia includes all the legislative powers which a State may exercise over its affairs. * * * We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. . . .
>
> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.
>
> * * *
>
> . . The concept of the public interest is broad and inclusive. . . . The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.
>
> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.

Although it is obvious that the Supreme Court in *Berman* used the term "police power" in its broadest sense, as constituting the totality of legislative power—including the power of eminent domain—rather than simply the power to regulate, many State courts have relied on the *Berman* dictum as to aesthetic values in sustaining aesthetic zoning under the police power.[234] Whether the *Berman* case really supports "aesthetic regulation" or not—it dealt, after all, with a case where the issue was whether urban renewal constituted a public purpose and public use sufficient to justify use of the eminent domain power for land acquisition—it seems clear that the case does support both the use of public funds and the use of eminent domain to acquire scenic easements, which are designed to forward aesthetic values and to make the community beautiful.

Although the *Berman* case did not—and could not—decide that the Fourteenth Amendment permits the exercise of State eminent domain powers for purposes which do not involve any use by the public in the narrow sense, or primarily for aesthetic purposes, the case did decide that the First Amendment permits this when the power of Congress is challenged.[235] And it is inconceivable that the Supreme Court will apply different standards in dealing with an attack on State scenic easement enabling legislation based on the Fourteenth Amendment. It thus seems clear that the Supreme Court will sustain State scenic easement enabling legislation as against any Fourteenth Amendment attack based on the arguments that land made subject to scenic easement restrictions will not be available for use by the public or that aesthetic purposes are not public purposes. Moreover, the *Berman* opinion is likely to be viewed as a persuasive precedent by State courts in dealing with attacks on scenic easement enabling legislation grounded upon State constitutional provisions as to public use and public purpose.

More significant even than *Berman v. Parker*, in all probability, is the recent decision of the Wisconsin Supreme Court in *Kamrowski v. State*,[236] specifically upholding the acquisition of scenic easements under the power of eminent domain, as against the contention that "public enjoyment of scenic beauty of certain land is not a public use of such land."

As the Wisconsin court pointed out in the *Kamrowski* opinion,[236]

> . . . It is . . . clear that the legislature has determined that the protection of scenic resources along highways is a public purpose, has set the policy of acquiring scenic easements along particular routes, in order to protect

[230] Clark v Nash, 198 U.S. 361, 25 S. Ct. 676, 49 L. Ed. 1085 (1905); Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 28 S. Ct. 331, 52 L. Ed. 637 (1908); Taylor v. Porter, 4 Hill 140 (N.Y. 1843). For discussion, see 1 Nichols, EMINENT DOMAIN § 4.7 (rev. 3d ed. 1964).

[231] 348 U.S. 26 (1954).

[232] 31 Wis.2d 256, 142 N.W.2d 793 (1966).

[233] 348 U.S. at 31-33.

[234] See, e.g, State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 271-72, 69 N.W.2d 217, 222 (1955).

[235] The *Berman* case clearly held that use by the public is not required; and the dictum in favor of aesthetic purposes is an extremely strong one.

[236] 31 Wis.2d at 263-66, 142 N.W.2d at 796.

such resources, and has delegated to the State Highway Commission the function of deciding the exact terms of the easements to be acquired, and of exercising the power of eminent domain to acquire them.

The concept of the scenic easement springs from the idea that there is enjoyment and recreation for the traveling public in viewing a relatively unspoiled natural landscape, and involves the judgment that in preserving existing scenic beauty as inexpensively as possible a line can reasonably be drawn between existing, or agricultural (and in these cases very limited residential) uses, and uses which have not yet commenced but involve more jarring human interference with a state of nature. We think both views can reasonably be held.

* * * * *

The learned trial judge succinctly answered plaintiff's claim that occupancy by the public is essential in order to have public use by saying that in the instant case, "the 'occupancy' is visual." The enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement, and not a mere incidental benefit from the owner's private use of the land.

* * * * *

Whatever may be the law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purposes. More importantly, however, we consider that the concept of preserving a scenic corridor along a parkway, with its emphasis upon maintaining a rural scene and preventing unsightly uses, is sufficiently definite so that the legislature may be said to have made a meaningful decision in terms of public purpose, and to have fixed a standard which sufficiently guides the Commission in performing its task.

There are two possible lines of attack on the public use issue. First, following the Wisconsin court in *Kamrowski v. State*,[232] the courts could simply hold that, "The enjoyment of the scenic beauty by the public which passes along the highway" is "a direct use by the public of the rights in land which have been taken in the form of a scenic easement." Second, the courts might rely on cases holding public use to mean simply public purpose, public benefit, or public welfare. In substance, the Supreme Court did this in *Berman v. Parker*. And even before the recent spate of cases dealing with the public use issue in the urban renewal context, many courts tended to accept the broad view that public use means only public advantage, benefit, or welfare, rather than the narrow view that public use requires the property taken by condemnation to be available for use by the public.[237] Indeed, one scholarly comment published in 1949 was entitled, "The Public Use Limitation on Eminent Domain: An Advance Requiem." [238] The commentator concluded his discussion of the public use doctrine in the State courts as follows: [239]

> The expanding social philosophy of the present century has brought in the State courts an almost complete abandonment of the "use by the public" test. Symptomatic are the housing and slum clearance cases of the last decade. In 1937, Congress enacted a housing statute which granted Federal subsidies to States which would condemn slum areas and construct homes for the use of families which could not otherwise afford them. Eminent domain was, of course, necessary to execute this program. Since, however, the dwellings for which the eminent domain power was to be employed were for the use of only those individuals who would lease them, such acquisitions could well have run afoul of the "use by the public" test. But twenty-two State courts of last resort have endorsed the takings as being constitutionally unobjectionable, following the lead of the New York Court of Appeals in *New York City Housing Authority v. Muller*. Thus the State which created the narrow doctrine of "use by the public" has taken the vanguard in its final demolition.
>
> Although the "use by the public" test continues to be raised by counsel litigating State takings, its effect is virtually nil. Emptied of its only tangible content, the doctrine of "public use" itself loses all practical significance. True, even a broad concept of "public use" implies a limitation, and many State courts still accord vocal acknowledgment to the concept. But they invariably find that the particular project under consideration is satisfactorily public in nature.

Since 1949, the many urban renewal cases have even more conclusively established, in a majority of the States, that a public use sufficient to justify the exercise of the eminent domain power can be found whenever a substantial public purpose is involved in the governmental action in question, viewed in its entirety.

Six states [240] avoided the public use issue by adopting constitutional provisions specifically authorizing urban renewal programs in which the resale of urban renewal land to private redevelopers is a characteristic feature. In at least 28 States,[241] however, the courts, without the aid of special constitutional provisions, have sustained urban renewal statutes which authorize the use of eminent domain to acquire land for urban renewal and the resale of such land to private agencies for redevelopment in accordance with a publicly approved plan, and subject to land-use restrictions designed to assure continued compliance with that plan. The courts of these 28 States have, in effect though not always in express terms, equated public use with substantial public purpose. Although most of the cases emphasize the public purpose and public use (the terms are used interchangeably) involved in clearance of slum and blighted areas,[242] some cases also recognize that resale of urban renewal project land subject to restrictions which limit its future use to publicly authorized purposes creates

[237] See 2 Nichols, EMINENT DOMAIN § 7.2[2] (rev. 3d ed. 1963) and cases cited. As the author points out, "Under this view of 'public use' it has been held that the scope of eminent domain has been made as broad as the powers under the police and tax provisions of the constitution." That, in substance, was the holding in Berman v Parker, *supra* note 231. For an early State urban renewal case which relied on prior decisions adopting the broad view, see Gohld Realty Co. v Hartford, 141 Conn. 135, 104 A.2d 365 (1954).

[238] See 2 Nichols, EMINENT DOMAIN § 7.2[1] (rev. 3d ed. 1963) and cases cited.

[239] Nichols, *supra* note 238, § 7.515161 n. 1 (incl. 1967 Supp.), cites cases from 34 States upholding urban renewal enabling acts For similar list of cases from 30 States upholding such acts, with a useful classification of the cases, see Appendix to Miller v. City of Tacoma, 61 Wash 2d 374, 378 P 2d 464 (1963).

[240] California, Georgia, Maryland, Missouri, New Jersey, and New York. See Appendix to Miller v. City of Tacoma, *supra note* 239. The Georgia constitutional amendment was a response to Housing Authority v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953), holding the urban renewal program unconstitutional.

[241] Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wisconsin. The only State that is still clearly contra is South Carolina. See Nichols, *supra* note 239.

a kind of continuing public use of the land.[243] The parallel with a scenic easement program is clear, inasmuch as the essence of a scenic easement is restriction of the use of privately-owned land to achieve a purpose declared by the legislature to be a public purpose.

The urban renewal cases actually go further than is necessary to sustain scenic easements as a public use. One of the major grounds for arguing that land acquired for urban renewal is not acquired for a public use is that most of the land will be resold for what is clearly private use. This feature of the urban renewal program is completely absent from the proposed scenic easement program.

Assuming that acquisition of scenic easements can be deemed for a public use if it is for a public purpose, the next question is whether a public purpose can be found where, admittedly, aesthetic considerations form the principal basis for scenic easement acquisition.

In the writer's opinion, there can be little doubt that in all, or almost all States, acquisition of scenic easements in connection with the highway beautification program will be held (if judicial determination is sought) to constitute a public purpose. In the first place, the adoption of Title III of the Highway Beautification Act of 1965 clearly expresses the judgment of the United States Congress that expenditure of Federal funds for (*inter alia*) acquisition of scenic easements involves expenditure for a public purpose; and the action of some 38 State legislatures in adopting enabling legislation for acquisition of scenic easements clearly expresses a similar judgment by these State legislatures. As Whyte has pointed out,[244] something serves a public purpose if the public thinks so, and this, in practice, means what the legislative body thinks the public wants and what it designates as a public purpose. Although courts do not always agree with the legislative determination, they tend to accept it if other constitutional requirements are met.[245] This is graphically illustrated by the decisions in *Berman v. Parker*[246] and *Kamrowski v. State*,[247] which were previously discussed. *Kamrowski* of course, is directly in point and holds that promotion of aesthetic values through acquisition of scenic easements satisfies the public purpose requirement.

In the second place, it seems clear that the increasing judicial acceptance of aesthetic considerations—at least in combination with other factors—as a proper basis for regulation of land use under the police power indicates the likelihood of general judicial acceptance of the preservation of scenic beauty as a public purpose.

There has been a truly prodigious amount of discussion as to whether aesthetics is a proper goal of police power regulation.[248] The original strict doctrine that property rights cannot be regulated for aesthetic purposes soon ran strongly against the felt necessities of the times, and the strict doctrine gave way to the rule that aesthetic considerations may also be taken into account in drafting police-power regulations, so long as other, non-aesthetic, considerations also provide some support for the regulations involved. As Williams has pointed out,[249] "Once this door was open, all sorts of things went right through; and in no time at all the most elaborate legal fictions began to luxuriate, as courts attempted to uphold regulations which are really aesthetic. The classic example is of course the argument in favor of regulating billboards, because after all they might blow over and hit somebody, and because immoral and terrible things might go on behind them.[250] In more recent case law, a strong trend is apparent toward increasing recognition of the aesthetic factor."[251]

The formula that aesthetic considerations may be recognized as a basis for police-power restrictions on land use, so long as other factors are also present, is still repeated in many judicial opinions, but a number of recent cases have given direct recognition to the aesthetic factor alone as a valid basis for police power regulations.[252] Of course,

---

[243] The opinion in Zurn v. City of Chicago, 389 Ill. 114, 128-29, 59 N.E.2d 18, 25 (1945) is typical.

All the State court decisions on the constitutionality of urban renewal acts authorizing the exercise of the eminent domain power have been significantly influenced by the United States Supreme Court's opinion in Berman v. Parker, discussed *supra* in text between notes 231 and 236.

[244] See, e.g., Gohld Realty Co. v. Hartford, *supra* note 237

[244] Whyte, SECURING OPEN SPACE FOR URBAN AMERICA CONSERVATION EASEMENTS 16 (Urban Land Institute Tech. Bull. 36, 1959).

[245] As Netherton and Markham have pointed out: "Within the memory of many of us the scope of 'public purpose' has increased beyond all expectation. Legislative trends in this respect have broadened to include many areas, and where the authority has been questioned, the courts have by and large upheld the constitutionality of the takings authorized by the Legislatures" Netherton and Markham, ROADSIDE DEVELOPMENT AND BEAUTIFICATION: LEGAL AUTHORITY AND METHODS, Part I, at 20-21 (Highway Research Board, 1965).

For further discussion of the changing concept of public purpose with respect to transportation, see Netherton, CONTROL OF HIGHWAY ACCESS 210-12 (1963).

[246] *Supra* note 231

[247] *Supra* note 232.

[248] See, e.g., Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning,*" 11 J. PUB. L. 260 (1962); Anderson, *Regulation of Land Use for Aesthetic Purposes,* 15 SYRACUSE L. REV. 33 (1962); Anderson, *Architectural Controls,* 12 SYRACUSE L. REV 26 (1960), Dukeminier, *Zoning for Aesthetic Objectives,* 20 LAW & CONTEMP PROB. 218 (1955); Rodda, *Accomplishment of Aesthetic Purposes Under the Police Power,* 27 SO. CAL. L. REV. 149 (1954); Sayre, *Aesthetics and Property Values. Does Zoning Promote the Public Welfare?,* 35 A.B.A.J. 4741 (1949). For examples of student work on aesthetics, see Comment, 64 COLUM. L REV. 81 (1964); Comment, 14 DEPAUL L. REV. 104 (1964); Comment, 15 SYRACUSE L. REV. 33 (1963); Comment, 32 U. CINC L. REV 367 (1963); Comment, 2 WILLAMETTE L. J. 420 (1963); Comment, 29 FORDHAM L. REV 729 (1961).

[249] Williams, *Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors,* 28-29 HIGHWAY RES. RECORD NO. 182, 1967). The discussion of police power regulation for aesthetic purposes in the text is largely drawn from the Williams paper, at pp 28-32 of HIGHWAYS AND ENVIRONMENTAL QUALITY

[250] See Thomas Cusack Co. v. Chicago, 267 Ill. 344, 108 N E 340 (1914), aff'd 242 U S. 526 (1917); St. Louis Gunning Advertisement Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), appeal dismissed 231 U.S 761 (1913).

[251] See, e.g., Murphy v. Westport, 131 Conn. 292, 295, 40 A 2d 177 (1944); Point Pleasant Beach v. Point Pleasant Pavilion, Inc., 3 N.J. Super 222, 225, 66 A.2d 40, 41 (App Div. 1949); Hankins v Rockleigh, 55 N J Super. 132, 137, 150 A 2d 63 (App. Div. 1959); Stoner McCray System v. Des Moines, 247 Iowa 1313, 1319, 78 N W 2d 843, 847 (1956), State ex rel. Saveland Park Holding Corp v. Wieland, 269 Wis. 262, 69 N.W.2d 712 (1955), cert. denied 350 U S 841, 76 S. Ct. 81, 100 L. Ed. 750 (1955); State ex rel. Civello v. New Orleans, 154 La. 271, 284-85, 97 So. 440, 33 A L.R. 260 (1923); Miami Beach v Ocean & Inland Co., 147 Fla. 480, 3 So.2d 364 (1941); Sunad, Inc. v. City of Sarasota, 122 So.2d 611 (Fla. 1960); Eskind v. Vero Beach, 159 So 2d 209 (Fla. 1963); General Outdoor Adv. Co v. Dept. of Pub. Works, 289 Mass. 149, 184-89, 193 N E. 799 (1935); Opinion of the Justices to the Senate, 333 Mass. 773, 779, 128 N.E.2d 557 (1955); Opinion of the Justices to the Senate, 333 Mass. 783, 128 N E.2d 663 (1955); Oregon City v. Hartke, 400 P.2d 255, 261 (Ore. 1965); People v. Stover, 12 N.Y.2d 467, 240 N.Y.S.2d 734 (1963).

See also United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); Santa Fe v Gamble-Skogmo, Inc., 73 N.M. 410, 416-18, 389 P.2d 13 (1964); Best v. Zoning Bd of Adjustment, 393 Pa. 106, 141 A.2d 606, 612 (1958); Lexington v. Govenar, 295 Mass. 31, 36-37, 3 N.E. 2d 19 (1936).

[252] See Point Pleasant Beach v. Point Pleasant Pavilion, Inc , Hankins v. Rochleigh, State ex rel. Saveland Park Holding Corp v. Wieland, State ex rel. Civello v. New Orleans, Miami Beach v. Ocean & Inland Co., Sunad, Inc v City of Sarasota, Eskind v. Vero Beach, General Outdoor Adv. Co. v. Dept. of Pub. Works, Oregon City. v. Hartke,

the case for aesthetic regulations is much stronger in situations where preservation of beauty plays a substantial part in the local economy—e.g., where tourism is important to the local economy.[253]

The aesthetic regulations restricting land use sustained by the courts have generally involved signs and architectural controls. The exclusion of advertising signs from all commercial as well as residential districts has been widely upheld,[254] as well as restrictions on signs along both older highways [255] and new Interstate highways,[256] and retroactive provisions requiring removal of signs after a fairly short period of amortization.[257] And the protection of historic areas by police-power regulations establishing architectural controls over changes in the exterior appearance of buildings is now well established.[258] Indeed, courts have even sustained some rather dubious ordinances imposing architectural controls on new houses in areas with no historic character whatever.[259]

All the cases supporting aesthetic zoning are based on judicial recognition of the fact that preservation or enhancement of aesthetic values is an appropriate goal of governmental action and that the use of the police power is an appropriate means for achieving the goal. Thus it seems clear that preservation or enhancement of scenic beauty through acquisition of scenic easements will be held to be a public purpose in any State where the courts have accepted aesthetic zoning as a valid exercise of the police power. And if police-power regulation is an appropriate means for achieving the governmental objective, then *a fortiori* the expenditure of public funds to acquire scenic easements is an appropriate method in cases where compensation must—or should—be paid to the landowners whose property is subjected to scenic restrictions.

Moreover, it is likely that acquisition of scenic easements will be held to involve a public purpose in many States where aesthetic zoning has not yet been held valid. The real problem with aesthetic zoning is not whether aesthetic values should be recognized as a basis for land-use regulation; it is how to define standards for aesthetic regulation so as to avoid giving too much discretion to an administrative agency.[260] Everyone will admit that there are real difficulties in defining objectively what is "beautiful." Indeed, the New Jersey court recently gave up the attempt and adopted a "lowest common denominator" approach—i.e., whatever the difficulty in defining "beauty," the police power may be used to exclude those land uses which by universal consensus are recognized as "ugly." [261] But when we shift from uncompensated regulation of land use under the police power to expenditure of public funds for acquisition of scenic easements, the problem of defining beauty becomes much less important; or, more accurately, it becomes much less important for the courts to oversee the legislative or administrative definition of beauty because the landowner will receive either satisfactory compensation through a negotiated purchase or just compensation in eminent domain proceedings. Hence, the courts are more likely to sustain a scenic easement acquisition program than a scenic zoning program.[262]

The cases directly upholding control of advertising along the highways [263] appear to provide strong support for the proposition that acquisition of scenic easements adjacent to highways is for a public purpose and designed to produce a public benefit. In some of the billboard cases aesthetic considerations are expressly recognized as a sufficient basis for regulation of billboards under the police power. In *General Outdoor Adv. Co. v. Dept. of Pub. Works*,[265] for example, the Massachusetts court said:

> Insofar as the granting or denial of permits for the location of billboards in the cases at bar has been governed by considerations of taste and fitness, the purpose has been to preserve places of natural scenic beauty and historical interest from incongruous intrusion. It is in substance exclusion of billboards and advertising devices by zoning. It is an attempt to segregate them to a certain extent in places where from the scenic or historical point of view the dominant use of land is indifferent or is the transaction of business, and to shut them out from regions where nature has afforded landscape of unusual attractiveness and where historic and other factors have created places hallowed by patriotic, literary and humanitarian associations. In view of the essential qualities of the plaintiffs' business . . . we think an administration of the rules and regulations to the end that the scenic beauty of the Commonwealth may be protected and preserved violates no constitutional right of the plaintiffs. It is, in our opinion, within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the Commonwealth by nature in conjunction with the promotion of safety of travel on the public ways and the protection

and People v. Stover—all *supra* note 251. See also dissenting opinion of Hall, J., in United Advertising Corp. v. Metuchen, *supra* note 251. In all these cases, of course, the courts also found other factors—usually economic—which justified the imposition of aesthetic zoning.

[253] See, e.g., Murphy v. Westport, Miami Beach v Ocean & Inland Co., Sunad, Inc. v. City of Sarasota, Eskind v. Vero Beach, Opinion of the Justices to the Senate (2 cases) all *supra* note 251

[254] See, e g., Murphy v. Westport, 131 Conn. 292, 40 A.2d 177 (1944); United Advertising Corp. v. Raritan, 11 N J 144, 93 A 2d 362 (1952); United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

[255] See, e g., Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A 2d 527 (1943); General Outdoor Adv. Co. v. Dept. of Pub. Works, 289 Mass. 149, 184-89, 193 N.E. 799 (1935).

[256] See, e.g., New York State Thruway Authority v. Ashley Motor Court, 10 N.Y.2d 151, 176 N.E.2d 566 (1966); Opinion of the Justices, 103 N.H. 268, 169 A 2d 762 (1961), Moore v. Ward, 377 S.W 2d 881 (Ky. 1964); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

[257] See, e.g , Grant v. Baltimore, 212 Md. 301, 129 A 2d 363 (1957). But see Stoner McCray System v. Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956). Compare Santa Barbara v. Modern Neon Sign Co., 189 Cal. App.2d 188, 11 Cal. Reptr. 57 (1961), with National Advertising Co. v. Monterey County, 211 Cal. App.2d 375, 27 Cal. Reptr. 136 (1962).

[258] See, e.g., New Orleans v. Pergament, 198 La. 852, 5 So 2d 129 (1941) (Vieux Carre); New Orleans v. Levy, 223 La. 14, 64 So 2d 798 (1953) (Vieux Carre); Vieux Carre Property Owners and Associates, Inc. v. New Orleans, 246 La. 788, 167 So.2d 367 (1964); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E 2d 557 (1955) (Nantucket and Siasconset); Opinion of the Justices to the Senate, *id.* 783, 128 N E.2d 563 (1955) (Beacon Hill); Deering ex rel Bittenbender v. Tibbetts, 202 A.2d 232 (N.H. 1964), Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964), Manhattan Club v Landmarks Preservation Commission, 51 Misc.2d 556, 273 N.Y S 2d 848 (Sup. Ct 1966). See also Hankins v. Rockleigh, 55 N.J. Super. 132, 150 A 2d 63 (1959); Hayes v. Smith, 167 A.2d 546 (R.I. 1961)

[259] See State ex rel. Saveland Park Holding Corp v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), cert. den. 350 U S. 841 (1955); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E 2d 74 (1963). But compare West Palm Beach v. State ex rel Duffey, 158 Fla. 863, 30 So.2d 491 (1947). Williams, *supra* note 249, at 30, characterizes these ordinances as "directed against houses which look alike, or look different—or even both at once!"

[260] See Williams, *supra* note 249, at 28.

[261] See United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A 2d 447 (1964).

[262] See quotation from opinion in Kamrowski v. State, in text *supra* at note 236.

[263] *Supra* notes 254 through 256

> of travellers from the intrusion of unwelcome advertising. * * *
>
> Even if the rules and regulations of billboards and other advertising devices did not rest upon the safety of public travel and the promotion of the comfort of travellers by exclusion of undesired intrusion, we think that the preservation of scenic beauty and places of historical interest would be a sufficient support for them. * * *

More broadly, scenic easement acquisition can be viewed as fulfilling important public purposes with respect to safety, recreation, conservation, and the promotion of tourism.

Prohibition of billboards by means of the police power has sometimes been upheld, at least in part, on the theory that it protects the safety of the traveling public on the highways.[264] Where this theory is accepted, it is clear that acquisition of scenic easements which include a prohibition of billboards on the land adjacent to the highway can be viewed, in part, as a public safety measure.

Scenic easement acquisition can also be viewed as a significant means of providing for public recreation, a public purpose recognized by the courts in many cases upholding land acquisition for public parks.[265] Driving for pleasure is America's most important outdoor recreational activity. More Americans engage in it more often than in swimming, boating, hunting, fishing, or any of the other sports, and it accounts for forty-two percent of all outdoor recreation.[266] Moreover, about one-third of all highway travel in the United States is for recreational, vacation, and social purposes.[267] Public Health Service scientists who have studied the relationship between recreational travel and mental health believe that such travel contributes to mental health in at least two significant ways: (a) it brings release from tensions generated by job pressures and general urban living stresses, and (b) it confers positive benefits through enjoyment of the natural beauty of streams, lakes, forests, mountains, and other scenic resources.[268] Hence, it seems clear that enhancement of the recreational benefits of highway travel through a program of scenic easement acquisition constitutes a public purpose.

The cases upholding land acquisition for public park purposes (especially the earlier ones) often emphasize the public health benefits arising from the creation of parks,[269] but in many of these cases the courts have also explicitly recognized the public benefits flowing from aesthetic considerations. For example, in *Attorney General v. Williams*,[270] the Massachusetts court said:

> The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature, in the varied forms which the change of seasons brings. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and, in the highest sense, educational. If wisely planned and properly cared for they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. Their aesthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not always justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated.

And in *Rindge Co. v. Los Angeles*,[265] the United States Supreme Court sustained a taking for highway purposes with the following significant statement:

> These roads, especially the main road, through its connection with the public road coming along the shore from Santa Monica, will afford a highway for persons desiring to travel along the shore to the county line, with a view of the ocean on the one side, and of the mountain range on the other, constituting, as stated by the trial judge, a scenic highway of great beauty. Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. Thus, the condemnation of lands for public parks is now universally recognized as a taking for public use. . . . A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery. * * * Manifestly, in these days of general public travel in motor cars for health and recreation, such a highway as this, extending for more than twenty miles along the shores of the Pacific at the base of a range of mountains, must be regarded as a public use.

Conservation, as an objective of the scenic easement program, obviously overlaps recreational and aesthetic objectives. Yet it can be viewed, to some extent, at least, as a separate though related objective. As the recent report by the U.S. Department of Commerce to the President's Council on Recreation and Natural Beauty has pointed out,[270]

> Each scenic corridor could become a model of resource conservation. Appropriate exhibits, signs, and other informational devices can advance conservation education and arouse deeper public awareness of natural and aesthetic values. Highway builders and conservationists have a common ground. . . .

Although this was said in connection with a proposal for a national system of scenic roads and parkways, it is almost equally applicable to the existing program of scenic enhancement of Federal-aid highways under Title III of

[264] See, e.g., discussion in General Outdoor Adv. Co. v. Dept. of Pub. Works, *supra* note 255, at 180-82, 193 N.E. at 813-14. But cf. Schulman v. People, 10 N.Y.2d 249, 176 N.E.2d 817 (1961).

[265] See, e.g., Attorney General v. Williams, 174 Mass. 476, 479, 55 N.E. 77, 78 (1899), *aff'd sub nom.* Williams v. Parker, 188 U.S. 491 (1903); Matter of Commissioners of Central Park, 63 Barb. 282 (N.Y. Sup. Ct. 1872) (involving Riverside Park); Brunn v. Kansas City, 216 Mo. 108, 116, 115 S.W. 446, 449 (1908); Higginson v. Treasurer of Boston, 212 Mass. 583, 590, 99 N.E. 523, 527 (1912); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707-08 (1923); Matter of Mayor of New York, 99 N.Y. 570, 585, 2 N.E. 642 (1885); Lexington v. Kentucky Chautauqua Assembly, 114 Ky. 781, 785, 71 S.W. 943, 944 (1903).

[266] U.S. Dept. of Commerce, A PROPOSED PROGRAM FOR SCENIC ROADS AND PARKWAYS 1 (Prepared for the President's Council on Recreation and Natural Beauty, 1966).

[267] *Id.* 33.

[268] *Id.* 37.

[269] See, e.g., Owensboro v. Commonwealth *ex rel.* Stone, 105 Ky. 344, 348-49, 49 S.W. 320, 321 (1899); Kansas City v. Ward, 134 Mo. 172, 177, 35 S.W. 600, 601 (1896); Lloyd Harbor v. Huntingdon, 4 N.Y.2d 182, 190-91, 149 N.E.2d 851, 854 (1958) (holding that a village could not exclude a town beach by zoning).

[270] *Supra* note 266, at 39.

the Highway Beautification Act of 1965—especially where the Federal-aid system includes primary and secondary roads which can be converted into scenic roads of the type envisioned in the proposal of the President's Council. There is, of course, no doubt that conservation serves a significant public purpose.[271]

Finally, it should be recognized that tourism is big business in the United States today, and that promotion of tourism through scenic enhancement of Federal-aid highways will produce tangible economic benefits for the public at large. As the recent report of the U.S. Department of Commerce to the President's Council on Recreation and Natural Beauty has pointed out,[272]

> Florida, Nevada, New Jersey, and the District of Columbia rate tourism as their most important industry. More than half of the States consider it one of their three major sources of revenue. The magnitude of the recreation travel business is indicated by the fact that the combined annual payrolls of twelve of the Nation's largest companies are equal to only one-half of annual tourist expenditures.
>
> * * * * *
>
> Each year Americans take more than 100 million automobile trips involving an overnight stay or a visit at least 100 miles away. Less than a third of the trips are for business purposes.
>
> National parks, monuments, and national forests attract about 245 million recreational visits each year. State park systems alone account for an additional 300 million visits each year.
>
> Travelers and tourists in the United States spend about $30 billion yearly. The U.S. Chamber of Commerce estimates that cash returns from 24 tourists per day benefit a community as much as a factory with an annual payroll of $100,000.
>
> * * * * *
>
> Tourism forecasts indicate even greater economic stimulus from a national program of scenic roads and parkways. Studies by the Federal Government, States, universities, and others indicate that improved highways, and especially scenic roads and parkways, can benefit the development of many more existing and potential resort and recreational areas.

Again, it should be noted, what was said with respect to the proposed national system of scenic roads and parkways is almost equally applicable to the existing program of scenic enhancement of Federal-aid highways under Title III of the Highway Beautification Act of 1965. Many of the primary and secondary roads in the present Federal-aid system would qualify for the proposed national system of scenic roads and parkways, inasmuch as about 42 percent of the proposed system is already part of the primary system and about 37 percent is already part of the secondary system.[273] And even though highways in the Interstate System would not become part of the proposed system of scenic roads and parkways, scenic enhancement along the Interstate System will nevertheless add appreciably to their recreational value, and thus contribute to the increase in tourism forecast by the President's Council. Scenic easements, it is clear, can contribute significantly to the scenic enhancement of the Interstate System, as well as the primary, secondary and other roads that would make up the proposed national system of scenic roads and parkways.

State Constitutional Anti-Diversion Provisions

Assuming that acquisition of scenic easements outside the right-of-way is considered a taking of property for a public use under eminent domain doctrine, and that expenditure of public funds is justified by the public purpose involved, there remains a question in many States as to whether it is lawful for the State to pay for the acquisition of scenic easements with dedicated highway funds.[274]

Some 28 States have constitutional provisions which earmark certain State revenues—typically the motor fuel excise taxes and the vehicle registration fees—for specified highway purposes.[275] These provisions are generally known as the "anti-diversion amendments" and have served the purpose of preventing the highway user taxes from flowing into the States' general funds and later being appropriated by the legislatures for the support of governmental functions and programs which have nothing to do with highways and confer no benefit on the people who pay these taxes as highway users. These amendments, in short, are based on the idea that if a particular class of people is taxed in connection with a particular activity, the proceeds of such taxes should be used in a way that will return some benefit to this class.

In States like California, Colorado, Missouri, and South Dakota, where the scenic easement enabling legislation precludes the use of any State funds at all for acquisition of scenic easements,[276] or permits use of State funds for this purpose only where the State will be fully reimbursed by the Federal government under Title III

[271] Whyte discusses the public purposes involved in a program of conservation easement acquisition (in part) in the following terms:

"In practice, a great proportion of the key areas that most people would agree should be conserved are likely to be stream valleys. Many people would not be thinking of the drainage and flood control aspect—but of the fishing and the swimming in the streams, or the beauty of the meadows, or the excellence of the farming, the contoured slopes that seem to go so well with the stream valleys.

"Yet, for the reasons these valleys are beautiful, they are tremendously useful. Like a great sponge, their flood plains temper the flow of the water downstream; the good soil practices of the farmers help keep down the silt that can be such a problem for communities and industries further downstream; because they have not been covered with asphalt, their runoff is much less; and when there is heavy rainfall, the streams and the creeks that flow into a natural storm sewer system are far better than anything constructed by man" Whyte, *supra* note 244, at 16-17.

[272] *Supra* note 266, at 34-35.

[273] *Supra* note 266, at 8 This assumes the recommended minimum scenic roads program of 54,411 miles. Of this mileage, about 79 percent, or 42,876 miles, would be on existing roads to be improved, and the remaining 21 percent, or 11,535 miles, would be built on new locations. Most of the routes (about 95 percent) in the recommended program are in rural areas, but all would be within reasonable driving time of the population centers of the nation See *id* at 141.

[274] The material dealing with this topic is based on an unpublished speech by Ross D. Netherton, Counsel for Legal Research, Highway Research Board, at a seminar held by the Nevada Department of Highways in the fall of 1966.

[275] The provisions are as follows: ALA CONST amendment 93; ARIZ CONST art. 9, § 14; CAL CONST art. 26; COLO. CONST. art. 10, GA. CONST. art. 7, § 9; IDAHO CONST. art. 7, § 17; IOWA CONST art. 7, § 8; KAN. CONST. art 11, § 10; KY CONST. § 230, LA. CONST art. 6, § 23; ME. CONST. art 9, § 11; MASS. CONST. art 78; MICH CONST. art. 9, § 9; MINN. CONST. art. 16, §§ 5, 9, 10; MO CONST art. 4 § 30(b), MONT. CONST art. 12 § 1(b); NEV. CONST. art. 9, § 5; N H CONST. part II, art 6a, N D. CONST. art 56, § 1; OHIO CONST. art. 12, § 5a; ORE CONST. art. 9, § 3; PA. CONST. art. 9, § 18; S D. CONST. art. 9, § 8; TEX. CONST. art. 8, § 7-a; UTAH CONST art. 13, § 13; WASH CONST. art. 2, § 40; W. VA. CONST. art. 6, § 52; WYO. CONST. art 15, § 16.

[276] See, e.g , MO. ANN STAT. § 226 780 (Supp. 1966).

of the Highway Beautification Act of 1965,[277] the effect of an anti-diversion provision in the State constitution may not be very important.[278] In States where the scenic easement enabling legislation does not expressly preclude or limit the use of State funds for scenic easement acquisition, however, the proper interpretation of an "anti-diversion" provision will often be of crucial importance if the State wishes to spend State funds on the scenic easement program in addition to the Federal funds available under Title III of the Highway Beautification Act of 1965.

Although the forces that were originally mobilized in the 1920's to promote the State anti-diversion amendments were, and still are, energetic in their efforts, they were not able to secure uniformity of language in the amendments that were adopted. As a result, each State legislature which faces the problem of squaring its scenic easement program with its State constitution must look carefully to the wording of the anti-diversion amendment in its own constitution. Some indication of the extent of variation in the language of these amendments may be gathered from the tabulation given in Appendix B.

All the amendments, naturally, are chiefly concerned with directing highway user funds into road construction and maintenance. The most liberal amendments simply specify highway purposes (as in Kansas and Minnesota) or highway purposes as defined by law (as in Michigan) or the creation of a special highway fund (as in Louisiana) or add other statutory purposes to the list of specified highway purposes (as in Ohio). In all these States, it seems clear that the legislature, by designating the acquisition of scenic easements as a highway purpose, can make available dedicated highway funds for acquisition of scenic easements if it wishes. Minnesota has already taken this step by including in its scenic easement enabling legislation a provision that all costs of acquisition of such rights shall be deemed necessary for a highway purpose.[279] New Mexico has a similar provision in its scenic easement enabling legislation.[280]

In many States, the anti-diversion amendments prescribe in substance that construction, reconstruction, maintenance and repair are the only permissible uses of highway user funds.[281] Even under such amendments, however, it would seem that highway user funds could be properly expended for acquisition of scenic easements if the scenic easement enabling legislation expressly states that such acquisition may be deemed to constitute "a part of the establishment, construction, or reconstruction of State highways on the Federal-aid Highway System" (as in Pennsylvania)[282] or that "[1] and, or any interest therein, acquired under . . . this act is hereby declared to be part of the adjacent or nearest highway" (as in Utah).[283]

A few States have other general language in their anti-diversion amendments which offers the possibility of interpretation to permit use of highway user funds for scenic easement acquisition. For example, the California and Utah provisions speak of "construction, *improvement,* repair and maintenance of highways."[284] Georgia's provision refers to "all activities incident to providing and maintaining an adequate system of public highways." And Washington's provision speaks of "construction, reconstruction, repair and *betterment* of public highways." Of all the amendments, however, only that of Oregon specifically authorizes expenditure of highway user funds for "development, maintenance, care and use of parks, recreational, *scenic* or other historic places."

Where the anti-diversion amendments expressly limit expenditure to construction, reconstruction, maintenance and repair, highway agency lawyers and right-of-way agents going out to acquire scenic easements may well feel that in view of the restrictive language of these amendments they are "buying a lawsuit" at every step of the way, especially if the scenic easement statute does not expressly make scenic easement acquisition a part of highway construction or reconstruction.

Up until the late 1950's there was practically no case-law interpreting the anti-diversion amendments. In recent years, however, as a result of the enactment by Congress in 1956 of legislation[285] authorizing the use of Federal-aid highway funds to reimburse States for 90 percent of the cost of relocating utility fixtures from the highway right-of-way, a series of cases has dealt with the anti-diversion principle. Following the authorization by Congress to use Federal-aid funds to reimburse for utility relocation costs, there was a rash of State legislation designed to liberalize existing State limitations on payments of this type. Following the enactment of this State legislation, a number of suits were brought to test its constitutionality. Decisions on constitutional issue have been rendered in the highest courts of Delaware, Idaho, Maine, Minnesota, Montana, New Hampshire, New Mexico, North Dakota, Tennessee, Texas, Utah, and Washington.

In some of the States just mentioned[286] the constitution contains no anti-diversion provision and the constitutional issue with regard to relocation payments was necessarily decided without reference thereto. In those States with a constitutional anti-diversion provision where the constitutionality of utility relocation payments has been litigated, the decisions are divided, but a majority of the decisions has sustained the legislation authorizing relocation payments and has expressly held that such payments

[277] See, e.g., CAL. STS. & H'WAYS CODE § 895 (Deering Supp. 1966), COLO. REV. STAT. ANN. § 120-3-10 (1963), as amended by Colo. Acts 1966, ch. 38, p 178.

[278] Where the statute permits use of State funds only to the extent that they are reimbursable by the Federal government, an anti-diversion provision in the State constitution may still create difficulties if the State's general funds are insufficient to cover the initial costs of scenic easement acquisition.

[279] See MINN. STAT. ANN. § 173.05 (Supp. 1966)

[280] See N.M. STAT. ANN. § 55-11-14 (Supp. 1967), which says. "Acquisition of any land under this section is for highway purposes."

[281] This is the case in Alabama, Arizona, Colorado, Idaho, Iowa, Kentucky, Maine, Massachusetts, Montana, Nevada, New Hampshire, North Dakota, Pennsylvania, South Dakota, Texas, West Virginia, and Wyoming

[282] See PA. STAT. ANN. § 670-413.1 (Supp. 1966).

[283] See UTAH CODE ANN. §§ 27-12-109.1 to 27-12-109.3 (Supp. 1967).

[284] The Missouri provision authorizes use of dedicated highway funds to complete, widen or *improve* the State highway system, and also for "such *other purposes* and contingencies relating . to the construction and maintenance of such highways . . . as the commission may deem necessary and proper." But, as indicated in the text *supra* at note 277, the Missouri scenic easement legislation precludes the use of any State funds at all for acquisition of scenic easements

[285] Federal-Aid Highway Act of 1956, § 111, 23 U.S.C. § 123 (1964).

[286] Delaware, New Mexico, and Tennessee.

do not violate the constitutional anti-diversion provisions. There are decisions to this effect in Minnesota, Montana, New Hampshire, North Dakota, and Texas, although the rationale is not precisely the same in each case.

In *Minneapolis Gas Co. v. Zimmerman*,[287] the Minnesota court said (*inter alia*): [288]

> In view of the fact that the transmission of utility services is one of the general and primary purposes for which highways are designed, it would be unrealistic to construe the broad language of Minn. Const. art. 16, §§ 2 and 6 [anti-diversion provisions], so narrowly as to prohibit the legislature from authorizing the use of highway funds for the non-betterment location of utility services as a proper cost of highway construction, reconstruction, improvement, and maintenance. It would be unreasonable to hold that the proceeds of the highway fund may not be expended for whatever is reasonably necessary to the complete accomplishment of all the basic purposes for which a highway exists.
>
> * * * * *
>
> Although we have not heretofore had occasion to consider the relocation cost issue, our conclusion that article 16 is to be given a broad, and not a strict, construction which justifies the payment of such costs out of the highway fund is justified by a number of prior decisions in which we have approved the payment of expenses which were reasonably related to the construction and maintenance of highways. . . .

In *Jones v. Burns*,[289] the Montana court said (*inter alia*): [290]

> Montana's anti-diversion amendment does not define the words "construction, reconstruction, maintenance and repair of public highways, roads, streets, and bridges," and to give these words the narrow interpretation contended for by the plaintiff would seriously curtail and limit the Highway Commission in its activities. For example, if the relocation of utility facilities is declared not to be a "cost of construction" within the meaning of the anti-diversion amendment, the Highway Commission could not spend highway funds covered by that amendment to relocate facilities located on fee rights-of-way. Since many utility facilities in Montana are located on utility owned rights-of-way, and since in an area where they must be moved in order to build new Federal highways, admittedly the State would have to reimburse the utility, it would be necessary for the Highway Commission to secure funds from sources other than those mentioned in the anti-diversion amendment. This would seriously delay any major highway project.
>
> * * * * *
>
> The legislative assembly of Montana has expressly declared that the definition of "cost of highway construction" is to include "cost of relocating utility facilities."
>
> This is a reasonable definition, one adopted by the Congress of the United States and approved by the majority of courts of last resort in States where the matter has arisen, and therefore this court will not interfere.

In *Opinion of the Justices*,[291] the New Hampshire court explained its decision on the anti-diversion issue as follows: [292]

> In view of the plenary power of the State over its highways, it may allow the location therein of any facilities not inconsistent with the superior rights of the traveling public. . . . As science develops highways may be used for any improved methods for the transportation of persons, property, intelligence or other means to promote sanitation, public health and welfare. Such use of the public highways constitutes a proper highway purpose even though it may be new and is subordinate to the primary use of the highways for the traveling public. . . . The relocation of utility facilities is an integral part of highway improvements. The Legislature, if it chooses to do so, may validly declare that the relocation of utility facilities is part of the cost of highway relocation and reconstruction and shall be paid out of highway funds.

In *Northwestern Bell Telephone Co. v. Wentz*,[293] the North Dakota court, in discussing the anti-diversion issue, said: [294]

> Article 56 of the Amendments to the Constitution speaks clearly by its language. The purpose of the amendment was to prevent any use of gasoline taxes for other than highway purposes and the payment of obligations incurred therefor. . . . Any portion of the money in this constitutional fund may be used for the payment of obligations. . . . The legislature created an obligation upon the fund to reimburse utilities for their non-betterment costs in relocating facilities along and across the Interstate System. We need not determine whether this constitutes a donation, because if it is, it is an onerous one. It is made subject to the charge that the utility remove, relocate or change its facilities to accommodate the construction of the highway. The expenditure from the fund is made necessary by the commissioner's order to remove, relocate or change utility facilities to accommodate construction. Article 56 of the Amendments to the Constitution does not define or restrict the meaning of "construction" in any way. We believe it embraces "everything appropriately connected with, and necessarily incidental to, complete accomplishment of the general purpose for which the fund exists."

In *State v. Austin-Dallas*,[295] the Texas court used similar language, as follows: [296]

> . . . Article VIII, Section 7-2 [the anti-diversion amendment], does not define or restrict the meaning of "constructing" in any way. The term obviously does not embrace merely the clearing and grading of the road bed and the pouring of concrete, but includes "everything appropriately connected with, and necessarily incidental to, the complete accomplishment" of the general purpose for which the fund exists. . . .
>
> The constitutionality of a statute must be sustained by the courts unless its invalidity is apparent beyond a reasonable doubt. . . . It has already been pointed out that the use of public ways for the installation of utility lines and mains is one of the proper and common purposes to which roads and streets are necessarily devoted, although their principal and primary use is for travel and transportation. The relocation of such facilities is made necessary by and is an integral part of the highway improvement program. If the Legislature determines, as it has in this instance, that the non-betterment cost thereof should be paid by the State, it is our opinion that the same is properly attributable to highway construction within the meaning of the Constitution.

In *State Road Comm'n of Utah v. Utah Power & Light Co.*,[297] the Utah court sustained the statute authorizing

[287] 253 Minn. 164, 91 N.W.2d 642 (1958).
[288] *Id.* at 173, 91 N.W.2d at 649.
[289] 138 Mont. 268, 357 P.2d 22 (1960).
[290] *Id.* at 286, 357 P.2d at 31.
[291] 101 N H. 527, 132 A.2d 613 (1957).
[292] *Id.* at 530, 132 A.2d at 615.
[293] 103 N.W.2d 245 (N.D. 1960)
[294] *Id.* at 255
[295] 160 Tex. 348, 331 S W 2d 737 (1960).
[296] *Id.* at 361, 331 S.W.2d at 746.
[297] 10 Utah 2d 333, 353 P.2d 171 (1960).

utility relocation payments without discussion of the anti-diversion issue, although the Utah constitution contains an anti-diversion provision. Because the effect of the decision is to establish that such payments are for highway purposes, it can be argued however, that the decision really supports the view that such payments do not violate the constitutional anti-diversion provision.

In Idaho and Washington, legislation authorizing utility relocation payments has been held invalid on the ground that it violated both the constitutional prohibition against giving or loaning the State's credit to a private corporation and the anti-diversion provision. In *Washington State Highway Comm'n v. Pacific N.W. Bell Tel Co.*,[298] the Washington court construed the anti-diversion amendment's words "exclusively for highway purposes" as preventing payment of utility relocation costs from the dedicated highway fund, noting that such payment would substantially decrease funds reserved for safety, administration and operation of the highway system. In *State v. Idaho Power Company*,[299] the Idaho court relied upon and quoted from the advisory opinion of the Maine court in *Opinion of the Justices*,[300] as follows: [301]

> In our opinion the relocation of utility facility is not to be construed as construction or reconstruction of a highway within the meaning of . . . [the anti-diversion provision] of the Constitution.
>
> We do not commonly consider that a power company in erecting a pole line or a water district in laying a pipe in a highway is constructing a highway. To an even lesser degree would we consider the construction of a pole line or a water pipe across country to be the construction or reconstruction of a highway, although the reason for the relocation was occasioned solely by changes in the highway.
>
> The language of the Constitution should not . . . be extended beyond its plain and ordinary meaning.

It should be noted, however, that the Maine court was of the opinion that payment of utility relocation costs out of the State's general fund would be constitutional.

An issue more directly parallel to the question of whether dedicated highway funds can be used for scenic easement acquisition in States with constitutional anti-diversion provisions was recently raised in North and South Dakota. In 1963 the Attorneys General of these States were asked to render opinions on the constitutionality of legislative bills then pending which would have authorized the State highway departments to enter into agreements with the U.S. Secretary of Commerce under the 1958 Federal-aid legislation providing for billboard control along the Interstate System.

South Dakota's Attorney General was of the opinion [302] that use of dedicated highway funds to purchase outdoor advertising rights would violate the State constitutional provision which requires that such funds be spent "exclusively for the maintenance, construction and supervision" of highways and bridges. In passing, he distinguished the use of highway funds to pay for relocation of utilities from the highway right-of-way by noting that no vested property rights were disturbed by relocation and that it was merely incident to actual highway construction.

Shortly after the South Dakota opinion was issued, the Attorney General of North Dakota issued his opinion.[303] He noted that North Dakota's constitution limits the use of dedicated highway funds to "construction, reconstruction, repair and maintenance of public highways"—a limitation which he felt was even tighter than South Dakota's, which mentions "supervision." He also noted North Dakota's legislation providing for payment of utility relocation costs and cited the North Dakota court's approval of that law on the ground (stated above) that " 'construction' embraces everything appropriately connected with and necessarily incidental to the complete accomplishment of the general purpose for which the fund exists." Despite this however, the Attorney General found no authority for regarding the acquisition of outdoor advertising rights, either in the form of additional right-of-way or rights in land adjacent to the right-of-way, as part of highway construction. Instead, he viewed control of roadside advertising as an independent project and expressed serious doubts that dedicated highway funds could lawfully be spent for this purpose.

Two years later, however, the Attorney General of North Dakota was compelled to argue in support of the State's program of billboard control through purchase of advertising rights and, in *Newman v. Hjelle*,[304] succeeded in convincing the court that this practice should be sustained. The issue of anti-diversion was squarely raised in *Newman* by plaintiff's attempt to enjoin the State's use of revenue from motor fuel taxes and vehicle license and registration fees for the purchase of advertising rights. The opinion of the court carefully traced the history of the North Dakota anti-diversion amendment, and concluded by saying: [305]

> It is clear that the purpose of the amendment was to prevent any use of the earmarked revenues for anything but highway purposes and not to restrict the terms of the amendment by a narrow construction of the purpose for which the revenue may be used within the area designated.
>
> . . . In view of this history and statutes in effect at the time the constitutional amendment was voted upon, it is clear that the people intended . . . to make the scope broad enough to include such matters as were considered within the area of the powers of the State highway department, as those powers may exist in relation to public highways. We find this included the right to control advertising signs, billboards, and other signs erected on the right-of-way, as well as on lands abutting thereon, if such control was provided by law.

Although the case law dealing with the anti-diversion amendments is certainly not conclusive, on the whole it gives substantial reason to believe that these amendments will generally not be construed so narrowly as to preclude the use of dedicated highway funds for the purchase of scenic easements.

[298] 59 Wash 2d 216, 367 P.2d 605 (1961).
[299] 81 Idaho 487, 346 P.2d 596 (1959).
[300] 152 Me. 449, 132 A.2d 440 (1957).
[301] *Id.* at 455, 132 A.2d at 443.
[302] S.D. O.A.G 1963-64, p. 34 (Feb 18, 1963).
[303] N.D. O.A.G. 1962-64, p. 148 (Mar. 16, 1963).
[304] 133 N.W.2d 549 (N.D. 1965).
[305] *Id.* at 557-58.

Equal Protection of the Laws and Delegation of Power

Any program of scenic easement acquisition along highways may run into a two-pronged attack on the ground that it denies the "equal protection of the laws" guaranteed by the 14th Amendment. An example of the first type of equal protection attack, and the Wisconsin court's answer thereto, may be found in the *Kamrowski* opinion, as follows: [306]

> Plaintiffs assert that scenic easements are being taken from owners of agricultural lands along the Great River Road, but for one reason or another will not be taken from the owners of all lands abutting that highway. They point out that the Burlington Railroad tracks run between the highway and the river and that there are cities along the highway, where the adjacent property is developed for urban use. They suggest that the highway commission will not take scenic easements from the railroad and from urban owners so as to restrict all those lands to agricultural and limited residential use. Plaintiffs argue that as a result they are being denied equal protection of the laws.
>
> The fact that urban land has been developed for commercial, residential, or similar purposes, and that the railroad property is used for railroad purposes, and those uses cannot readily or economically be destroyed is probably basis enough for classification if a reasonable classification is needed in this context. We consider, however, that once it has been determined that the use for which property is taken is a public use, and that the taking is necessary for such use, neither a property owner whose property is taken in return for just compensation nor a property owner whose property is not so taken is in a position to claim that he is denied equal protection of the laws.
>
> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

It should be noted that the Wisconsin court said, "the need for a particular tract to complete the *integrated* plan rests in the discretion of the legislative branch." (Emphasis added.) This strongly suggests that some sort of integrated plan for scenic easement acquisition may be necessary to provide a rational basis for determining what land is to be subjected to scenic easement restrictions and what land is to be left free of such restrictions. It should also be observed, however, that the power to formulate an appropriate integrated plan for scenic easement acquisition can certainly be delegated to an administrative agency (the State highway department or commission) and that the actual decisions as to where scenic easements are to be acquired can also be delegated, provided the enabling statute lays down a sufficient general standard for the exercise of the delegated powers. In the *Kamrowski* case, the court expressly approved the delegation of power in the following language.[307]

> . . . It is . . . clear that the legislature has determined that the protection of scenic resources along highways is a public purpose, has set the policy of acquiring scenic easements along particular routes, in order to protect such resources, and has delegated to the State highway commission the function of deciding the exact terms of the easements to be acquired, and of exercising the power of eminent domain to acquire them.
>
> * * * * *
>
> . . . We consider that the concept of preserving a scenic corridor along a parkway, with its emphasis upon maintaining a rural scene and preventing unsightly uses is sufficiently definite so that the Legislature may be said to have made a meaningful decision in terms of public purpose, and to have fixed a standard which sufficiently guides the commission in performing its task.

More generally, it should be noted that the Federal courts have repeatedly sustained the delegation of power to administrative agencies under such vague standards as "just and reasonable," "public interest," "unreasonable obstruction" of navigation, "reciprocally unequal and unreasonable," "public convenience, interest or necessity," "tea of inferior quality," "unfair methods of competition," "reasonable variations," "unduly or unnecessarily complicate the structure" of a holding company, or "unfairly or inequitably distribute voting power among security holders." [308] Indeed, as Davis has pointed out,[309] "In the Federal courts, nothing but a Congressional abdication or clear abuse is likely to be held an invalid delegation." And even though "the law of State delegation differs substantially from the law of Federal delegation," [310] most State courts have consistently upheld the delegation of power to administrative agencies under relatively vague standards.

For example, State courts have generally upheld the delegation to local zoning boards of the power to grant variances under such standards as the following: "such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done"; [311] "where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, . . . [and] so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done"; [312] where "(1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality"; [313] or "in particular cases and for special reasons" where "such relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." [314]

[306] 31 Wis.2d 256, 266, 142 N.W.2d 793, 797 (1966).
[307] *Id.* at 263, 266, 142 N.W.2d at 796, 797.
[308] K. DAVIS, ADMINISTRATIVE LAW TREATISE 81-82 (1958).
[309] *Id.* at 150.
[310] *Id* at 101.
[311] This is the variance provision in § 7 of the famous STANDARD STATE ZONING ENABLING ACT of 1923 (revised in 1924 and 1926), which served as the model for a majority of the State zoning enabling acts adopted in the period from 1925 to 1940. This provision is still found, either verbatim or with only immaterial changes, in more than one-half of the current State zoning enabling statutes.
[312] This is the variance provision in N.Y. TOWN LAW § 267(5) (McKinney 1965), N.Y. GEN. CITY LAW § 81(4) (McKinney 1951), and N.Y. VILLAGE LAW § 179-b (McKinney 1966).
[313] This is the variance provision in ILL. ANN. STAT. ch 24, § 11-13-4 (1962), which applies only to cities of more than 500,000.

Similarly, the delegation to local zoning boards of the power to grant "special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained," [315] has been upheld even where the local zoning ordinances "merely echo the words or the statute and authorize the granting of exceptions under a generalized standard which may vaguely be termed as a reference to the general welfare." [316] And an ordinance providing (without specific statutory authorization) for the issuance of special use permits for "the location of special classes of uses which are deemed desirable for the public welfare within a given district or districts, but which are potentially incompatible with typical uses herein permitted within them," subject to conditions considered "necessary to protect the public health, safety, and welfare," has been upheld against attack on the ground that the standard is too vague.[317]

In Wisconsin at the time of the scenic easement acquisition challenged in the *Kamrowski* case, an integrated plan for such acquisition did exist as a result of the general legislative designation of areas where scenic easements were to be acquired with O.R.A.P. funds and the more detailed scenic corridor plans prepared by the State highway agency. When the enabling statute in Wisconsin is broadened to permit scenic easement acquisition in other areas, further detailed plans can be formulated on the basis of the inventory of scenic resources which comprises a part of the reecntly completed *Outdoor Recreation Plan* prepared by the Wisconsin Department of Resource Development. Similarly, scenic easement acquisition planning in Vermont can be based on the recently published *Study of Scenic Values and Location of Scenic Sites and Views in Vermont*,[318] and scenic easement acquisition plans in California can be based on the criteria for selection of scenic areas contained in a recent report to the legislature.[319] Presumably all States which undertake programs of scenic easement acquisition will find it both necessary and desirable to base their programs on some sort of plan, which in turn is based on some sort of inventory of scenic resources in existing or proposed highway corridors.

This may not solve all the problems of equal protection, however. Because all or almost all of the States with scenic easement enabling legislation have also enacted billboard control legislation designed to implement Title I of the Highway Beautification Act of 1965,[320] most of the areas in which scenic easements are likely to be acquired are already subject to State or local police-power controls over new advertising signs; and in order to avoid the 10 percent penalty provided by Title I of the Act, existing billboards within 660 ft of the right-of-way in areas which are neither industrial nor commercial in character must (with some exceptions) be removed by July 1, 1970. But Title I also requires the payment of just compensation not only for "the taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device," *but also* for "the taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

As a result of the provisions of Titles I and III of the Highway Beautification Act of 1965, many State highway agencies may want to develop an integrated highway beautification plan for different areas along the following lines:

1. In some areas, which are neither industrial nor commercial, where there are lawfully existing signs, the agency will remove the existing signs and acquire a standard scenic easement which will prohibit the erection of new signs and prohibit any substantial change in the existing use of the land adjacent to the highway. Payment to the landowner for the scenic easement, together with payment to the owners of the signs themselves, will satisfy the just compensation requirements of Title I of the Highway Beautification Act of 1965.

2. In some areas, which are neither industrial nor commercial, where there are lawfully existing signs, the agency will remove existing signs and acquire a scenic easement which merely prohibits the erection of new signs. Again, payment to the landowner for the scenic easement, together with payment to the owners of the signs themselves, will satisfy the just compensation requirements of Title I of the Highway Beautification Act of 1965.

3. In some areas, where there are no lawfully existing signs, the agency will acquire a standard scenic easement which will prohibit the erection of signs and also prohibit any substantial change in the existing use of the land. Title I of the Highway Beautification Act of 1965 does not require payment for the prohibition of new signs under the police power, but payment to the landowner will be necessary in order to acquire the complete scenic easement package.

4. In some areas, where there are no lawfully existing signs, the agency will be satisfied with the existing or newly imposed police-power prohibition against the erection of new signs.

5. In some areas, the agency may want to supplement its scenic easement program by imposing, under the police power, a package of restrictions equivalent to those which comprise a standard scenic easement. This, of course, would require a new enabling legislation in all or almost all States.

It is obvious that action along the lines suggested in items 1, 2, and 3, without more, does not raise any equal protection issues provided there is a rational basis (some sort of plan) for treating the different areas dif-

---

[314] This is the famous special reasons variance provision in N.J. REV STAT. § 40:55-39(d) (Supp. 1953-54).

[315] This is the special exception provision in the STANDARD STATE ZONING ENABLING ACT § 7, *supra* note 311

[316] D. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 76.

[317] Kotrich v. County of Du Page, 19 Ill.2d. 181, 166 N.E.2d 601 (1960), *appeal dismissed* 364 U.S. 475 (1960).

[318] Central Planning Office, State of Vermont, VERMONT SCENERY PRESERVATION, ch. V (1966).

[319] State of California, Dep. of Public Works, Div. of Highways, REPORT ON ACQUISITION OF SCENIC AREAS ADJACENT TO STATE HIGHWAYS (1966).

[320] 79 Stat. 1028, amending 23 U S.C. § 131.

ferently. In all these situations, the landowner is fully compensated for the rights purchased or taken from him. It is equally obvious, however, that equal protection problems may arise if action along the lines suggested in items 4 and 5 is added to action along the lines suggested in items 1, 2, and 3. The problems arise from the attempt to supplement land-use controls based on purchase or condemnation with police-power controls.

In many areas, at least, use of the police power to preserve scenic beauty may be reasonable and therefore constitutional when viewed in isolation. But the combination of a scenic easement acquisition program—where landowners are compensated for the restrictive easement which is acquired—and a program of police-power regulation, such as highway zoning—where landowners are not compensated for the restrictions imposed upon them, even though the restrictions are exactly the same as those imposed by a scenic easement—raises an obvious equal protection problem. The problem, of course, is not whether the scenic easement acquisition program is valid, but whether the supplementary program of police-power regulation is valid in view of the discrimination between landowners who are compensated for land-use restrictions imposed on them and those who are not compensated.

Theoretically, of course, equal protection could be assured by using police-power restrictions only in cases where there clearly is no taking of the landowner's property in a constitutional sense, and by acquiring scenic easements—with compensation to the landowner—in any case where there is a taking of property. Unfortunately, however, there is no way to be sure whether there is a taking in many cases unless and until a court decides that there is or is not a taking. The mere fact of loss of value to the landowner is clearly not enough to establish a taking,[321] and in some States, at least, nothing short of a total loss of value to the landowner will constitute a taking where the landowner retains the right to possession of the land.[322] In short, there is a substantial gray area within which the imposition of land-use restrictions may or may not constitute a taking in the constitutional sense, and within which any distinction between cases where compensation is paid and cases where it is not paid ought to be based on a reasonable classification.

It would no doubt be possible to classify land abutting highways on the basis of the amount of immediate loss in value which will result from imposition of scenic restrictions. The police power could be used where the immediate loss is relatively small, and negotiated purchase or condemnation where the immediate loss is relatively large to the landowner. But such a simple system of classification is not likely to work well because it gives too little consideration to the question whether the particular tract of land has little or much development potential.

In many rural areas the land may have so little development potential that virtually no loss will occur even in the distant future as a result of imposition of scenic restrictions. In other areas, however, although the immediate loss to the landowner from imposition of scenic restrictions may be small, the land may have sufficient potential for development so that, as time goes on, the loss is likely to become greater and greater—as is the vigor of the landowner's attack on the police-power restrictions to which his land may be subject. It would seem, therefore, that a policy of acquiring scenic easements and compensating the landowner wherever the land has substantial development potential would be wise, even though the anticipated development may appear to be rather far in the future. The equal protection guarantee would certainly be satisfied by a classification which based compensation upon a finding of substantial development potential in a particular tract of land, and which denied compensation where no substantial development potential is found. And such a classification would also tend to assure the relative permanency of scenic restrictions because, in areas where development potential exists, the State would have a permanent scenic easement restricting land use rather than a mere police-power regulation subject to repeal, amendment, or variance by legislative or administrative action.

How would the principle suggested for determining when to purchase (or condemn) and compensate and when to impose police-power regulations apply to an integrated highway beautification program of the type outlined in the foregoing? In areas where there are lawfully existing signs, it can be presumed that the land adjacent to the highway has sufficient development potential to justify purchase or condemnation of at least some of the landowner's development rights—either the full standard scenic easement package or the right to erect new signs. Whether the State highway agency should acquire the full scenic easement package or only the right to erect new signs should depend on a determination of the development potential of the particular location for other than advertising uses. In areas where there are no lawfully existing signs, the decision between acquisition with compensation and police-power regulation can be based on the same criterion.

But an additional problem may arise. Because all such areas are (or will be) subject to police-power restrictions against new signs in most States, should the compensation paid to the landowners in areas where scenic easements are acquired include the value of the right to erect new signs?

One possible answer is that the payment for taking away the landowner's right to construct new advertising signs in areas where scenic easements are purchased or taken is a payment for the imposition of a permanent land-use restriction, whereas the prohibition of new signs under the police power in areas not subject to scenic easement restrictions is merely a regulation of land use which may be temporary in character. Thus, when a

[321] This proposition needs no citation of authority. If reduction in value were enough to establish a taking, practically all zoning ordinances would be unconstitutional.

[322] See, e.g., Consolidated Rock Products Co v. City of Los Angeles, 57 Cal.2d 515, 370 P.2d 342 (1962), *appeal dismissed* 371 U.S. 36 (1962)

scenic easement is acquired in an area already subject to a police-power restriction against new advertising signs, the landowner should be paid, as compensation for the additional restriction against advertising signs, only the difference between the value of the land subject to a temporary police-power restriction and the value of the land subject to a permanent scenic easement restriction.

But such a distinction may present a very difficult, if not insoluble, problem of valuation. And it should also be noted that the 10 percent penalty provided by Title I of the 1965 Highway Beautification Act might be sufficient to induce the States generally to maintain adequate police-power controls over outdoor advertising—at least while the Interstate System is still under construction, and perhaps even after its completion, so long as highway construction with Federal-aid funds continues to be an important activity of the State highway agencies. Thus, the distinction between the value of permanent restrictions against advertising signs imposed by scenic easement and of temporary restrictions imposed under the police power may be difficult to maintain. In the final analysis, the difference in treatment of landowners may have to be justified on the ground that administrative convenience and feasibility require payment for all the restrictions imposed when a scenic easement is purchased or taken, without any deduction on account of the existing police-power restrictions against advertising signs.

Although the author favors use of the principle already discussed to determine when to acquire and compensate and when to impose police-power regulations, it is possible to make the determination on other grounds. For example, the State highway agencies might decide to rely entirely on the police power to exclude new signs in areas where there are no existing signs. In such areas, the restrictions imposed by the standard scenic easement would not include the usual restriction against advertising signs, and the landowners would not be compensated for that restriction. But where existing signs must be removed in order to avoid the 10 percent penalty imposed by Title I of the Highway Beautification Act of 1965, the removal of the existing signs would be accompanied by the acquisition of a scenic easement package which would (*inter alia*) prohibit the erection of any new signs, with the landowners being compensated for *all* the rights they lose. This would seem to satisfy the requirements of Title I of the 1965 Highway Beautification Act and also the requirements of equal protection.

It can, of course, be argued that the treatment of sign restrictions suggested in the preceding paragraph would result in denial of equal protection because landowners who have no existing signs on their land would not be compensated for the loss of their right to erect signs in the future, whereas landowners with existing signs on their land would be compensated for the loss of such right as well as the loss caused by removal of existing signs. It would appear to be an adequate answer, however, that the existence of signs on the land can be regarded as sufficient evidence of the value of the land for future sign use to justify compensation for loss of that value; and, contrariwise, that where there are no existing signs, such evidence is lacking. So long as the classification is reasonably debatable, the equal protection requirement is satisfied.

The major objection to relying solely on the police power to prohibit advertising signs in areas where no such signs lawfully exist at present is that police-power regulation is not necessarily permanent. As previously noted, the 10 percent penalty provided by Title I of the Highway Beautification Act of 1965 may be sufficient to induce the States to maintain "effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within 650 ft of the nearest edge of the right-of-way and visible from the main traveled way of the system"—at least until completion of the Interstate System and perhaps even for a longer period. But Title I of the Act provides a loophole which may enable the advertising industry, in many States, to prevent achievement of the goal of effective control by means of the police power. Section 101 (d) of the Act [123] provides as follows:

> In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within 650 feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are *zoned industrial or commercial under authority of State law,* or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. *The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and actions of the States in this regard will be accepted for the purposes of this Act.* (Emphasis supplied.)

Under this provision, local governments with zoning power under State enabling acts can, unless restrained by State legislation, emasculate the proposed effective control of highway advertising by zoning or rezoning substantial areas adjacent to the Interstate and primary highway systems for industrial or commercial use, despite the fact that there are presently no such uses, and no advertising signs, in these areas. The State statutes on billboard control enacted in response to the Highway Beautification Act of 1965 appear generally to leave the zoning power with the units of local government, free of any restraint designed to close the loophole under discussion. It would thus appear that acquisition of standard scenic easements by the State highway agency, including a prohibition on erection of new signs, may provide a desirable permanency of restriction which would not be assured if police-power controls are relied upon.

Similar equal protection problems may arise because of the overlap between the scenic easement programs developed under Title III of the Highway Beautification Act of 1965 and the junkyard control program established

[123] 79 Stat 1028, amending 23 U.S.C § 131.

by Title II of the Act.[324] Title II imposes a penalty (10 percent of the amounts which would otherwise be apportioned to a State, as under Title I) upon any State that does not make "provision for effective control of the establishment and maintenance along the Interstate System and the primary system of outdoor junkyards," and defines "effective control" to mean that "junkyards shall be screened by natural objects, plantings, fences, or other appropriate means so as not to be visible from the main traveled way of the system, or shall be removed from sight." Title II further provides that "the Federal share of landscaping and screening costs under this section shall be 75 per centum," and that the Federal share of the cost of relocation, removal, or disposal of junkyards which "as a practical matter cannot be screened" shall also be 75 per centum.

Although Title II fails to make this absolutely clear, it would seem that the Federal share is only payable for screening and landscaping existing junkyards. It seems to be implied, therefore, that control over establishment of new junkyards—either total prohibition within sight of the main traveled way of the system or requirements as to screening and landscaping—should be exercised by the States through their police power. In many areas, at least, police-power controls will certainly be held valid. But prohibition of the establishment of new junkyards is normally a standard feature of scenic easements. If the police power is relied on in some areas and in other areas landowners are compensated (through purchase or condemnation) for loss of the right to establish junkyards in the future, equal protection problems arise which are similar to those already discussed in connection with the control of outdoor advertising.

Necessity for Acquisition of Easements at Particular Locations

Let us assume that any challenge to a program of scenic acquisition based on the alleged absence of any public use or public purpose, or the alleged denial of equal protection, or the alleged lack of adequate standards to guide the exercise of discretion by the State highway agency can be defeated. When the highway agency decides to condemn scenic easements at particular locations, the landowner might still challenge the condemnation on the ground that there is no necessity for the taking of a scenic easement at that location.

If the legislature were to determine the precise locations at which scenic easements should be acquired, any challenge to its determination would be practically certain to fail. As Nichols points out,[325]

> The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review. * * *
>
> There are various aspects of this principle which have crystallized into specific questions. In accordance with the general principle, it has been held that the courts may not inquire into the question
>
> (1) Whether there is any necessity for the taking,
>
> (2) Whether there is any need for resorting to eminent domain in effecting such acquisition,
>
> (3) Whether the time is a fitting one,
>
> (4) Whether there is a need for the property to the extent sought to be acquired,
>
> (5) Whether there is a need for the particular tract sought to be acquired (and, correlatively, whether another tract would not better serve the purposes of the condemnor),
>
> (6) Whether there is any need for the particular estate sought to be condemned,
>
> (7) Whether the mode of acquisition with respect to the instrumentalities employed, such as a State officer, an individual, or a corporation is proper insofar as the exercise of the legislative discretion is concerned.

In implementing the scenic easement acquisition program, however, decisions as to the precise location of scenic easements and the precise terms of the scenic easement restrictions will have to be delegated to the State highway agency. The State highway agency will have to operate in practically all States on the basis of a general delegation of power to acquire interests in land adjacent to Federal-aid highways "necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways," or some similar formula. And so the question recurs: What is the likelihood of successful attack on highway agency determinations on the ground that the taking of a particular scenic easement at a particular location was not necessary? The answer, unfortunately, is not so clearcut as it would be if all such determinations were made by the legislature. According to Nichols,[326]

> . . . the necessity is for the condemnor and not for the courts to decide, and the decision of the condemnor is final as long as it acts reasonably and in good faith. If the land is of some use to it in carrying out its public object, the degree of necessity is its own affair. *Whether there is any necessity whatever to justify the taking is, however, a judicial question, and as a taking without necessity in such a case would be unauthorized, the courts may hold it to be unlawful without the reluctance they feel in declaring acts of the legislature unconstitutional.*

In short, the determination of an administrative agency on the question of necessity may be subjected to judicial scrutiny with respect to its reasonableness or good faith, or both. Hence it would seem to be very important for State highway agencies to work out some kind of plan or a set of general criteria upon which the choice of scenic easement locations and restrictions is to be based. Any determination as to condemnation of scenic easement imposing particular restrictions on a particular tract of land based on the plan or the general criteria developed in advance can then be successfully defended as having been made reasonably and in good faith.

Reference has previously been made to the plans or general criteria for scenic easement acquisition developed in Wisconsin, Vermont, and California.[327]

[324] 79 Stat 1028, 1030, amending 23 U.S.C. § 136.

[325] 1 Nichols, THE LAW OF EMINENT DOMAIN § 4.11 (rev. 3d ed., J. Sackman, 1964).

[326] *Id.* at 570-73.

[327] Text *supra* accompanying notes 318 and 319.

SOME TECHNICAL LEGAL PROBLEMS

Enforcement Against Successive Owners of the Servient Land

GENERAL RULES AS TO RUNNING OF BURDENS WITH LAND

As previously indicated,[328] it is quite doubtful whether the burden of a scenic easement can run with the servient land, so as to be enforcible against subsequent owners of the land, if the benefit is only personal or in gross. This is true whether the scenic easement is viewed as a legal negative easement or an equitable servitude. But the burden of an appurtenant scenic easement will run with the servient land, so as to be enforcible against subsequent owners of the land, provided the instrument creating the scenic easement is properly recorded. The running of the burden with the servient land is an inherent characteristic of a scenic easement if it is viewed as a legal negative easement. And the burden will also run with the servient estate, subject to the notice requirement discussed below, if it is viewed as an equitable servitude.

No privity of estate between the parties to the instrument creating the scenic easement need be shown beyond that arising from the easement or servitude thereby created, in order for the burden of an appurtenant easement or servitude to run with the servient land.[329] Subject to the satisfaction of the requirements of the local recording statute, a legal negative easement will be protected against interference by both legal and equitable remedies. A purely equitable servitude, on the other hand, will be protected against interference only by equitable remedies. However, as previously noted,[330] in many instances a restrictive covenant may be enforced not only as an equitable servitude but also as a covenant running with the land at law. If the covenant is contained in a deed of conveyance and restricts the use of the land conveyed for the benefit of land retained by the grantor, or restricts the use of land retained by the grantor for the benefit of the land conveyed, practically all United States courts hold that there is sufficient privity of estate between the parties to the covenant to permit the burden of the covenant to run with the land at law.[331] Thus, in many cases, if a scenic restriction is not deemed to create a legal negative easement, it may be enforced either at law as a covenant running with the land[332] or in equity as an equitable servitude.

As noted in the foregoing, enforcement of restrictions on land use is subject to certain recording or notice requirements.[333] But in the United States the requirements appear to be identical whether we consider a restriction to create a legal negative easement, an equitable servitude, or a covenant running with the land at law.

> In the English cases it has been carefully pointed out that enforcement of an equitable servitude can only be had against a subsequent purchaser of the burdened land who takes with notice. In other words, the equitable remedy by way of injunction to enforce an agreement as an equitable servitude is subject to the defense that equitable interests are cut off by a transfer of the legal title of the burdened land to an innocent purchaser for value. However, since these covenants or agreements respecting the use of land create an equitable property interest upon the burdened land, they are entitled to be recorded under the usual [American] recording statutes, so that the constructive notice arising from such recording prevents the existence of a subsequent bona fide purchaser. Likewise, since the same recording statutes provide that an unrecorded conveyance of a legal easement or of a covenant running with the land at law shall be void as against a subsequent bona fide purchaser, there is today no fundamental difference between the enforcement of legal easements or covenants and equitable servitudes, as against subsequent purchasers of the servient land in respect to this defense of bona fide purchase for value.[334]

If it is desired to provide, in connection with a scenic easement, for performance of affirmative duties by the servient land owner—e.g., to require him to keep fields mowed, brush cleared, or the like—the easement deed may include a covenant by the servient land owner, for himself and his successors, to perform such affirmative duties. In almost all American jurisdictions the burden of such a covenant would run with the servient land at law;[335] and in many States it could also be enforced against successors of the covenantor as an equitable servitude.[336]

SCENIC EASEMENTS AS APPURTENANT TO HIGHWAY RIGHT-OF-WAY

Because of the doubt as to whether restrictions imposed by a scenic easement can be enforced against a transferee of the servient land (even when the transferee has actual notice of the restrictions) unless the scenic easement is "appurtenant" to some dominant tenement, it becomes important to determine whether a scenic easement acquired by a State highway agency for the purpose of preserving scenic beauty adjacent to a highway can be classified as an easement appurtenant to that highway, with the highway serving as the dominant tenement.

As Powell has pointed out:[337]

> Historically, easements appurtenant were substantial factors in the agricultural set-up of England. Such easements were required to have been created for the purpose of benefiting the owner of the dominant estate as the possessor of the dominant estate. In an agricultural community, where dominant estates were always farm lands, this test was easy to apply, and became crystallized

[328] See *supra* Chapter 1, notes 52 and 53 and accompanying text.

[329] This has always been clear with regard to legal easements. That it is also true of equitable servitudes, see 2 AMERICAN LAW OF PROPERTY § 9.26 (A. J. Casner ed 1952); 5 R Powell, LAW OF REAL PROPERTY 161-62 (1962).

[330] See text *supra* Chapter 1, between notes 50 and 51.

[331] See *supra* Chapter 1, note 50

[332] A restrictive covenant, of course, may be enforced at law against a subsequent owner of the servient estate if all requirements, including the privity requirement, for running of the burden at law are satisfied.

[333] See discussion of Tulk v. Moxhay, London and South Western Railway Co. v. Gomm, and London County Council v Allen in text *supra* Chapter 1 accompanying notes 47-49.

[334] 2 AMERICAN LAW OF PROPERTY 404 (A J. Casner ed 1952) Accord: C. Clark, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 183 (2d ed. 1947). See also 5 R. Powell, *supra* note 329, at 199-200.

[335] The fact that the covenant is in a deed conveying the scenic easement would satisfy the privity of estate requirement in most States where there is such a requirement, although the interest conveyed is an easement rather than an estate. See Carlson v. Libby, 137 Conn. 362, 77 A.2d 332 (1950). Since the covenant is "in aid of an easement," the Massachusetts privity requirement is also satisfied.

[336] Although affirmative covenants cannot be enforced as equitable servitudes in England, the weight of authority in the United States is to the contrary. See 2 AMERICAN LAW OF PROPERTY § 9 36 (A. J. Casner ed. 1952); 3 H. Tiffany, THE LAW OF REAL PROPERTY § 859 (3d ed. 1939); Fitzstephens v. Watson, 218 Or. 185, 344 P.2d 221 (1959), and cases cited.

[337] 3 R. Powell, THE LAW OF REAL PROPERTY 395-98 (recomp. ed. 1967).

> to mean that, to be found appurtenant, the easement must be found serviceable to the agricultural utilization of the dominant estate. As the types of land utilization have become more diversified in modern society, especially in the United States, it has become necessary to loosen the crystallized English rule and to recognize that serviceability to the dominant estate can exist even when the dominant estate is devoted to business purposes. . . . This liberalization of the scope of appurtenant easements makes a corresponding increase in the burden of such easements. . . . The basic requirement that to be appurtenant, the easement must have been created for the purpose of benefiting the owner of the dominant estate as the possessor of such estate remains, but the content of this requirement has altered with changes in land utilization. It is also required that the easement shall in fact benefit the possessor of the dominant estate in his use of such land. A constructional preference for the finding of an easement to be appurtenant (rather than in gross) exists and is very strong. It is not normally regarded as essential that the dominant and servient tenements be contiguous.

There can be little doubt that scenic easements are intended to benefit the public generally, insofar as the public makes use of its highways. Inasmuch as the State holds title to the highway right-of-way in trust for the public, the highway itself can readily be regarded as a dominant tenement to which scenic easements may be appurtenant, provided the State's interest in the highway right-of-way is of a nature which permits it to be so regarded.

It is clear that the highway right-of-way may be regarded as a dominant tenement if the State's interest therein is a fee-simple estate.[338] But if the State's interest therein is merely an easement, there is likely to be difficulty in persuading the courts that a scenic easement can be appurtenant to the easement of way held by the State. This follows from the traditional classification of easements as an incorporeal species of real property [339] and the ancient common law rule that an easement may only be appurtenant to corporeal real property.[340]

In 43 States, [341] the State highway agency has express statutory authority to acquire by purchase or condemnation either a fee-simple estate or an easement for right-of-way purposes. In one State, [342] the highway agency may acquire either a fee-simple estate or an easement by purchase, but only an easement by condemnation. Only two States [343] expressly restrict the highway agency to acquisition of an easement for right-of-way purposes, regardless of the method of acquisition. In three States [344] the statutes are wholly silent as to the interest that may be acquired for right-of-way purposes. In one State, [345] although the statute generally authorizing right-of-way acquisition is silent on the subject, [346] the statute authorizing acquisition of property for controlled-access highways expressly prescribes that acquisition is to be in fee simple only.[347]

It thus appears that, at the present time, the great majority of the State highway agencies has statutory authority to acquire a fee-simple estate for highway right-of-way purposes. In the future, it seems probable that this authority will be exercised in all, or almost all cases. As recently as 1958,[348] however, nine States [349] had express statutory provisions limiting the highway agency to acquisition of an easement for right-of-way purposes, and nine other States [350] had statutes which were wholly silent on the subject. In the latter nine States, as a general rule, the highway agencies could acquire only an easement for right-of-way purposes by condemnation, and this is still true in the three States where the statutes are wholly silent on the subject. This conclusion logically follows from the general rule that statutes authorizing condemnation are strictly construed against the condemnor—a rule which means, as applied to the question now under consideration, that authorization for the acquisition of a fee-simple estate must appear either by express provision or by necessary implication.[351]

In some eighteen States, [352] therefore, the State's interest in the highway rights-of-way acquired up until the very recent past will generally, if not always, consist only of an easement; and in some five States [353] this will continue to be the case as to rights-of-way acquired in the future. In these States, the question whether a scenic easement can be regarded as appurtenant to the highway easement may become important.

In dealing with this question, it may be helpful to remember that a highway easement is an easement of a very peculiar character. As against the fee owner—usually the abutting landowner—the public right of user amounts practically to an exclusive right of possession and use. Hence, it can be argued that a highway easement is not really an easement—i.e., an incorporeal or nonpossessory interest—at all, but rather an estate in the nature of a fee simple determinable in the surface of the land, with an easement of support in the soil below.[354] Such an argument is supported by the frequent

[338] "A dominant tenement is one the possessor of which is, by virtue of his possession, entitled to the benefit of the uses authorized by the easement." 2 AMERICAN LAW OF PROPERTY § 8.13 (A. J. Casner ed 1952). See *id.* §§ 9.28 and 9.29 with respect to the land which the benefit of land-use restrictions imposed by covenant "touches or concerns" and which the parties intend to be benefited.

[339] See, e.g., Gale & Whatley, EASEMENTS ch. 1, § 1 (1839); Washburn, EASEMENTS AND SERVITUDES 3 (4th ed. 1885); Jones, EASEMENTS 4 (1898).

[340] Gale & Whatley, EASEMENTS ch. 1, § 4 (1839); Washburn, EASEMENTS & SERVITUDES 3 (4th ed. 1885); Jones, EASEMENTS 4 (1898).

[341] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

[342] Kansas.

[343] Alabama and Pennsylvania

[344] Missouri, South Dakota, and Washington.

[345] Iowa.

[346] IOWA CODE ANN. § 306.13 (Supp. 1966).

[347] *Id.* § 306A.5

[348] See Highway Research Board, CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES: A LEGAL ANALYSIS, Part I, 9-12 (*Spec Rep. 32*, 1958).

[349] Alabama, Alaska (not then a state), Kansas, Montana, New Mexico, Ohio, Pennsylvania, and Utah. North Dakota also had such a provision in its general condemnation statute, but this seems to have been rendered inapplicable by a 1953 amendment to the highway code which expressly provided that a fee-simple estate may be acquired for highway purposes. Compare N.D CENT. CODE § 32-1503 (2) with § 24-10-18 See also Wallentinson v. Williams County, 101 N.W.2d 571 (N.D. 1960). Generally, see *supra* note 348, at 10, 12.

[350] Delaware, Iowa, Missouri, New Hampshire, Oklahoma, South Dakota, Tennessee, Vermont, and Washington.

[351] See 3 Nichols, THE LAW OF EMINENT DOMAIN § 9.2[1] (rev. 3rd ed. 1965), and authorities cited, in support of this proposition. See also *id.* §§ 9.2, 10 1; *supra* note 348, at 11.

[352] See *supra* notes 349 and 350.

[353] See *supra* notes 343-344.

[354] "The estate or interest which is acquired by eminent domain when it is not necessary to condemn the fee is usually called an easement or

judicial references to the abutting landowner's right of reversion when the highway is abandoned.[355] It would appear, arguably at least, that the real distinction with respect to highway rights-of-way is not between fee simple and easement, but between fee simple absolute [356] and fee simple determinable in the surface.

Moreover, it can be argued that the ancient common-law rule requiring a corporeal property interest as the dominant tenement is really not a strict requirement, but rather a reflection of the usual fact situation in which the question of the appurtenancy of an easement was raised. As a practical matter, during the formative period of the common law, and down to relatively recent times, there was no reason to try to make one easement appurtenant to another. But the common law is capable of change, as history graphically demonstrates, and there is no reason why, in order to serve the general public interest in scenic preservation, the courts should not regard the State's interest in the highway right-of-way as sufficient to constitute a dominant tenement to which scenic easements may be made appurtenant.

In any case, in those States where classification of the State's interest in the highway right-of-way as an easement may create doubt as to the enforceability of scenic easement restrictions against transferees of the servient land, it will be desirable for the legislature to provide expressly for enforcement against transferees with notice of the restrictions, without regard to the question whether the scenic easement is appurtenant or in gross.

Transfer of Benefit

If scenic easements are deemed to be appurtenant to a highway right-of-way, no problems are likely to arise with respect to transfer of the benefit of such easements. The right-of-way and the scenic easement will generally both be owned by the State, and it is unlikely that the State will want to transfer the benefit of the scenic easement. It is possible, of course, that occasionally a State highway right-of-way might be transferred to county jurisdiction, or vice versa, but this should create no problems because the scenic easements appurtenant to the highway right-of-way will pass with it.[357]

Suppose, however, that public-spirited individuals or conservation organizations desire to acquire scenic easements adjacent to, or near, highways, and then to transfer these scenic easements to the State. An attempted transfer to the State would raise a serious question because, in all or almost all cases, the scenic easement would be in gross rather than appurtenant. As a recent study concludes, [358]

> The question of the assignability of an easement in gross presents . . . difficult problems, and there is an enormous amount of confusion in the authorities. The general rule is that easements in gross are not assignable, but there are so many conflicts in the authorities that it is very difficult to generalize. A quite general exception to the "rule" is that easements with a profit are assignable. Easements which include the right to sever and remove a portion of the servient land are alienable "in all situations involving easements of a commercial nature and in most other situations as well." There are so many other exceptions to the general statement above that it can scarcely be stated to be a rule at all. In an apparent effort to reconcile the conflict in the cases, the Restatement took the position that easements in gross are assignable if they are "commercial" in nature, but not if they are not, but this attempted distinction drew such heavy criticism that it can scarcely be looked to as a reliable guide by either the practitioner or by the courts. Lacking a clear holding in his jurisdiction that easements in gross are assignable, which the researcher is unlikely to find, it should not be assumed that they can be assigned. Even if there are cases in a particular jurisdiction holding that some interests having the characteristics of easements in gross are assignable, it cannot be assumed that these holdings will apply to all easements in gross; the cases must be examined with care. . . .
>
> * * * * *
>
> . . . The fact is that in many jurisdictions critical questions simply have not been decided. . . . In some jurisdictions the draftsman may feel that he can insure assignability by a clear expression of intent to permit assignment. But there are many statements that such interests are simply not assignable, and the parties cannot make them so. The path of safety lies in the most careful scrutiny of the authorities in the jurisdiction. In the absence of clear authority in support of alienability, it should be assumed that the easement cannot be assigned. . . .

There appear to be no authorities on the question whether the benefit of an "equitable servitude in gross" can be transferred. It seems to the writer that decisions in favor of transferability are unlikely in the absence of a statutory declaration to that effect.

Termination

It has been assumed in all of the foregoing discussion that scenic easements will normally be of perpetual dura-

---

servitude. This designation has been criticized, since there is a wide difference between such an estate or interest and a private easement; it is appurtenant to nothing, there is no dominant tenement, and it is commonly held by the public at large rather than by any definite person or organized body." 3 Nichols, THE LAW OF EMINENT DOMAIN 273 (rev. 3rd ed 1965). In the case of a State highway, of course, the easement or servitude is held by the State in trust for the public at large, but the criticism of the term easement or servitude seems well-directed.

See also C. Clark, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 83-84 (2d ed. 1947).

It goes without saying that the fee owner of land within a modern highway right-of-way can make no use of the land except for travel in the same manner as the public at large. Hence, it seems strange to refer to the public interest in the surface as a mere easement or servitude, and the abutting landowner's interest therein as a fee simple.

[355] "It is well settled that when an easement has been taken by eminent domain for the public use or has been acquired by purchase, prescription or dedication, . . if the public use is subsequently discontinued or abandoned, the public easement is extinguished, and the possession of the land *reverts* to the owner of the fee free from any rights in the public." 3 Nichols, THE LAW OF EMINENT DOMAIN 327 (rev. 3rd ed. 1965) (emphasis added).

[356] If the highway right-of-way is held in fee simple absolute, then upon discontinuance or abandonment of the highway use, the state "may leave it idle, or devote it to a different use, or sell it in the same manner and to the same extent as an ordinary private owner." 3 Nichols, THE LAW OF EMINENT DOMAIN 331 (rev. 3rd ed. 1965).

[357] 2 AMERICAN LAW OF PROPERTY § 8.71 (A. J. Casner ed. 1952); 3 R. Powell, THE LAW OF REAL PROPERTY § 418 (recom. ed. 1967).

[358] R. Brenneman, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 30-32 (1967). See also C. Clark, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 67-89 (2d ed. 1947); 2 AMERICAN LAW OF PROPERTY §§ 8.75-8.83 (A. J. Casner ed. 1952), 3 R. Powell, THE LAW OF REAL PROPERTY § 419 (recomp. ed. 1967); RESTATEMENT OF PROPERTY §§ 489-492 (1944) It should be noted that RESTATEMENT OF PROPERTY § 491 does not state that non-commercial easements in gross are never alienable, but rather that their alienability is determined by the manner or terms of their creation, the stated factors which determine alienability include the personal relations of the parties at the time of creation, the extent of the increased burden on the servient land resulting from alienability, and the consideration paid (*id.* § 492).

tion. But unless care is taken to draft the enabling statute or the scenic easement deed itself in such a way as to assure perpetual duration, there is always a possibility of adventitious termination by operation of law or—more accurately—by judicial decision. This possibility is especially strong if the scenic easement is viewed as an equitable servitude rather than a legal negative easement.

The courts, in exercising their discretion to grant or withhold equitable remedies, have frequently refused to enjoin violation of restrictive covenants in cases where a change in conditions in the neighborhood is found to have frustrated the purpose of the restriction.[359] Although the author has found no authority on the point, it is conceivable that the changed conditions rule might be carried over and applied to legal negative easements. In any case, there is a well-settled analogous rule in the law of easements. If an easement is created for a particular purpose, the easement is extinguished by operation of law if that purpose becomes impossible of realization or is no longer served by the easement.[360]

The significance of these rules in connection with scenic easements is obvious. If a servient landowner challenges scenic easement restrictions, a court may decide that the purpose of the restrictions has been frustrated and is no longer capable of realization because, e.g., there is substantial new commercial or residential development nearby, or a group of new billboards on nearby land not covered by the scenic easement. In that event, the court may hold either that the easement has been extinguished or that it cannot be enforced by injunction. Either holding means, in substance, that the State's interest in the scenic easement is extinguished without compensation. This is clearly an undesirable result.

The power to terminate scenic easement restrictions should rest with the State highway agency and not with the courts. If circumstances change over time and the highway agency decides that the maintenance of a scenic easement is no longer in the public interest, it should have authority to effect its termination in such a way as to minimize the loss to the public—e.g., by obtaining compensation for the release of the scenic easement restrictions.

SOME TAX PROBLEMS

Real Estate Tax

EFFECT OF STATE'S ACQUISITION ON VALUATION OF SERVIENT LAND FOR TAX PURPOSES

At first blush, it would seem clear that if scenic easements covering land adjacent to highways reduce the value of the servient land, the reduction in value must be recognized for tax purposes. In the analogous case of land subject to a zoning ordinance, tax assessors take account of the reduction in value resulting from zoning restrictions, although they also recognize that zoning restrictions are not necessarily permanent and that the possibility of rezoning to permit more profitable land use affects the market value of the land. Where land is subject to a scenic easement, it would seem, *a fortiori*, that any reduction in value because of the permanent scenic easement restrictions should be recognized in the tax assessment process.

Unfortunately, however, no categorical answer can be given as to the effect of the State's acquisition of a scenic easement on the valuation of the servient land for real estate tax purposes—assuming that the market value of the land is in fact reduced by the existence of the scenic easement. The difficulty arises from the fact that, in some States, the tax assessor does not undertake to "trace out subdivided or qualified interests and . . . seek to hold the various owners responsible according to their respective interests."[361] Instead, land subject to an easement or equitable servitude is assessed as land, on the basis of a full and unencumbered fee-simple estate, as if it were not subject to the outstanding easement or equitable servitude. In such States, presumably, tax assessors will not take any account of the reduction in value (if any) resulting from the fact that the land is subject to a scenic easement.

Detailed information as to tax assessors' practices is not available for most jurisdictions. In some States, however, it seems that valuation of land subject to appurtenant easements or equitable servitudes is normally determined on the basis of the value of the servient estate, taking into account the reduction in value (if any) resulting from the existence of outstanding easements or equitable servitudes. This may follow either from statutory provisions for collection of real estate taxes which indicate that such taxes are levied *in personam* on the owners of interests in land rather than *in rem* against the land itself,[362] or from statutory definitions of real property subject to taxation which expressly include all interests appertaining to land.[363] Under the former, it would appear that the owner of each interest in a given tract of land would have to be separately assessed, and that the owner of a fee-simple estate subject to an easement or equitable servitude would only be assessed for the value of his servient estate.[364] Under the latter type of statutory provision, the value added to the dominant land by an appurtenant easement or equitable servitude would be included in the assessment of the dominant land, and to avoid double taxation the servient landowner would only be assessed for the

[359] C. Clark, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 184-186 (2d ed. 1947); 2 AMERICAN LAW OF PROPERTY § 9.39 (A. J. Casner ed. 1952); 5 R. Powell, THE LAW OF REAL PROPERTY § 684 (1962)

[360] 3 R. Powell, THE LAW OF REAL PROPERTY 526.23-526 24 (recomp. ed. 1967), and authorities cited; Highway Research Board, CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES: A LEGAL ANALYSIS, Part I, at 9 (*Spec. Rep. 32*, 1958); Williams, LAND ACQUISITION FOR OUTDOOR RECREATION—ANALYSIS OF SELECTED LEGAL PROBLEMS 52 (ORRRC Study Report 16, 1962).

[361] Nedderman v. Des Moines, 221 Iowa 1352, 1365, 268 N.W. 36 (1936).

[362] See Kloek, *Effect of Tax Deeds on Easements Appurtenant and Rights-of-Way*, 16 CHI-KENT L. REV. 328, 357-366 (1938), for authority that such provisions are in force in 16 States: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Indiana, Kentucky, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and West Virginia.

[363] See, e.g., ALA. CODE tit. 51, §§ 1(b), 21(a) (1958), ALASKA STAT. § 29.10 552 (1962); ARK. STAT. ANN. § 84-101 (1960); HAWAII REV. LAWS § 128-1 (1955); KAN. GEN. STAT. ANN. § 79-102 (1964); LA. REV. STAT. § 47:1702 (1952); ME. REV. STAT. ANN. tit. 36, § 551 (Supp. 1967); MINN. STAT. ANN. § 272 03 (Supp 1966); MO. ANN. STAT. § 137.010 (1952); WASH. REV. CODE ANN § 84.04 090 (1961).

[364] See Kloek, *supra* note 362. It should be noted, however, that very few of the cases cited by Kloek involved easements or equitable servitudes.

value of his servient estate rather than for the value of an unencumbered fee simple absolute.[365]

In some States, however, the tax statutes either do not define real property for tax purposes [366] or the statutory definition does not expressly include all interests appertaining to land.[367] And in some States the statutory provisions for collection of real estate taxes or with respect to the effect of a tax sale indicate that such taxes are levied *in rem* against the land itself.[368] Under all these types of statutes it is quite possible that land subject to an easement or equitable servitude will be assessed for taxes simply as land—i.e., on the basis of the value of an unencumbered fee-simple estate, with no account taken of the reduction in value (if any) resulting from the outstanding easement or servitude.

Although the situation is not clear in many States, the judicial decisions as to the effect on easements and equitable servitudes of a tax sale of the servient land [369] provide some clues. In some States, the decisions indicate that it is in fact the practice of assessors to assess the servient land as land, with no consideration of any possible reduction in value because of an outstanding easement or equitable servitude.[370] In a larger group of States, however, the courts have found—often with the benefit of a presumption to that effect—that the value added to the dominant land by virtue of an appurtenant easement or equitable servitude is included in the assessment of the dominant land, and that the servient land is assessed on the basis of its value as a servient estate, subject to the easement or servitude in question.[371]

If scenic easements are deemed to be easements or equitable servitudes in gross because the highway right-of-way is not an adequate dominant estate, there appears to be less likelihood that a scenic easement will be taken into account in the valuation of the servient land for tax purposes. This is because most of the State tax statutes neither provide expressly for separate assessment of easements and servitudes in gross nor define real property so as to include easements in gross. Consequently, the servient land is usually valued as an unencumbered fee-simple estate. In some States, however, there are special statutory provisions for the separate assessment of certain types of easements in gross to their owners.[373] Under these statutes, it seems clear that the reduction in value of the servient land resulting from the existence of the easement in gross would be taken into account in assessing the servient land for tax purposes. But none of the existing statutes deals with scenic easements. Unless the courts of a particular State are willing to differentiate between cases where easements in gross are owned by the State (or other governmental entity) and cases where they are owned by private persons, [374] the general rule will presumably be applied to scenic easements in gross in the absence of new legislation [375] dealing with the scenic easement problem.

As a matter of policy, it is clear that the owner of land subject to a scenic easement should get the benefit for tax purposes of any reduction in the value of his land which may result from the imposition of scenic easement

[365] A number of the cases dealing with the effect of a tax sale of the servient land, *infra* note 371, adopt this rationale; but this is frequently done without any reference to the statutory definition of real property for tax purposes.

[366] This is true, e.g., in Connecticut and Maryland.

[367] See, e.g., ARIZ. REV. STAT. ANN. § 42-201 (Supp. 1967); CAL REV. & TAX CODE § 104 (Deering 1963); COLO. REV. STAT. ANN. § 137-1-2 (1963); DEL. CODE ANN tit. 1, § 302 (1953); FLA. STAT. ANN. § 192 02 (1958); GA. CODE ANN. § 85-201 (1955); IDAHO CODE ANN. § 63-108 (1948); IOWA CODE ANN. § 427.13 (1949); KY. REV. STAT. ANN. § 132.010 (1962); MASS. ANN. LAWS ch 59, § 3 (1964); MISS. CODE ANN. § 683 (1957); MONT. REV. CODES ANN. § 84-101 (1966); NEB. REV. STAT. § 77-103 (1966); NEV. REV. STAT. § 361 035 (1) (1965); N. M. STAT. ANN. §§ 70-1-1, 72-1-1, 72-2-2 (1961); N.Y. REAL PROP. TAX LAW § 102 (12) (McKinney 1960). In some of these statutes, the definition is arguably broad enough to include appurtenant easements and equitable servitudes See, e.g., the Delaware, Georgia, Idaho, and Iowa statutes listed above.

[368] See Kloek, *supra* note 362, at 336-347, for authority that such provisions are in force in 21 states. Arkansas, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Rhode Island, South Dakota, Utah, and Wisconsin. It should be noted, however, that all the cases cited by Kloek deal with the effect of a tax sale, and few of them actually involve an easement or equitable servitude.

[369] See discussion *infra* in text following note 377.

[370] Wolfson v. Heins, 149 Fla 499, 6 So. 2d 858 (1942) (easement); Nedderman v Des Moines, 221 Iowa 1352, 268 N. W. 36 (1936) (equitable servitude); Magnolia Petroleum Co v. Moyle, 162 Kan. 133, 175 P. 2d 133 (1946) (secondary easements appurtenant to mineral estate in servient land held extinguished by tax sale of servient land, although owner of mineral estate had paid all taxes assessed against that estate); Hill v. Williams, 104 Md. 595, 65 A. 413 (1906) (easement); Jackson v. Ashley, 189 Miss. 818, 199 So. 91 (1940) (restrictive covenant creating what court called a "negative limitation"); Hanson v. Carr, 66 Wash. 81, 118 P.2d 927 (1911) (easement. court suggested that assessment of servient land might have been reduced if owner of easement had had that land "segregated" for tax purposes).

See also Hunt v Boston, 183 Mass. 303, 67 N.E. 244 (1903) (court held that tax sale extinguished a right in gross to enter on the servient land for a limited period for the purpose of removing a specified amount of gravel).

[371] Smith v. Smith, 21 Cal. App. 378, 131 P. 890 (1913) (easement), Engel v. Catucci, 197 F.2d 597 (D C. Cir. 1952); Lodge v. Swampscott, 216 Mass. 260, 103 N.E. 635 (1913) (equitable servitude); Shafley v. Baumann, 341 Mo. 755, 108 S.W.2d 363 (1937) (equitable servitude); State ex rel. Koeln v. West Cabanne Imp. Co., 278 Mo 310, 213 S.W. 25 (1919) (easement); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937) (equitable servitude); Gowen v. Swain, 90 N H. 383, 19 A.2d 249 (1939) (easement); Ehren Realty Co. v Magna Charta Bldg. & Loan Ass'n, 120 N.J. Eq. 136, 184 A. 203 (Ch. 1936) (easement); Metropolitan Life Ins. Co. v. McGurk, 119 N.J L. 517, 197 A. 47 (E. & A. 1938) (easement); Niestat v. Equitable Security Co., 138 N.J. Eq. 480, 48 A.2d 907 (ch. 1946) (easement); Lipman v. Shriver, 51 N.J. Super. 356, 144 A.2d 37 (Law Div. 1958) (easement); Almogordo Imp Co. v. Prendergast, 43 N.M. 245, 91 P.2d 428 (1939) (equitable servitude); Jackson v. Smith 153 App. Div. 724, 138 N.Y.S. 654, aff'd, 213 N.Y. 630, 107 N E. 1079 (1914) (easements); Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751, *rehearing den.*, 213 N.Y. 700, 108 N.E. 1109 (1915) (easements), Gerbig v. Zumpano, 13 Misc. 2d 357, 177 N.Y.S.2d 969 (Sup. Ct. 1958) (easements), Ross v. Franko, 139 Ohio St. 395, 40 N.E 2d 664 (1942) (easement); Crawford v. Senosky, 128 Ore. 229, 274 P. 306 (1929) (equitable servitude); Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 A 351 (1924) (semble; court did not clearly decide whether easement was appurtenant or in gross); Hayes v Gibbs, 110 Utah 54, 169 P.2d 781 (1946) (equitable servitude); Union Falls Power Co. v. Marinette County, 238 Wis. 134, 298 N.W. 598 (1941) (easement); Doherty v. Rice, 240 Wis 389, 3 N.W.2d 734 (1942) (equitable servitude).

See also Allied Amer. Inv. Co. v. Petti, 65 Ariz. 283, 291, 179 P.2d 437 (1947) (dictum).

See, further, Kloek, *Effect of Tax Deeds on Easements Appurtenant and Rights-of-Way*, 16 CHI.-KENT L. REV. 328, 348-66 (1938). The rule adopted in the above cases is said to be the prevailing rule in Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 352, 367 n. 64. It is argued that this is the correct rule in Thompson, *Taxation of Easements*, 8 MICH L. REV. 361 (1910); RESTATEMENT OF PROPERTY § 509, Comments d and e (1944).

[372] See Hunt v. Boston, 183 Mass. 303, 67 N E. 244 (1903); Schmidt v. Almon, 181 Wis. 244, 194 N.W. 168 (1923); RESTATEMENT OF PROPERTY § 509, Comments a, b, and c (1944). But see Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351 (1924).

[373] See ORE. REV. STAT. §§ 307.012(2)(b), 307 090 (1965); S.C. CODE ANN. § 65-1509 (1962); WASH. REV. CODE § 84.36.210 (1961); WYO. STAT. § 39-223 (1959). All these statutes deal with easements in gross owned by public utility corporations. See also City of Fort Worth v. Southwestern Bell Tel. Co., 80 F.2d 972 (5th Cir. 1936); Postal Tel. Cable Co. v. County Comm'rs, 131 Md. 96, 101 A. 600 (1917), Gulf Refining Co. v. Jenkins, 194 Okla. 331, 151 P.2d 419 (1944).

[374] Such a distinction was drawn in Englewood Cliffs v. Estate of Allison, 69 N.J. Super. 514, 528-30, 174 A.2d 631, 640 (App. Div. 1961), involving land held by testamentary trustees subject to a trust restriction

restrictions, whether the scenic easement is deemed to be appurtenant to the highway right-of-way or in gross. Such a policy will encourage landowners to sell scenic easements at a reasonable price and will avoid the obvious unfairness of requiring the servient landowner to pay taxes on a land valuation based on the false assumption that he can use his land for purposes which are prohibited by the scenic easement restrictions. Because of the uncertainty in many States as to the tax treatment of land subject to scenic easements, there should be clear statutory provision for appraisal of land covered by scenic easement restrictions on the basis of its value subject to those restrictions.[376] If the application of such a statutory provision results in excessive erosion of the local tax base, the State should then undertake a carefully considered program of "in lieu" payments to the local taxing units.

Even under the proposed treatment of scenic easements for real estate tax purposes, valuation will present some problems. It can be argued that the price paid for a scenic easement is a good measure of the impact of the easement on the market value of the servient land, and that the market value of the latter for tax purposes can be determined by deducting the price paid for the scenic easement from the original market value of the land. But in practice there will be many cases where the scenic easement does not appreciably reduce the value of the servient land and the price paid for the easement is nominal. This will be true where the land has little development potential and the scenic easement restrictions prohibit land uses which are not likely to be economically feasible even in the absence of such restrictions. Indeed, the scenic easement may actually increase the value of the servient owner's land where only part of his land is covered by the scenic easement. It is therefore clear that the tax assessor cannot always assume the price paid for a scenic easement is an accurate measure of the diminution in market value of the servient owner's land. He must always make an independent appraisal of the market value of the land for tax purposes.

that it should be used only for a public park. The court held that the land should be assessed only on the basis of the remaining private rights of the trustees, saying:

> We conclude that it is immaterial for assessment purposes whether the fee owner holds a title subject to a private easement for the benefit of a dominant tenement, a public easement in a dedicated and accepted street, or public rights to use and enjoy a park under a charitable trust. In each case the land has been deprived of an element of value to be subtracted from the value of the fee. Possibility of adding that element in whole or part to other property, as in the case of a dominant tenement, is not the controlling factor. The assessor's duty is to determine true value of the property being assessed, he should not include elements of value transferred to other properties or transfered to the community at large in the form of public rights The record here . . is barren of information about the influence, if any, of proximity to the park upon the assessed values of neighboring properties

The same view was taken in People ex rel. Poor v. O'Donnel, 139 App. Div. 83, 124 T.Y.S. 36 (1910), *aff'd.* 200 N Y. 518, 93 N.E 1129 (1910).

See discussion of the problem as it affects Wisconsin conservation easements, in Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program,* 1965 WIS. L. REV. 352, 367-71

[375] See, e.g., N.Y. GEN. MUNIC. LAW § 247 (3) (McKinney 1965):

> After acquisition of any such interest [conservation easement] pursuant to this act the valuation placed on such an open space or area for the purpose of real estate taxation shall take into account and be limited by the limitation on future use of the land.

See also MINN. STAT. § 272.59(1) (1961).

[376] See *supra* note 375. See also the suggestion in Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program,* 1965 WIS. L. REV. 353, 371-72 and nn. 78-79 therewith.

EFFECT OF TAX SALE OF SERVIENT LAND ON SCENIC EASEMENT

Under existing law, it would appear [377] that a sale for nonpayment of taxes on servient land subject to an affirmative easement in gross results in extinguishment of the easement, in the absence of a duly authorized separate tax upon the easement in gross.[378] No cases dealing with negative easements or equitable servitudes in gross have been found.

When the land sold for taxes is subject to an appurtenant easement or equitable servitude, it is generally held that a tax sale extinguishes the easement or servitude if the servient land has been assessed as land—i.e., as an unencumbered fee-simple estate—with no deduction for the reduction in value (if any) resulting from the outstanding easement or servitude.[379] Additional reasons given by courts for reaching this result are that the tax statute provides for *in rem* enforcement against the servient land as land or that the tax statute provides, either expressly or by construction, for transfer at a tax sale of a new and independent title which is perfect and free from any encumbrances.[380] Indeed, grounds such as these have been held to justify the result without any consideration of the question whether the servient land was assessed on the basis of an unencumbered fee-simple estate.[381]

A majority of the States have statutes on tax sales which do not expressly provide that a tax sale shall pass a new and independent title free from all encumbrances, [382] and a majority of the cases hold that a tax sale passes to the purchaser only the interest on which the delinquent taxes were assessed, so that an appurtenant easement or equitable servitude is not extinguished by a tax sale where the delinquent taxes were assessed against the servient estate only—i.e., on the basis of the value of the fee subject to the easement or equitable servitude.[383] A few statutes

[377] The discussion of this topic is based largely on the following sources: 2 AMERICAN LAW OF PROPERTY §§ 8.103, 8 104, and 9.40 (pp. 451-52) (A. J. Casner ed. 1952); 3 R. Powell, LAW OF REAL PROPERTY 526.55-526 59 (recomp ed. 1967), 5 *id.* 225-227 (recomp ed. 1962); Klcek, *Effect of Tax Deeds on Easements and Rights-of-Way,* 16 CHI.-KENT L. REV. 328 (1938), Comment, *The Assessment and Taxation of Easements,* 16 WASH L. REV. 36 (1941).

[378] See authorities cited *supra* note 372. Compare authorities cited *supra* note 374.

[379] See authorities cited *supra* note 370.

[380] See, e.g., Nedderman v. Des Moines, *supra* note 370 (tax sale gives a complete and perfect title, and a new and independent title); Hill v. Williams, *supra* note 370 (tax sale gives a new and complete title . . . under an independent grant from the sovereign authority, which bars or extinguishes all titles or encumbrances of private persons); Jackson v. Ashley, *supra* note 370 (tax sale gives a perfect title with the immediate right to possession). In Hanson v. Carr, *supra* note 370, a statute providing that a tax lien "shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real estate may become charged or liable" was held to result in extinguishment of an appurtenant easement. For criticism of *Hanson* on the ground (*inter alia*) that the statute did not require the construction given to it, see Comment, *The Assessment and Taxation of Easements,* 16 WASH L. REV. 36 (1941).

[381] See, e g., Young v. Thendara, Inc., 328 Mich. 42, 43 N.W.2d 58 (1950); Kern v Schaar, 338 Mich. 637, 62 N.W 2d 614 (1954). Cf. Stansell v. American Radiator Co , 163 Mich. 528, 128 N.W. 789 (1910), based on MICH. COMP. STAT. § 3825, which then provided: "For the purpose of taxation, real property shall include all lands within the State, and all buildings and fixtures thereon, and all appurtenances thereto. . . ." An easement was considered an appurtenance in *Stansell,* to be assessed as part of the dominant land. The *Young* and *Kern* cases, in holding appurtenant easements extinguished by a tax sale of the servient land, relied on MICH. COMP. LAWS § 211.359, which provides: "Any quitclaim deed . . . executed by the board or department shall convey title in fee to land . . . free from any encumbrances. . . ."

See also *supra* note 368 and accompanying text.

[382] See, e.g., MO. ANN. STAT. § 140 420 (1952); TEX REV. CIV. STAT. art. 7281 (1960).

[383] See authorities cited *supra* note 371.

expressly provide that a tax sale shall pass a title subject to easements existing at the time when the delinquent taxes were levied.[384] In at least one State it has been held that an equitable servitude is an "easement" which is not extinguished by a tax sale of the servient land,[385] and a few States have statutes which provide (with certain qualifications) that limitations, restrictions, and covenants running with the land shall not be extinguished by a tax sale of the servient land.[386] Some of the cases dealing with the effect of tax sales on equitable servitudes adopt the view that a situation both inequitable and contrary to public policy would arise if the tax sale purchaser could claim the land sold free of all restrictions to the detriment not only of his neighbors but also of the State and municipality, because of the reduction in the valuation of the dominant land for tax purposes.[387]

Where tax sales result in transfer of title to the State, there seems to be no danger that scenic easements owned by the State will be extinguished. But it would presumably be necessary to reimpose the scenic easement when and if the tax-forfeited land is reconveyed into private ownership.

Where tax sales result in transfer of title to private purchasers in the first instance, it would appear that new legislation to preserve the State's interest in scenic easements covering tax delinquent land should be enacted unless it is crystal clear under existing case law that the State's scenic easements will survive the sale of the servient land for nonpayment of taxes.

Federal Income Tax

TREATMENT OF PAYMENTS

In some cases, at least, a landowner's decision whether to grant a scenic easement or not may be significantly influenced by the way the payment received for the scenic easement is treated for Federal income tax purposes. More specifically, the decision may depend, in some measure, on whether such payment is treated as ordinary income or is accorded capital gains treatment.[388]

Capital gains treatment is available for the proceeds of a sale or exchange of real property if the real property is either a capital asset or a Section 1231 asset. Realty held for investment or speculation and rented is a capital asset;[389] rented realty, or other realty used in a taxpayer's business, if held for more than six months and not held primarily for sale in the ordinary course of a taxpayer's business, is a Section 1231 asset.[390] In most cases, land over which scenic easements are granted will be either a capital asset or a Section 1231 asset.[391] The sale of a scenic easement will therefore qualify for capital gains treatment if (1) the transaction is a sale[392] and (2) its subject matter is property of the same character as the land over which it is granted.

It is clear that the grant of a perpetual scenic easement for a money consideration is a sale of a capital asset or a Section 1231 asset to the extent the scenic easement transfers affirmative rights to the grantee[393]—e.g., to the extent the State highway agency is given a right of entry for specified purposes. So far as the scenic easement creates merely negative rights, however, it is less clear that the scenic easement transaction can be treated as a sale of a capital asset or a Section 1231 asset. The problem arises because the restrictions imposed on the servient land do not give the grantee any rights the grantor previously had; instead, the grantee is simply given the right to prevent the grantor from using his land in ways that would otherwise be permissible.

As previously noted, in at least some States the enforcement of restrictive covenants is said to rest on contractual principles. Hence it is possible that, in some States, purely negative scenic easement rights may not be classified as property. In this connection, it should be noted that there are some decisions that when land subject to restrictive covenants is taken for public use under the power of eminent domain no compensation need be paid to the owners of land benefited by the restrictions, on the ground that equitable servitudes rest upon contract and do not create any property interest known to the common law for whose taking compensation is constitutionally required.[394] The weight of authority is to the contrary,[395] however, and in all probability the great

---

[384] See, e.g., N.Y. REAL PROP. TAX LAW § 1020 (McKinney 1960) ("subject to all easements or rights-of-way which were in existence at the time of the levy of the tax the non-payment of which resulted in the tax sale").

[385] See Halpin v. Poushter, 59 N.Y.S.2d 338 (Sup. Ct. 1945), holding that building restrictions are easements not extinguished by a tax sale of the servient land. The tax sale statute then in force was N.Y. TAX LAW § 154, which contained no provision as to easements in 1945. It was amended in 1947 to exempt easements; presumably the term easements was intended to include within its scope equitable servitudes of the type held to be easements in *Halpin*. N.Y. TAX LAW § 154 was repealed in 1954 and replaced by N.Y. REAL PROP. TAX LAW § 1020, *supra* note 384, which contains the same provision as to easements.

[386] See, e.g., MASS. ANN. LAWS c. 60, § 45 (1964); OKLA. STAT. ANN. titl. 68, §§ 24349-24351 (1966). In connection with the Oklahoma statute, see Hawkins v. Whayne, 198 Okla. 400, 179 P.2d 138.

[387] See, e.g., Shafley v. Baumann, 341 Mo. 755, 108 S.W.2d 363 (1937), Almogordo Imp. Co. v. Prendergast, 43 N.M. 245, 91 P.2d 428 (1939); RESTATEMENT OF PROPERTY § 567 (1944); 2 AMERICAN LAW OF PROPERTY 452 (A. J. Casner ed. 1952); 5 R. Powell, LAW OF REAL PROPERTY 227 (recomp. ed. 1962)

[388] INT. REV. CODE of 1954, § 1221. The capital gain or loss is taxed differently depending on whether the property on sale of which the gain or loss accrued was held for six months or not. But the period for which the property has been held is not material in determining whether it qualifies for capital gain or loss treatment. The importance of the capital gain and loss provisions is due to the fact that in many cases it is to the taxpayer's advantage to treat a gain as a capital gain and to treat a loss as an ordinary loss.

[389] INT. REV. CODE of 1954, § 1221 (1) and (2).

[390] *Id.* § 1231.

[391] The land would be neither a capital asset nor a Section 1231 asset only if it were held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. See INT. REV. CODE of 1954, §§ 1221 (1) and (2), 1231.

[392] Even though property is a capital asset or a Section 1231 asset a transaction involving such property will not result in a capital gain or loss unless the property is sold or exchanged. See INT. REV. CODE of 1954, §§ 1222, 1231.

[393] Watts v. Erickson, 10 Am. Fed. Tax R.2d 5832 (D.C. Ore. 1962) (holding that the grant of an easement to the U.S. Forest Service constituted a sale by the grantor of property used in its trade or business, as defined in Section 1231(b) of the Internal Revenue Code, and that the gain realized on such sale was to be considered as gain from the sale of a capital asset held for more than 6 months). Accord: Inaja Land Co. v. Commissioner, 9 T.C. 727 (1947). In general, if the grant of an easement substantially deprives the landowner of the beneficial use of the land, the grant is treated as a sale of the land. See, e.g., Scales v. Commissioner, 10 B.T.A. 1024 (1928) (grantee of easement obtained a perpetual right to flood grantor's land, and as a result the land was flooded ten months of the year). An easement transaction is a sale only if the easement granted is perpetual in duration. Ebb B. Nay, 19 T.C. 114 (1952).

[394] See, e.g., Friesen v. Glendale, 209 Cal. 524, 288 P. 1080 (1930). The same view was taken in some of the earlier Federal cases, but it was recently repudiated in United States v. Certain Land, 220 F. Supp. 696 (D. Me. 1963)

majority of States will characterize negative scenic easement rights as an incorporeal property interest in land.

However, the fact that negative scenic easement rights are characterized as property by State law does not mean that the creation of such rights is a sale of a capital asset or a Section 1231 asset for income tax purposes. It has recently been suggested [396] that the closest analogy to the sale of a negative scenic easement is to be found in the cases dealing with payments for relinquishment or termination of contract rights such as distributorships or purchase agreements, inasmuch as the landowner is paid by the State to terminate his right to erect structures or buildings or otherwise use his land so as to destroy the view from the highway. *Commissioner v. Pittston* [397] is cited for the rule that, to qualify as a sale or exchange, the transaction must involve a transfer of rights of the seller which will continue to exist as property of the buyer, and the conclusion is drawn that creation of a negative scenic easement may not qualify as a sale because no rights of the landowner are transferred which will continue to exist as property of the State highway agency.[398]

The attempted analogy to cases dealing with termination of contract rights is not very persuasive. In the contract termination cases it is clear that no new rights are created against the seller. But the sale of a negative scenic easement does create new rights in the buyer against the seller which did not exist before—rights to enforce the scenic easement restrictions by injunction or other appropriate remedies. It would seem that the creation of such new rights for a money consideration ought to be considered as the sale of a capital asset or Section 1231 asset, as the case may be, despite the treatment accorded to the relinquishment of simple contract rights under the *Pittston* doctrine.

In any case, as one commentator has recently noted, the termination payments cases decided since *Pittston* have placed less emphasis on "the purely technical requirement of sale or exchange; that is, that a separately disposable property interest survive the transaction." [399] Certainly the more recent cases have moved away from the formalistic distinction between "a sale to third persons that keeps the 'estate' or 'encumbrance' alive and a release that results in its extinguishment," as the Second Circuit has recognized; [400] and the Second Circuit itself seems to have retreated from the position it took in *Pittston*. In *Commissioner v. Ferrer*, [400] where it held that a capital gain was realized from the surrender of a lease of the rights to produce a play and to prevent disposition of film rights, the court said: [401]

> One common characteristic of the group [of assets] held to come within the capital gain provision is that the taxpayer had either what might be called as "estate" in . . . or an "encumbrance" on . . . or an option to acquire an interest in . . . property which, if itself held, would be a capital asset. In all these cases the taxpayer had something more than an opportunity, afforded by contract, to obtain periodic receipts of income, by dealing with another . . . or by rendering services . . . or by virtue of ownership of a larger "estate." . . . Tax law is concerned with the substance, here by voluntary passing of "property" rights allegedly constituting "capital assets," not with whether they are passed to a stranger or to a person already having a larger "estate." . . . Finally with respect to the lease of the play, there was no such equivalence between amounts paid for its surrender and income that would have been realized by its retention as seems to lie at the basis of the Tenth Circuit's recent refusal of capital gain treatment in Wiseman v. Halliburton Oil Well Cementing Co., 301 F.2d 654 (1962), a decision as to which we take no position.

The *Ferrer* case does not really make clear what the test of a capital asset is. One commentator has suggested [402] that the test is whether the rights relinquished were merely rights to share in the proceeds of property in the future, or were rights to control the use or disposition of the property itself. Because the essence of a scenic easement is a right to control the use of the servient land, it would seem that the sale of a scenic easement would meet the suggested test and qualify as a sale of a capital asset or a Section 1231 asset, as the case may be.

The other circuits seem in recent years to have applied an essentially negative test originated by the Supreme Court: [403] the asset sold is not a capital asset if the termination payment is, in reality, simply the present value of future earnings that would be received by the payee under the contract being terminated. At least where it can be shown that the future earnings were certain in amount, a lump sum payment for relinquishment of the right to such earnings will be treated as ordinary income.[404] The price paid by a State highway agency for scenic easements can hardly be characterized as a lump sum payment in lieu of future earnings from the servient land, because the price is supposed to reflect the reduction in the market value of the land. Although this reduction depends,

---

[395] See discussion in 2 AMERICAN LAW OF PROPERTY 448-450 (A. J Casner ed. 1952); 5 R. Powell, LAW OF REAL PROPERTY 223-225 (recomp. ed. 1962); RESTATEMENT OF PROPERTY § 566, Comment c; R. Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, 1945 WIS. L. REV. 5; Comment, 53 MICH. L. REV. 451, 452-56 (1955)

[396] Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 352, 360.

[397] 252 F.2d 344 (2d Cir. 1958). The *Pittston* decision was foreshadowed in Commissioner v. Starr Bros., 204 F.2d 673 (2d Cir. 1953) and followed in Leh v. Commissioner, 260 F 2d 489 (9th Cir. 1958). See also Weyerhaeuser S.S. Co v. United States, 192 F. Supp. 615 (W.D. Wash. 1961).

[398] Note, *supra* note 395, at 361-62.

[399] Chirelstein, *Capital Gain and the Sale of a Business Opportunity: The Income Tax Treatment of Contract Termination Payments*, 49 MINN. L. REV. 1, 11 (1964). As Chirelstein points out, the law on Federal income tax treatment of contract termination payments has been somewhat confused. *Id.* at 13.

[400] Commissioner v. Ferrer, 304 F.2d 125, 131 (2d Cir. 1962).

[401] *Supra* note 399, at 130-31, 133.

[402] Chirelstein, *supra* note 398, at 22. See also Eustice, *Contract Rights, Capital Gains, and Assignment of Income—The Ferrer Case*, 20 TAX L. REV 1 (1964).

[403] Hort v. Commissioner, 313 U.S. 28 (1941); Corn Products Co. v Commissioner, 350 U.S. 46 (1955); Watson v Commissioner, 345 U.S 544 (1952), Commissioner v. P. G. Lake, Inc, 356 U.S. 260 (1958); Commissioner v. Gillette Motor Co, 364 U.S 130 (1960); United States v. Midland-Ross Corp, 381 U.S. 54 (1965)

[404] See Supreme Court cases *supra* note 402. Accord. Commissioner v. Phillips, 275 F.2d 33 (4th Cir. 1960); U S. v. Eidson, 310 F.2d 111 (5th Cir. 1962); First Nat Bank of Kansas City v. Commissioner, 309 F.2d 587 (8th Cir. 1962); Holt v Commissioner, 303 F.2d 687 (9th Cir 1962); Bisbee-Baldwin Corp. v. Tomlinson, 320 F.2d 929 (5th Cir. 1963); United States v Foster, 324 F 2d 702 (5th Cir. 1963); Hallcraft Homes, Inc. v. Commissioner, 336 F.2d 701 (9th Cir. 1964); Pounds v. United States, 372 F 2d 346 (5th Cir. 1967).

Under this test, capital gains treatment was held proper in Nelson Weaver Realty Co. v. Commissioner, 307 F.2d 897 (5th Cir. 1962); Commissioner v. Killian, 314 F.2d 852 (5th Cir. 1963); United States v Dresser Industries, Inc., 324 F 2d 56 (5th Cir. 1963); Turzillo v. Commissioner, 346 F.2d 884 (6th Cir. 1965).

in part at least, on estimated future loss of earnings due to the scenic easement restrictions, such future earnings would seldom be so certain in amount as to meet the future income test applied in contract termination cases.

Assuming that the proceeds of sale of a scenic easement to the State highway agency will be accorded capital gains treatment, the landowner must then consider how to compute the amount of capital gain or loss resulting from the sale. The taxable capital gain or loss will be the difference between the payment received for the scenic easement and the basis of the easement rights.[405] But because the landowner will ordinarily have acquired a full fee-simple estate in the servient land to begin with, it may be difficult to compute the basis of the easement rights he contemplates selling to the State.

One possible method for allocating the basis of the entire property between the scenic easement rights sold to the State and the rights retained by the servient landowner would be to determine the ratio of current scenic easement value (i.e., the price paid for the easement) to the current value of the full fee-simple estate, and then to apply this ratio to the basis of the full fee-simple estate to arrive at a basis for the scenic easement rights.[406] Thus, if the price paid for the scenic easement is 10 percent of the current value of the fee-simple estate, the capital gain or loss could be determined by finding the difference between the price of the scenic easement and 10 percent of the original price paid for the fee-simple estate. This method of basis allocation would seem to be appropriate in any case where it cannot be shown that the value of the scenic easement rights represents a greater or lesser percentage of total fee-simple value at the time of the easement sale than at the time of original acquisition of land.

A second method of basis allocation could be used where the scenic easement covers only part of the taxpayer's land and the scenic easement restrictions substantially limit the beneficial use which the taxpayer can make of the part covered by the scenic easement.[406] In such a situation the sale of the scenic easement would be tantamount to sale of the fee-simple in part of the land, [407] and the basis of the entire property could be allocated in the same manner as when a landowner sells part of his land in fee-simple.[408]

Even if there is no satisfactory method for determining the basis of scenic easement rights in a particular case, the landowner may still be able to treat the proceeds of sale of a scenic easement as a return of capital.[409] Courts have held that where there is no fair method of determining the basis of an easement, the price paid for the easement may be subtracted from the basis of the entire property.[410]

[405] The general rule is that the basis of property for tax purposes is its original cost to the taxpayer. INT. REV. CODE of 1954, § 1012.

[406] Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 352, 363.

GIFTS AS CHARITABLE DEDUCTIONS

It is possible that some landowners may be persuaded to give scenic easements to the State highway agency if the amount of the gift can be deducted from the donor's adjusted gross income for Federal income tax purposes.[411] A recent Revenue Ruling [412] indicates that such a deduction will be permitted. The Ruling deals with a taxpayer who gave to the United States a scenic easement along a Federal highway in response to the government's indicated interest in preserving the view from the highway. The deduction was allowed as a charitable contribution under the definition in Internal Revenue Code of 1954, section 170 (c) (1). Applying the definition of a charitable contribution to a public body—a "contribution or gift to or for the use of" the United States or any political subdivision thereof "for exclusively public purposes"—the Ruling allowed a deduction of the fair market value of the property rights donated. It appears that the Internal Revenue Service will accept as *prima facie* evidence of fair market value the determination of the local tax assessor upon reassessment of the servient land.[413]

It should be noted that the landowner obtains a greater benefit in giving a scenic easement to a public agency than in giving it to a private conservation group. The normal limitation on charitable deductions is 20 percent of adjusted gross income: [414] but a total deduction of 30 percent of adjusted gross income is allowed for contributions to churches, certain educational institutions, and governmental agencies.[415] Moreover, special carryover provisions apply to this latter group of organizations, so that the excess of contributions over 30 percent can be deducted on future returns up to five years from the date of the gift.[416]

[407] See Commissioner v. Scales, *supra* note 392.

[408] I.T. 1843, 1923-II-2 Cum. Bull. 72.

[409] *Supra* note 404.

[410] Inaja Land Co., Ltd. v. Commissioner, 9 T.C. 727 (1947). See also Burnet v. Logan, 283 U.S. 404 (1931); Warren v. Commissioner, 193 F.2d 996 (1st Cir. 1952); Nathan Blum, 5 T.C. 702, 709 (1945); Raytheon Production Corp., 1 T.C. 952 (1943).

> In this situation, if the taxpayer originally bought his property for $10,000 and sold an easement at a later date for $2,000, he would pay no tax initially on the $2,000 dollars he received from the State for the easement. However, the $2,000 would be subtracted from the basis of the entire property. When the remainder of the taxpayer's property was sold, he would pay a capital gains tax on the difference between what he received for the property and the adjusted basis of $8,000. However, if the sale price of the easement had exceeded the basis of the entire property, for example, if the easement were sold for $11,000 in the above example, the taxpayer would immediately pay a capital gains tax on the excess amounting to $1,000.

Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 352, 363-64.

[411] The treatment of this topic is based on W. Matuszeski, "Less Than Fee Legal Devices for Open Space Preservation in Metropolitan Areas: Feasibility and Implementation" 26-29 (unpubl. seminar paper submitted to Prof. C. Haar, Harvard Law School, 1966).

[412] Rev. Rul. 24-205.

[413] Matuszeski, *supra* note 410, at 27 n. 42. Matuszeski's statement about fair market value is based on an interview with S. David Levy, National Capitol Parks Service, Aug. 1965.

[414] INTERNAL REVENUE CODE of 1954, § 170(b)(1)(B).

[415] *Id.* § 170(b)(1)(A).

[416] *Id.* § 170(b)(5).

CHAPTER FOUR

PROPOSED ENABLING LEGISLATION AND SUGGESTED SCENIC EASEMENT PROVISIONS

PROPOSED ENABLING LEGISLATION

It may seem presumptuous to set forth a proposed scenic easement enabling act, inasmuch as a large majority of the States have already enacted enabling legislation in response to Title III of the Highway Beautification Act of 1965. It is possible, however, that the proposed scenic easement enabling act may be helpful to those States which as yet have no enabling legislation, and perhaps also in other States which may wish to reconsider enabling legislation enacted somewhat hastily in order to qualify for "3 percent" Federal funds under Title III of the Highway Beautification Act of 1965. Like most of the enabling statutes already adopted, the proposed statute is broad enough to permit acquisition of land in fee simple, or any lesser estate or interest therein, for the purpose of preserving, restoring, or enhancing scenic beauty along the highways.

The proposed enabling legislation is as follows:

Highway Scenic Beauty Act

(1) It is the intent of this act to promote the safety, convenience and enjoyment of travel on, and protection of the public investment in, those State highways which are part of the National System of Interstate and Defense Highways or the Federal-aid system of primary and secondary highways, and to provide for the restoration, preservation, and enhancement of scenic beauty within, adjacent to, or within eyeshot of such highways.

(2) The State highway agency [commission or department] is hereby authorized to acquire, either in fee simple or any lesser estate or interest, real property adjacent to or within eyeshot of any State highway comprised in the National System of Interstate and Defense Highways or the Federal-aid system of primary and secondary highways, [any State or county highway] which the State highway agency considers necessary for the preservation, restoration, or enhancement of scenic beauty within, adjacent to, or within eyeshot of such highways. Such acquisition may be by gift, purchase, exchange, or condemnation. The cost of acquisition shall be considered part of the cost of highway construction.

(3) The less-than-fee simple interests authorized to be acquired by this act may include scenic easements, which are servitudes designed to permit land to remain in private ownership for its normal agricultural, residential, or other use and at the same time to restrict and control the future use of the land for the purpose of preserving, restoring, or enhancing the natural beauty of the land subject to the scenic easement. Scenic easements acquired pursuant to this act shall be deemed to constitute easements both at law and in equity, and all the usual legal and equitable remedies (including prohibitory and mandatory injunctions) shall be available to protect and enforce the State's interest in such scenic easements. All scenic easements acquired pursuant to this act shall be deemed to be appurtenant to the highways to which they are adjacent or from which they are visible. The duties created by any scenic easement acquired pursuant to this act shall be binding upon and enforcible against the original owner of the land subject to the scenic easement and his heirs, successors, and assigns in perpetuity, unless the instrument creating the scenic easement expressly provides for a lesser duration. No court shall declare any scenic easement acquired pursuant to this act to have been extinguished or to have become unenforcible by virtue of changed conditions or frustration of purpose.

(4) The State highway agency may acquire land in fee simple pursuant to this act and convey or lease such property back to its original owner or to another person or entity subject to such reservations, conditions, easements, covenants, or other contractual arrangements as will preserve, restore, or enhance the scenic beauty of the area traversed by the highway.

(5) The State highway agency is hereby authorized to grant variances from the reservations, conditions, restrictions, covenants, or other contractual arrangements contained in any scenic easements acquired pursuant to this act or in any conveyances made pursuant to this act, upon the following conditions:

(a) Application for such variance shall be made by the landowner in writing on forms supplied by the State highway agency and shall include a description of the land, the variance or release desired and the reasons therefor.

(b) Any such variance shall be determined by the State highway agency to be in the public interest and not contrary to the purposes of the scenic enhancement program.

(c) The State highway agency shall determine whether the granting of the variance sought will add value to the land in question. If the determination is affirmative, the landowner seeking the variance shall be required to pay such value to the State highway agency. To aid in such determination, independent appraisers may be employed.

(d) The State highway agency shall require the execution of such conveyances, contracts, or other instruments as it deems legally necessary to accomplish the desired result.

(6) When the State highway agency shall deem it necessary to exercise the power of eminent domain to acquire any real property, either in fee simple or any lesser estate or interest, pursuant to this act, the agency shall be entitled at any point in the condemnation proceeding, even after

verdict, to have the proceeding dismissed upon payment of all costs of the condemnee, including attorney's fees.

(7) The Legislature hereby declares that the acquisition of interests in real property for the purposes stated in this act will serve a public purpose and provide for a public use of such interests. Where the interest acquired pursuant to this act is a scenic easement or other less-than-fee simple interest imposing scenic restrictions on land, the visual use and occupancy by the traveling public of areas subject to such restrictions is hereby declared to be a public use.

SUGGESTED SCENIC EASEMENT PROVISIONS

In drafting scenic easement deeds, it would seem that the current Wisconsin practice has substantial advantages in terms of tailoring the land-use restrictions and the affirmative rights granted to fit the particular situation. It will be recalled (see Chapter Two) that the current practice in Wisconsin is to select from a substantial list of restrictions and affirmative rights those most appropriate for the particular scenic location. The field team which makes the selection uses a simple one-sheet scenic easement deed form, with ample blank space for typing in the restrictions and affirmative rights selected for each scenic easement. The Wisconsin highway agency's field teams now work from the following standard list:

Specific Rights Conveyed

The right of the State of Wisconsin, its agents and contractors, to enter upon the easement area:

(a) To inspect for violations of the provisions of this easement and to remove or eliminate advertising displays, signs and billboards, stored or accumulated junked automobiles, farm implements or parts thereof, and other salvage materials or debris, and to perform such scenic restoration as may be deemed necessary or desirable.

(b) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures.

(c) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures. The area excluded from this provision is described as follows: (Then describe excluded areas such as the residence, etc.)

Specific Rights Relinquished

1. The right to erect, display, place or maintain upon or within the scenic area any signs, billboards, outdoor advertising structures or advertisement of any kind, except that one (1) on-premise sign of not more than ___ square feet in size may be erected and maintained to advertise the sale, hire, or lease of the property, or the sale and/or manufacture of any goods, products or services upon the land. Any existing signs, other than the one on-premise sign, and/or advertisements as described above shall be terminated and removed on or before _____.

2. The right to dump or maintain a dump of ashes, trash, rubbish, sawdust, garbage, offal, storage of vehicle bodies or parts, storage of farm implements or parts, and any other unsightly or offensive material.

3. The right to cut or remove any trees or shrubs.

4. The right to cut or remove any trees, except marketable timber and then in accordance with standard forest cropping practices existent in the area, and at no time will the scenic area be denuded of trees.

5. The right to park trailer houses, mobile homes, or any portable living quarters.

6. The right to quarry, or remove, or store any surface or subsurface minerals or materials.

7. All rights except general crop and/or livestock farming (agricultural) within the first ____ feet of the scenic areas as measured normal to the (center line) (reference line) (nearest edge of pavement) (right-of-way line) of the highway.

8. All rights except general crop and/or livestock farming (agricultural).

9. The right to develop the easement areas except for limited residential development consistent with applicable State and local regulations. Such limited rights retained by the owner are as follows:

(a) Each single family residential lot fronting on and abutting (identify highway) shall be limited to a minimum width of _____ feet as measured parallel to the highway;

(b) A total of ____ single family residential lots is the maximum number authorized for the easement area.

10. The right to change the use of the easement area from residential to any other use.

11. The right to change the use of the easement area from commercial to any other use.

In drafting a scenic easement deed, the specific right to enter to inspect for and to eliminate violations should normally be included, and in most cases the specific right to enter to plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures should be included. If it is desired to exclude part of the scenic easement area from this provision, the area excluded should be specifically stated. (See alternative provisions (b) and (c) above under "Specific Rights Conveyed."

Any combination of the listed restrictions ("Specific Rights Relinquished") may be used in the scenic easement deed, depending on the character of the scenic easement site and the objective sought to be accomplished. Some of the restrictions are alternatives, both of which would not be included in the same scenic easement deed—e.g., items 3 and 4; items 7, 8, and 9; items 10 and 11. Item 9, dealing with residential development, leaves room for negotiation with the landowner as to the number of residential lots and the minimum width of lots to be permitted in the scenic easement area.

Additional restrictions which might well be added to any standard list would include the following:

1. No new or additional structures shall be constructed upon the scenic area without a written permit from the State highway agency [commission or department].

2. No new installation of utility structures or lines shall be made upon or within the scenic area without a written permit from the State highway agency [commission or department].

3. No overhead pipes, conduits or wires for the purpose of transmitting messages, heat, light, or power shall be erected upon or within the scenic area.

Items 2 and 3 might both be included in the scenic easement deed in unusual situations, but ordinarily only one of them would be included in a particular deed. And some State highway agencies may prefer to include one or the other, but not both, in their standard list of restrictions.

Every scenic easement deed form should contain the following printed clauses:

> The rights hereby acquired do *not* grant the public the right to enter the above-described area for any purpose.
>
> The rights hereby acquired do *not* grant the State of _____, or its agents, the right to enter the above-described area except for the purpose of inspection and enforcement of the rights specifically conveyed and relinquished herein.

The inclusion of these clauses will assure the landowner that the public will not be permitted to use the scenic easement area as a park and that the highway agency will not have the right to use it for highway construction or maintenance purposes. This should make the scenic easement more "salable" to landowners.

It may be desirable in some instances to obtain from the landowner an option to purchase the desired scenic easement. To provide for this, an option form with the same printed clauses and ample blank space for insertion of the desired affirmative rights and restrictions should be prepared. When the option to purchase is negotiated, agreement should be reached as to precisely what affirmative rights and restrictions the scenic easement is to include, and these can be typed onto the option form before it is executed by the landowner.

Inasmuch as condemnation will have to be resorted to in some instances (in most States, at least), a scenic easement condemnation award form will also be needed. In substance, this form should be like the scenic easement deed form used when a scenic easement is acquired by negotiated purchase. The desired affirmative rights and land-use restrictions can be selected from the standard list, together with any other rights or restrictions deemed desirable to deal with any unusual features of the scenic easement site, and typed onto the award form.

Appendix C contains additional scenic easement forms.

CHAPTER FIVE

ADMINISTRATIVE PROBLEMS AND PROCEDURES

DEFINITION OF SCENIC EASEMENT

Broadly, a scenic easement is a "conveyance of those ownership rights in property which will permit a public body to effectively preserve (protect or restore) the *scenic beauty* of the property when viewed from public lands, reserving to the grantee all other beneficial interests." [417]

GUIDELINES FOR SELECTION OF A SCENIC EASEMENT AREA

The following criteria as indicated by Levin [418] can be used for selection of scenic easement locations:

1. *Quality*—The scenic, historic, or cultural character of the highway corridor should have a quality that merits State or national recognition, or should be of sufficient interest to be a destination, in and of itself, for recreation purposes. It should provide frequent opportunities for the development of roadside complementary facilities adjacent to the road.

2. *Variety*—The highway should provide changes in terrain, types of landscape, or land-use activity. It should provide a balance to the type of experience offered elsewhere in the State by exhibiting a type of natural or cultural landscape peculiar to that area of the State.

3. *Accessibility*. The highway should provide access to or links between existing or proposed parks, other public recreation areas, or points of scenic, cultural, or scientific interest.

Accessibility may have another application in connection with scenic roads. On parkways, the number of access points may be limited. On other kinds of scenic roads the number of private and public points of access to the highway may be limited to no more than four per side per mile in heavily populated areas.

4. *Location and geographic distribution*—The scenic highways of a State should be distributed in location over as wide a geographic area as is possible, consistent with other qualifying requirements. It is also desirable to select some highways which will occasionally parallel the approximate alignment of a major trans-State or interregional route, or swing out in a wide loop and return. Motorists using the through routes would then have the opportunity

[417] From R. C. Leverich, Chief of Right-of-Way, District 5, Wisconsin Division of Highways.

[418] David R. Levin, Deputy Director, Office of Right-of-Way and Location, U.S. Bureau of Public Roads.

to leave them periodically to enjoy a particularly scenic area in a more leisurely manner. On long trips, these opportunities would be more than welcomed by those needing to relax from the tensions of the trip.

5. *Design and safety*—The highway should have a geometric design which fosters graceful, ground-fitting horizontal or vertical alignment, appropriate curves and striking vistas, and accommodates the anticipated volume of traffic without undue hazard to highway users.

6. *Adaptability to development*—The immediate roadside should be relatively free of commercial or restrictive development which would fall within the minimum corridor suggested and right-of-way width of 200 ft. Other development within the corridor, which would not be in keeping with the desired character of the corridor, could be eliminated, bypassed, or screened from view. Further undesirable development could be prevented.

7. *Compatibility*—The location of new highways should be coordinated with other outdoor recreation, aesthetic and conservation objectives. The highway should not disrupt wilderness areas, fish, wildlife, or nature preserves. Its location should not impair the maintenance or enjoyment of features of scenic, geologic, cultural, or historic interest.

8. *Competing uses*—The requirements of other highway users for the use of the highway should not materially interfere with the use of the road for recreation purposes. The other-use traffic: (a) should be small enough in volume to be of little concern; (b) the bulk of it should occur at a time when little recreation use is being made of the road; or, (c) should be considered by having additional capacity and design features built into the road to accommodate, with safety, the needs and driving patterns of the recreation seekers and other users.

A slightly different approach is put forth by Leverich,[417] whose guidelines for site selection for scenic easements are as follows:

1. Consider and isolate the qualities which create the beauty or which can be developed or altered to create beauty and draft the terms and conditions of the easements so as to preserve and promote this beauty.
2. Include in the scenic easement those rights which may be necessary to enable future restoration of desirable qualities or elimination or screening of undesirable qualities which may be present now or creep in in the future.
3. Apply these terms and conditions to the total scene or to that part of the scenic area which will effectively control the entire view.

The restrictive covenants should not only preserve the existing beauty of the site or the route selected, but should be designated to restore desirable visual factors in an area that may be eliminated or suppressed with the passage of time. Examples are the right to prevent the future use for advertising signs, the removal of signs effective with the expiration date of the existing lease, or the inclusion of the right to remove an obsolete building after a set number of years or the right to select, cut, prune, or plant trees or shrubs as needed to open or control a scenic view.

After a given route is selected for scenic easement acquisition, it is desirable to encompass in the easement agreement any and all factors that affect the scenic beauty of that specific route.

RESPONSIBILITY FOR ADMINISTRATION AND SELECTION

This study of the scenic easement program on a national basis indicates that little progress has been made to date. Lack of understanding of the scenic easement program by the various highway departments appears to be the major reason that scenic easement acquisition is not moving at a greater pace.

For a successful acquisition program of scenic easements, on the State level, it is felt that a committee should be formed of the various department heads for the primary purpose of selecting various sites for scenic easements. As a result of the current studies, it appears that a four-man team composed of representatives of the following departments would be warranted: (1) the landscape section; (2) the right-of-way section (engineering); (3) the right-of-way section (valuation); and (4) the maintenance section. The representatives from these offices of the State highway system should be formed into a committee for general site selection, acquisition, negotiation, etc., throughout the State. At a local or district level, a liaison man should be made available to work in conjunction with the persons on the State level. In addition, the local highway district offices should be encouraged to make suggestions pertaining to areas for scenic easement projects.

The reasons for the selection on a State level of the various departments are as follows: The landscape section for the aesthetic point of view of the scenic easement area; the right-of-way section (engineering) for the feasibility of scenic easements in conjunction with right-of-way takings; the right-of-way section (valuation expert); and the maintenance department for controlling of the scenic easement areas after the acquisition is completed. The liaison man with the local district office should be in charge of the particular project pertaining to the time, status, etc., of the specific job so there is control. The liaison man should report directly to the State Committee. An example of a status report is shown in Figure 1.

In addition, personnel at the State headquarters should be primarily responsible for the location, size, etc., of the specific scenic easement taking. It is recommended strongly that the local district engineer and district department heads make recommendations to the liaison man to be referred to the State concerning the various areas that are feasible for scenic easement acquisition. It is important that the scenic easements be acquired at the same time as new right-of-way. This is especially true along new Interstate highways. The scenic easement should be applied with the right-of-way area to eliminate the necessity of redrawing plat maps, etc., and having a negotiator work the same area (and some owners) twice.

In the acquisition of land for highway purposes, unfortunately, some ill will is created by the necessity of a specific highway through a given area. Thus, in many cases, when the negotiators are instructed to go back for scenic easements after the highway is completed the prop-

Form_____ State Highway Commission of _____

STATUS OF THE SCENIC EASEMENT PROJECTS

To From District ___ of ___

Report Period - From_____to_____Inclusive

Project	ST	County	Biennium
No./Parcels	No./Parcels Acqd.	Date of Original R. O.	
Appraisals Not Started			
Appraisals Started			
Offering Price to Central Office			
In Negotiations			
J. O. Tendered			
Awards at Central Office			
Estimated Date of Completion			

Project	ST	County	Biennium
No./Parcels	No./Parcels Acqd.	Date of Original R. O.	
Appraisals Not Started			
Appraisals Started			
Offering Price to Central Office			
In Negotiations			
J. O. Tendered			
Awards at Central Office			
Estimated Date of Completion			

Remarks

_____

Chief of Right-of-Way & Roadside Control

Figure 1. Example of status report on scenic easement projects.

erty owners' reaction can be hostile. This is poor procedure from the basis of "selling" the scenic easement program and acquisition for right-of-way purposes.

The prime responsibilities of the scenic easement State board or committee are to determine where the scenic easements are to be located, the sizes and the scope of the scenic easement area, the type of restrictions or permitted uses to be applied to the scenic area, the status of the scenic easement program, the progress or lack of progress of this program, the method of acquisition that would be warranted for the particular types of scenic easements for various locations, etc. In addition, the committee or its representatives would have the authority pertaining to the relocation of scenic easements or a possible relocation of scenic easement areas or boundaries, prior to a condemnation proceeding. The board would have the final authority as to what constitutes a scenic easement and what areas are to be enhanced with a scenic easement program.

In reviewing scenic easement programs in the various States it has been found that one of the prime causes of problems is the lack of responsibility by various officials to get the particular project moving. The chief concern of the local highway districts is acquisition of property for the construction of roadways. The status of these particular projects is watched closely by the various governmental heads, and is prodded along in each direction by construction people, engineering people, right-of-way people, etc.

In direct contrast, the scenic easement program has no direct push at the local district level and the scenic easement is laid aside as a "make work" project. (It might be added at this point that the "make work" job never seems to get done.) The scenic easement is assigned a priority of the least importance and there is no apparent need of urgency for this program. However, by establishing a four-man State board with liaison people at the district level, a quarterly or possibly even a monthly status report of the existing program could be maintained and accounted for. This program, more than any other, should be given prime consideration pertaining to its status. This program in any given State is only as good as the people administering it, and the local highway office will not fill this need.

As regards the responsibilities of the scenic easement program or the highway officials in charge of the program, it should be noted that a comprehensive selling or public relations job must be undertaken to insure success. This selling job will require literature, meetings, and other types of "soft sell" proposals to put the public into a frame of mind to think "scenic beauty."

Some State highway departments fail to cut weeds and brush along roads, fail to prevent maintenance crews from storing mixed materials on the right-of-way, and create borrow pits without screening. It appears that the various highway commissions and departments should, in a sense, "clean house" pertaining to scenic beauty. In other words, to attempt to acquire lands for a beautification program and then to violate in a small percentage of instances the actual right-of-way owned by the State, is poor in the image of the public pertaining to the acquisition of scenic easements.

WHERE AND HOW TO ACQUIRE SCENIC EASEMENTS

The scenic easements should be obtained along various types of roadways and, generally, in the initial stages of a State program, the scenic strip should be limited to a specific location rather than a number of scattered sites. It appears likely that one location is ideal to initiate a State in the acquisition of scenic easements and to gain some footing into the program. The basic concern is what to apply to the scenic easement and what to preserve for the natural beauty of the particular area, and to maintain that beauty as well as to eliminate any existing poor views on the property at the present time. The application of scenic easements should be practical—it is highly unlikely that entire highway systems can be encumbered with scenic easement restrictions and permitted uses, due to the high cost of the acquisition.

Pertaining to the general application of the scenic easement program, there is no question but that there are practical considerations as to what and where to start with the acquisition. However, the pattern of applying such easements should be ambitious in nature so as to cover entire scenic strips or scenic corridors over a given area. It appears highly likely and desirable that scenic easements should be applied along the various proposed Interstate routes. These Interstate routes, for the most part, extend through virgin lands, where there generally are no existing improvements of a commercial nature.

To aid in applying scenic easements to a given area, or in determining the type or size of the area to be covered, reference is made to Figure 2.

Obviously, the size of the scenic easement area will vary considerably and any application of a standard distance from roadways would not be warranted. In fact, the States that in the past used a standard distance are changing their procedures to use a flexible distance as indicated. As shown in Figure 2, a standard setback of 200 or 300 ft will result in controlling of the easement area, but the lands beyond the required setback can be violated legally and the highway department will not have accomplished anything. Consequently, it is obvious that scenic easement areas are going to vary greatly as regards size, location, and distance from the roadway (Fig. 3).

Referring to the responsibilities of the State committee or board, it should be pointed out that due to varying sizes, etc., of the scenic easements, the various departments (landscaping, right-of-way, and maintenance) should be consulted regarding the area that it is practical for the State to obtain easements on. When the land area tends to be large, it obviously becomes necessary to have a rough estimate of the cost of the acquisition as well as the various costs pertaining to the personnel involved. For this reason, the various departments of the State agencies should be consulted through or by the central scenic easement bureau or committee.

If there is one word that one would want to use throughout this study pertaining to the acquisition, application, etc., of scenic easements, that word should be "flexible." The scenic easement as applied should impose as few restrictions as possible as long as the view is insured. The

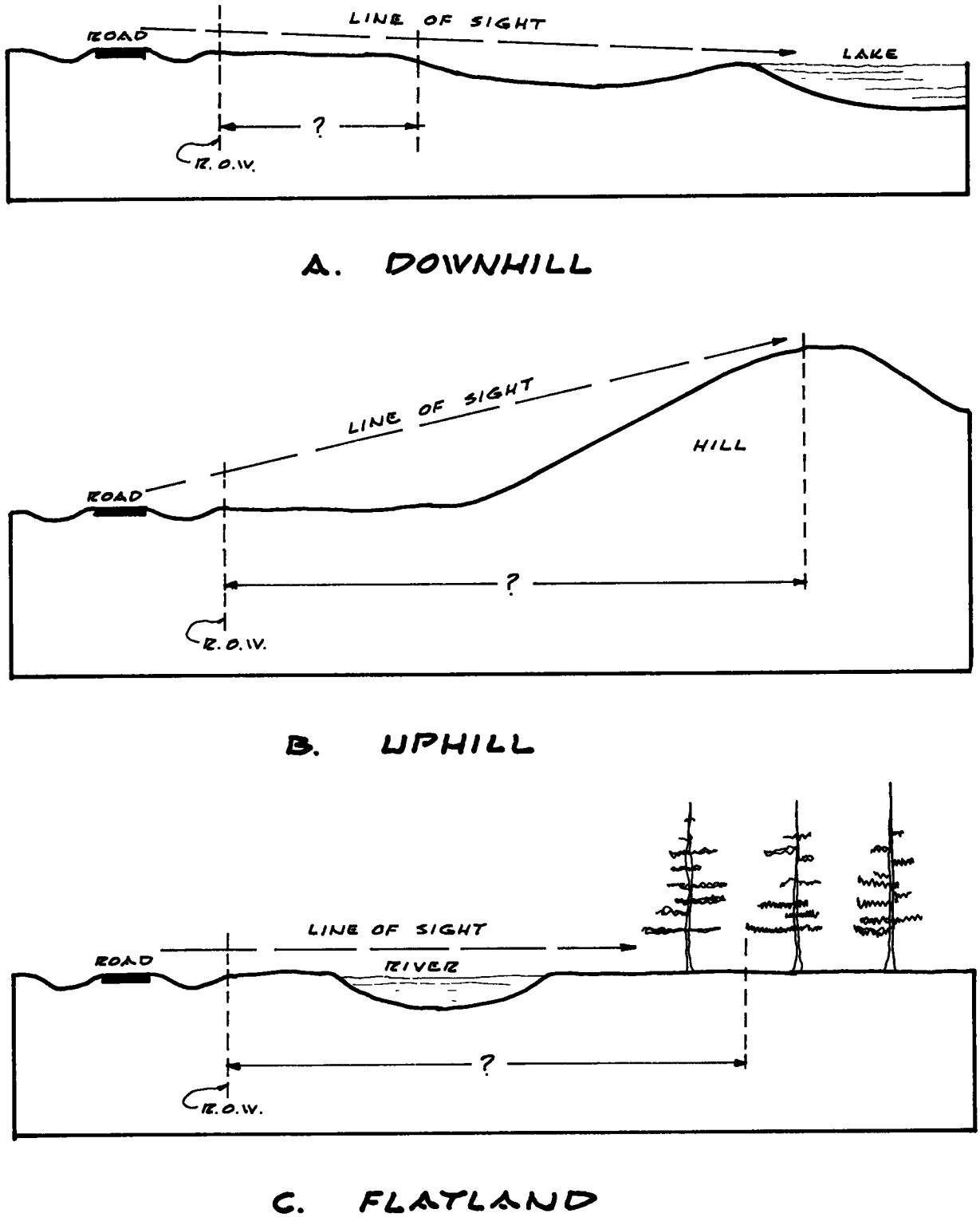


Figure 2. Generalized schemes for determining how far a scenic easement should extend.

fewer restrictions imposed upon the subject property, as long as the view is maintained, will lessen the control aspect and the policing of this general area after the easement is acquired and is turned over to the maintenance people.

It should be pointed out again that use of a set distance of the scenic easement from the roadway may not result in acquisition of a scenic easement that would be applicable in years to come; a standard distance may or may not be

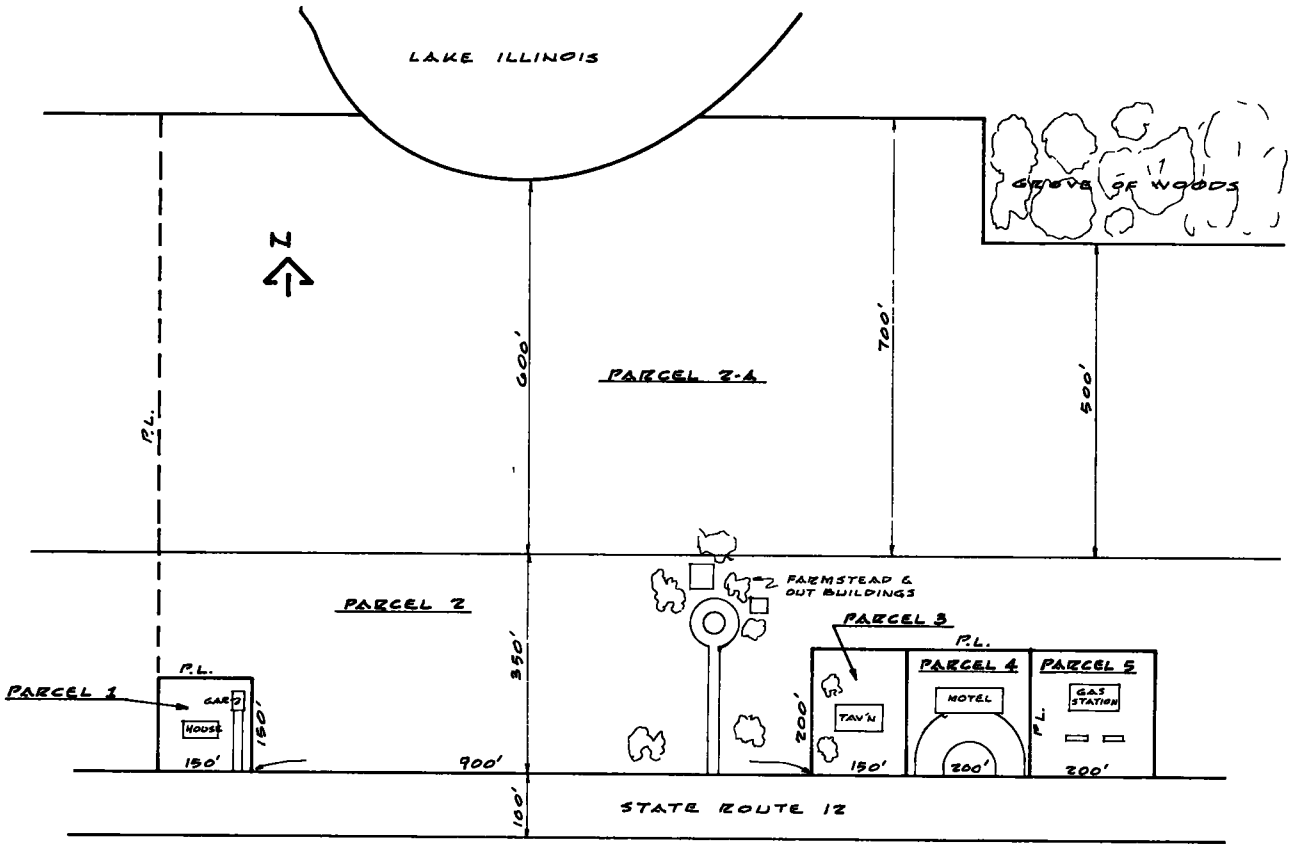


Figure 3. Example of scenic easement variations along a primary route. The variation in the depth of the scenic easements is due to the general topography of the area and will vary to preserve the vista. No standard depth pattern will effectively control this area.

worthwhile if the area does not encompass the entire view. (An example is a rest area that was taken in a specific State along an Interstate route. When the property was acquired, the area immediately adjacent to the rest area was in timber, which afforded a pleasant view for the public. However, the State did not apply any scenic easements to the area surrounding the rest area and the owner quite legally cut down all the existing trees. In this particular instance the rest area was originally located in a grove of trees and, in fact, does still have a few trees; however, the land surrounding the rest area now contains only unsightly stumps.)

In addition, examples of a 300-ft setback of scenic easements in other areas indicate that the lands beyond the 300-ft scenic easement area are used legally for various dumping and unsightly construction purposes. Therefore, the actual taking of the 300-ft frontage along the road for scenic beauty was offset by the use of those lands located just beyond it.

In these particular situations the scenic easements should be applied along the lines of Figure 4 so that encroachments beyond the scenic easement area would not negate the original scenic easement taking.

With regard to the aspect of how to apply the scenic easement, it should be pointed out that the department applying the easement has a choice of a less-than-fee-simple-type acquisition or a partial taking of the bundle of rights of the existing property. Many of the State agencies visited or from which correspondence was received indicated that these agencies had an interest in taking fee-type acquisition for scenic easement purposes.

However, this probably is not necessary. There may be cases in the acquisition of scenic easements where a fee-simple type of taking would be applicable; but this circumstance is rare and the restrictions or permitted uses would have to be severe and result in extreme hardship to the property owner. In addition, an easement could result in actual fee-plus compensation if the property were rendered almost useless and the present owner were required to pay the taxes.

A study of the 500 to 600 scenic easement acquisitions of the LaCrosse district of the State of Wisconsin Highway Department shows that the greatest percentage of acquisitions have been taken in a less-than-total-fee-type compensation. It appears from this that in the acquisition of scenic easements a less-than-fee-type compensation basis would be applicable to the greatest percentage of the scenic easement programs for highway purposes. The success of the less-than-fee-type compensation acquisition for scenic easements is based on a strong public relations effort by the State. To be sure, the program pertaining to the acquisition of scenic

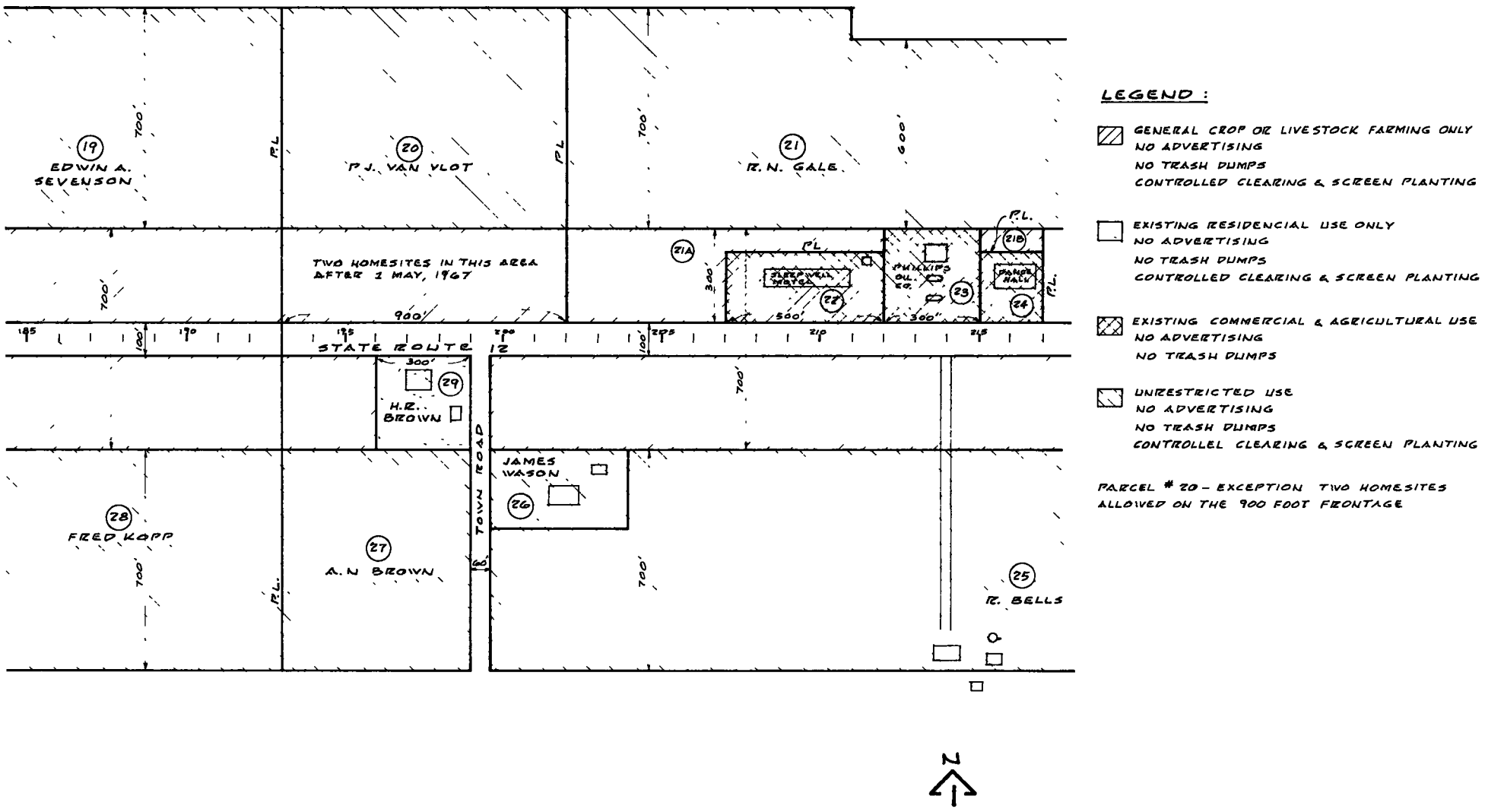


Figure 4. Example of plat of scenic easements along a primary route.

easements on a less-than-fee-type basis is extremely difficult. However, a review of working agencies that have acquired scenic easements shows the less-than-fee-type basis to be the most economical method of obtaining the objective.

A later section in this chapter entitled "Selling the Program and Negotiating for the Scenic Easement" gives a broader explanation of the methods of acquiring these scenic easements.

PERMITTED USES AND/OR RESTRICTIONS

In determining the restrictions or use to be applied to the subject property through a scenic easement and right of entry to be acquired, it is recommended that flexibility be the byword. Although a set pattern of easement restrictions and entry rights will apply in most cases, it may not apply in all. Basic simple restrictions and permitted uses should apply as long as the scene is preserved.

Obviously the negotiator should be provided with a basic outline of the restrictions or permitted uses that should be applied to the scenic easement area. However, beyond the basic restrictions or permitted uses he should be able to add in those various aspects that would help in the successful acquisition of the scenic easement. No complete set of guidelines pertaining to scenic easements would be applicable in all parts of the country and in all situations; certain basics should be applied and some of the recommended forms would be as follows:

Specific Rights Conveyed (Rights of Entry)

The right of the State of _____, its agents and contractors to enter upon the easement area:

(a) To inspect for violations of this easement and to remove all advertising display signs and billboards, stored or accumulated junk, automobiles, farm implements or parts thereof, and other salvage materials or debris, and to perform such scenic restoration as may be deemed necessary or desirable.

(b) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures.

(c) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures. The area excluded from this provision is as follows: (Then describe excluded areas such as residences, etc.)

Specific Rights Relinquished (Restrictions or Rights of Use)

1. The right to erect, display, place or maintain on any part within the scenic area any signs, billboards, outdoor advertising structures or advertising of any kind except that one (1) on-premise sign of not more than _____ square feet in size may be erected and maintained to advertise the sale, hire, or lease of the property, or the sale and/or the manufacture of any goods, products, or services upon the land. Any existing signs, other than the one on-premise sign, and/or advertisements as described above shall be terminated and removed on or before _____.

2. The right to dump or maintain a dump of ashes, trash, rubbish, sawdust, garbage, offal, storage of vehicle bodies or parts, storage of farm implements or parts, and any other unsightly or offensive material.

3. The right to cut or remove any trees or shrubs.

4. The right to cut or remove any trees except marketable timber and then in accordance with the standard forest cropping practices existent in the area, and at no time will the scenic area be denuded of trees.

5. The right to park trailer houses, mobile homes, or any portable living quarters.

6. The right to quarry, or remove, or store any surface or subsurface minerals or materials.

7. All rights except general crop and/or livestock farming (agricultural) in the first _____ feet of the scenic area as measured normal to the center line of the highway.

8. All rights except general crop and/or livestock farming (agricultural).

9. The right to develop the easement area except for a limited residential development consistent with applicable State and local regulations. Such limited rights retained by the owner are as follows:

(a) Each single family residential lot fronting on and/or abutting (*identifying highway*) shall be limited to a minimum width of _____ feet as measured parallel to the highway.

(b) A total of _____ single family residential lots is the maximum number authorized for the easement area.

10. The right to change the use of the easement area from residential to any other use.

11. The right to change the use of the easement area from commercial to any other use.

A number of these provisions cover the same subject matter, but with modifications. This was designed so that the State could cover differing situations for parcels with differing potential. It is important to stress that each scenic document that is drafted does *not* include all of the items listed.

In some of the rights relinquished, the State has referred to the prospective right of the owner to do certain things with his property which he probably is not doing at the time of acquisition. Examples are maintaining an automotive salvage yard, developing a gravel pit, using land for billboards, etc. The instructions to the negotiators are to use any combination of restrictions and permitted uses necessary to maintain the scenic beauty of the area. The scenic easement restrictions and permitted uses should be made as applicable or palatable to the existing property owner as possible. Therefore, flexibility in the application of these restrictions and permitted uses is highly essential.

It should be noted at this point that various types of screening can and should be used to insure a view at a given location and should be given the utmost consideration. Screening is a most effective way of preserving a vista at a minimum of expense to the State.

In dealing with the public in an attempt to acquire easements, it has been found that to achieve acceptance of the proposal a give-and-take basis is successful. It should be pointed out, however, that the give-and-take basis of these negotiations should in no way hamper the original purpose of the scenic easement and the landowner should know that, if necessary, the State will condemn. On the other hand, if an owner of an outlying farm property wanted to add one homesite to his highway frontage in the scenic easement area he could be granted this request and the State would still maintain the beauty of the scenic area.

The objective of the negotiations pertaining to the scenic easement areas is to limit the amount of dissention pertaining to the scenic easement program. In the situation just

reviewed pertaining to permitted uses and restrictions, flexibility is highly necessary for a successful program. In one particular scenic easement restriction observed, a particular farming-type property was restricted as to the number of animals (5 per acre) that would be allowed to graze in the scenic easement area of the 200-acre farm. The owner of this property was highly indignant at a restriction of this nature and we question seriously whether the State could police this type of restriction to any great extent.

In addition, there are scenic easements where buildings will be included. In one case reviewed, the owners were in the process of building an addition to their tavern building. The addition to the existing structure would in no way, if done under proper methods and supervision, affect the scenic easement area. Therefore, the scenic easement allowed the owner to construct the addition. The owner was happy to sign the easement agreement because it gave him the planned addition and eliminated (by the adjacent scenic easements) competition in his area. In this instance the negotiation was flexible and accomplished what the State had set out to achieve.

Another example is that in an area with trees a property owner might want the right to control as to what trees can grow within a given section. The State could grant to the owner the right to maintain a certain area for trimming. Under these circumstances, the scenic easement would be maintained with little or no trouble to the State and the property owner in a sense would not be put upon by unnecessary or unwarranted restrictions.

Due to the nature of the various restrictions, it is imperative that the negotiator have flexibility. If these negotiations are handled correctly the State will: (1) maintain the scenic beauty pertaining to the original premise of the acquisition, (2) help to sell this program to the existing owner of the property, and (3) to a great extent eliminate any future litigation through misunderstanding or overly severe restrictions.

The language in the agreements should be as simple as possible. The current study has shown that many of the property owners were unaware that these restrictions were put upon the property (or so they claimed). For this reason, the restrictions and permitted uses should be as simple as possible and the language used as simple and understandable to the layman as possible. The negotiator should explain all the aspects of the scenic easement program and answer all questions.

There are two types of highways to which scenic easements will be applied. The first is the primary system or the secondary road, such as shown in Figures 3 and 4. This type of road is quite similar to the Great River Road in Wisconsin. The second, as shown in Figure 5, is an Interstate route. This is generally a much newer road and the Interstate System for the most part extends through undeveloped areas. Therefore, except for metropolitan areas, commercial properties, etc., are for the most part nonexistent.

To illustrate the application of the various types of restrictions, reference is made to the several parcels shown in Figure 3.

Parcel 1 is a single dwelling unit consisting of a house and a garage. The restrictions and permitted uses applicable to this scene would be those to preserve the existing view. During the negotiator's first visit to explain the program and discuss the restrictions, the homeowner indicated that he wanted to put an addition on the house. Therefore, an addition could be specifically written into the permitted use section of the agreement for this property. In addition, the standard provisions as to no dumping of ashes, selective planting, billboards, etc., are included.

Parcels 2 and 2-A consist of a farm with the farmstead and outbuildings. The initial portion, or the 350 ft adjacent to the existing roadway, has the standard permitted uses and restrictions, such as no billboards, no dumping, no construction. The requirements for Parcel 2-A, which is 350 ft from the existing right-of-way, are to preserve the scenic view of Lake Illinois and therefore can be less restrictive than those on the frontal portion; that is, for Parcel 2-A the restrictions could be for billboards only. As has been the experience with farms with highway frontage, perhaps the owner would want a homesite reserved along State Route 12. The standard restrictions restrict the homesite. However, in order to accomplish the acquisition of the scenic easement area and with no detriment to the scene, one homesite could be granted. Consequently, Parcel 2 would have the usual restrictions pertaining to billboards, dumping, etc., with perhaps in this instance one homesite allowed.

Parcel 3 contains an existing tavern building on a site 150 ft by 200 ft and the restrictions and permitted uses are directed at maintaining this property "as is" with no new sign boards or addition.

Parcel 4 is a motel and the restrictions and permitted uses would be standard (no dumping, no additional signboards, no parking of trailers, etc.) and the motel would be allowed to remain as a motel kept in good repair with no additional units or new signboards.

The gas station in Parcel 5 would be quite similar. It would be allowed to remain in commercial use, but no addition or changes of this nature would be allowed.

Any restrictions or permitted uses that the negotiator has changed would have to be approved by the district highway office as well as the State office responsible for this program. The basic concept is to preserve the scene.

As indicated in Parcels 1 through 5, the various restrictions will vary to a great degree and Parcels 2 and 2-A have a differing degree of restrictions due to the distance from the existing right-of-way. Parcels 2 and 2-A constitute a good example of why a standardized 250, 350, or 400 ft from the existing roadway will not be sufficient to preserve the scene's beauty. If the State acquired the scenic easement in Parcel 2 and let parcel 2-A remain intact, billboards, etc., could be placed back of the 350-ft restricted area and all the moneys, compensation, time, etc., necessary to acquire the frontal portion of the property would be lost because the view would be lost.

Figure 5 indicates the types and sizes of the takings for scenic easements along an Interstate highway. The extreme variation in size, shape and depth of the scenic easement areas is due to the general topography of the area, which cannot be effectively controlled by any standard depth pat-

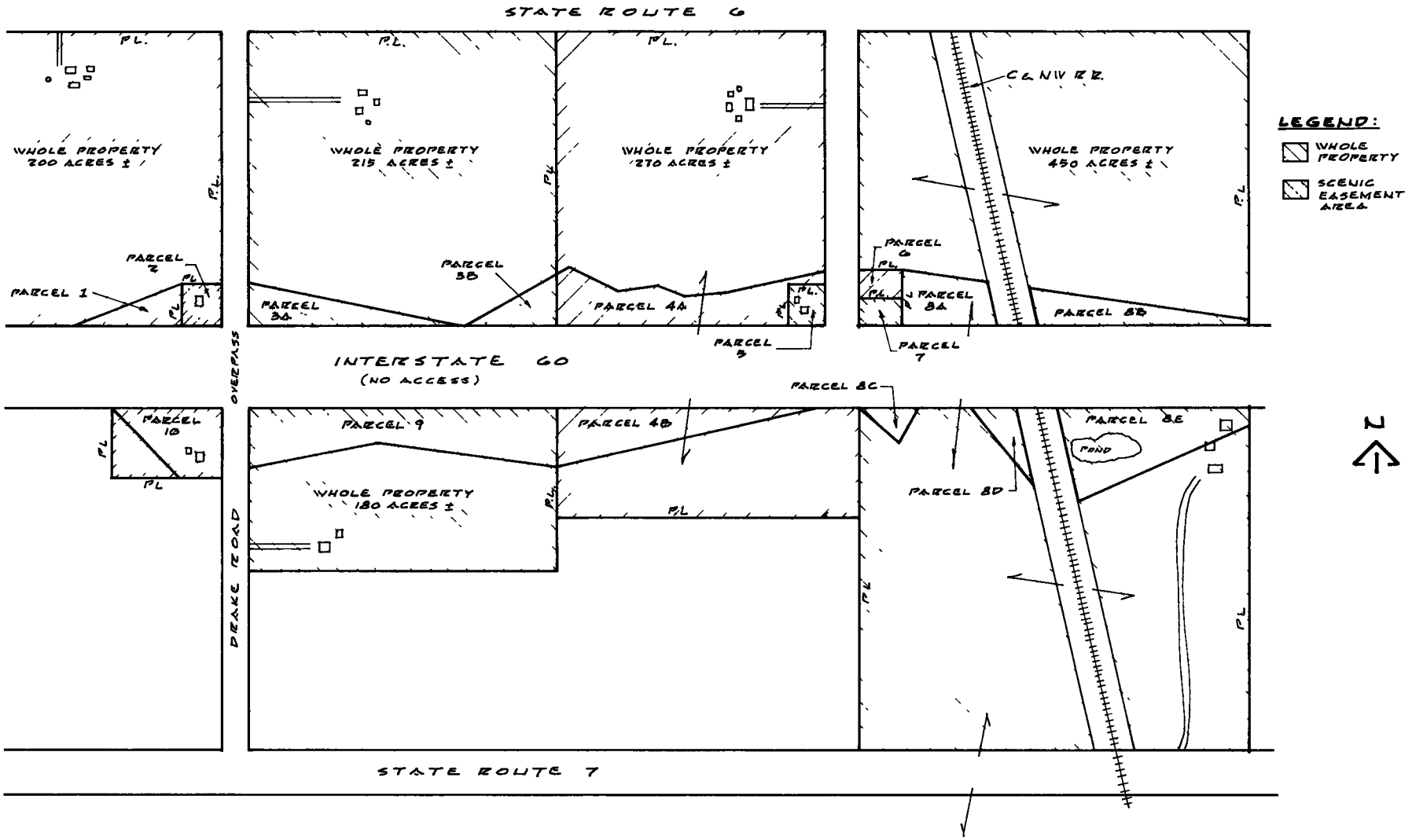


Figure 5. Example of plat of scenic easements along an Interstate route. Due tc the extreme variations in size, shape, and depth of the scenic easement areas, and due to the general topography, no standard depth pattern will efficiently control these areas.

tern of easements. The whole property holdings and the scenic easement areas are as given in Table 1. The Interstate route is located on the rear portions of large acreage holdings which are orientated for the most part to the existing State routes. Due to the topography, location, use, etc., of the whole properties and the scenic easement areas, the restrictions, would be confined to the general standards such as no dumping, signboards, and tree cutting.

Figure 6 indicates the whole property and the scenic easement areas as they apply to a rest area located in a growth of trees. In this instance the scenic easement area is to insure the beauty from the rest area by "freezing" the tree growth. The restrictions that would apply are confined to dumping, signboards, tree cutting, etc.

TABLE 1

WHOLE PROPERTY AND SCENIC EASEMENT AREAS FOR EXAMPLE PROGRAM SHOWN IN FIGURE 5

PARCEL	AREA (ACRES) WHOLE PROPERTY	AREA (ACRES) SCENIC EASEMENT
1	200 ±	2.5
2	0.75	0.75
3A	215 ±	14
3B	—	4
4A	270 ±	20
4B	—	15
5	2	2
6	2	2
7	2	2
8A	450	7
8B	—	6.5
8C	—	3
8D	—	4
8E	—	15
9	180	30
10	20	15

GOOD PUBLIC RELATIONS NEEDED

Experience has shown that the initial response to the scenic easement by the landowner is negative. In addition, it might be added that the response from various highway and other officials is also negative. The negotiators from many State agencies have been reluctant to enter into scenic easement agreements because they do not understand this type of agreement; it is foreign and they are not enthusiastic. With this type of negotiator and administration it is certain that the results will be negative.

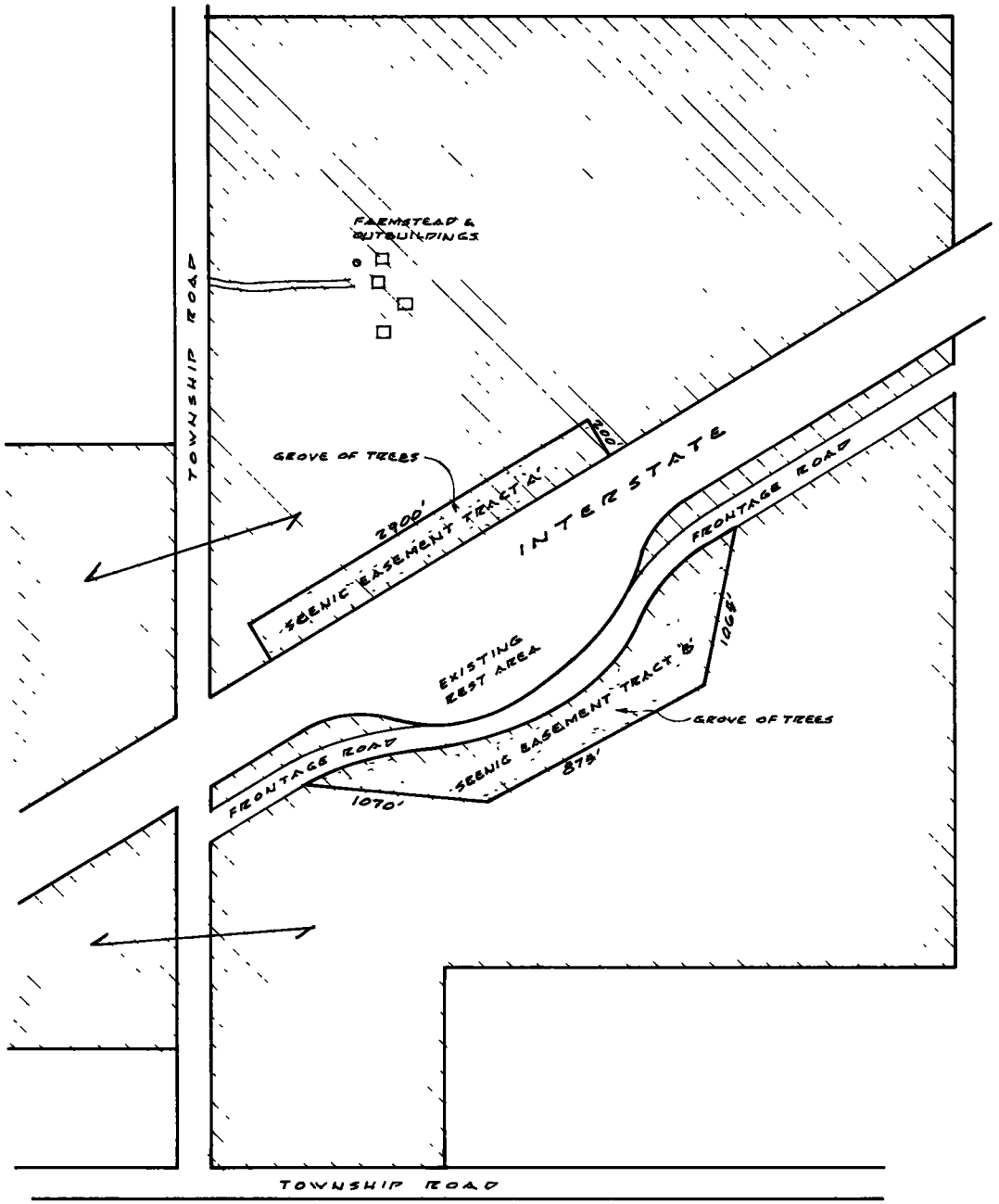
The landowner can readily understand the necessity for acquisition of lands for right-of-way; but to take a portion of a property owner's rights for easements is difficult to comprehend. Scenic easements by and large have been applied to outlying lands that may have some long-term appreciation or gain. Consequently, the owner is extremely hesitant to convey easement rights.

Some suggested questions and answers that may be incorporated into a booklet or publication to aid in explaining to the general public the purposes of the scenic easement program are outlined in Appendix D, together with two sample letters of explanation of the scenic easement to the property owner.

On the question of "selling" the scenic easement program, it is believed appropriate to quote from a speech by R. C. Leverich,[419] who has acquired more than 560 scenic easement parcels with a bare minimum of three going into court litigation. A portion of that speech is as follows:

> There are many people today who want to know: "What is this program?" "Will it work?" and if so, "*What problems must we overcome to succeed?*"
>
> **What Is This Program?**
>
> Simply stated, the program involves selecting scenic areas, carefully evaluating the beauty potential, and obtaining those land-use rights which will enable preservation, restoration, or enhancement of this potential.
>
> **Will It Work?**
>
> More than 560 easement parcels have been acquired in the District in which I work. Most of these parcels were acquired without recourse to condemnation procedures; only three have been tried in court. The balance of the appeals scheduled for trial to date have been settled with honor on both sides in pre-trial settlements. The major reason for the appeals thus far has been misunderstanding of the easement by the owners, who would not respond to our contacts. On one recent project, 35 of 38 owners executed purchase options. This is a good sample of what can be accomplished with competent staff people who are interested in the preservation of beauty.
>
> We have reason to say that an easement program will work—that there can be great benefits in this type of program.
>
> First, an easement program provides for continued useful land use by owners. It allows for the blending of man's works with nature. There is a harmony when man and nature work together, and we do not believe that all public rights need to be in fee.
>
> Second, the true objective of this program is not to deprive owners of usable, marketable property merely for the convenience of agencies unwilling to assume a cooperative relationship with owners. Too many government agencies expect this now. The preservation of beauty should provide a common bond between government and individual, a condition too fast disappearing in this country.
>
> Third, there is no merit in a preservation program which does not provide for the fullest possible utilization of beauty. People should not only see beauty, but also learn to live with beauty. A working easement program provides this atmosphere for many families who otherwise might be deprived of this environment.
>
> We see no merit in denying all people the pleasure of neat homes along the Mississippi River merely so that you and I can view unused frontage. Must all homes be out of sight, including our own? Must all commercial use be discontinued or hidden? Must all advertising signs be removed from public places?
>
> With reasonableness any program can succeed.
>
> **What Are the Problems?**
>
> I am directing my remarks to you today for one reason. For ten years now I have heard people talk of the problems in scenic preservation work. Very few ever talked of solutions. We have heard engineers, appraisers, negotiators, lawyers, and administrators, all talk of problems.
>
> To these people I now say we have had "much ado about nothing." There are no more problems in this work

[419] *Supra* note 417; from speech of June 3, 1967, before the American Bar Association in Chicago, Ill.



WHOLE PROPERTY:

181.174 ACRES (NORTH OF INTERSTATE)
78.151 ACRES (SOUTH OF INTERSTATE)
259.325 ACRES TOTAL

SCENIC EASEMENT:

12.974 ACRES TRACT 'A'
16.083 ACRES TRACT 'B'
29.057 ACRES TOTAL

N

Figure 6. Example of plat of scenic easements at a rest area along an Interstate route.

than there are in any new project. There has only been a failure to look for solutions. And the lack of solutions came about in Wisconsin for only two reasons—we failed to provide organized leadership, and we failed to provide positive thinking.

When we started the Interstate right-of-way program in our district about five years ago we also had problems. But today our right-of-way is clear and miles of Interstate highways have been built. We had a deadline, and we all worked together to reach a common objective.

But the deadline for preserving scenic beauty in our country is long passed, and we still talk of problems. Now we have restoration problems along with preservation problems. We are all waiting for someone to provide easy solutions. We need to see an immediate contrast—a change for the better.

You see an immediate change when you physically construct an Interstate highway. However, the intangible aspects of beauty may be overlooked. If you look at an easement project without seeing, you may pass it by.

We need leadership in this work today; leadership with understanding and positive thinking. We are developing leadership in Wisconsin. Our Commission supports and promotes the preservation and restoration of beauty. Our legal advisors are working on the legal problems and, most important, our legislators are taking an active overall interest in improving the framework of laws in which we now operate. There is a desire to succeed.

But you do not measure success in this work by the presence of things such as bridges and buildings. You measure it by the absence of things—the absence of signs, of junkyards and trash, of lime quarries and garbage dumps. It is hard for engineers to measure by absence, for they are by nature builders, and for years roads have meant development, not lack of development.

These are attitudes the leaders of this work need to change; but not completely, for all that a scenic easement program implies is controlled—not uncontrolled—use, and it implies beauty in contrast to ugliness.

These are the objectives of the program. They must be communicated to others; to the appraiser, to the negotiator, and ultimately to the owner.

There are many ways to communicate these objectives today. The negative results of our lack of solutions and progress are evident all over our country. We merely need to take advantage of them and jar the human defense mechanism.

When appraisers said that severing land caused 90 percent loss in value to the remainder, we made studies of values in actual cases to ascertain the facts.

When it was stated that there were no special benefits to this property, we made studies of actual cases around interchanges and proved that there were benefits.

We looked for the facts and presented them.

The facts on scenic beauty glare at you if you look. Start with pictures and films, and start right at home. Take an objective look at the former beauty spots in your community or county. Start your scenic easement program in those areas where you can realistically prove a before-and-after change in appearance.

Buy back a little beauty, and people will appreciate it when it is there again.

Obtain rights to clear out a junkyard or an obnoxious trash dump, or a nest of advertising signs that obstruct a view—or open a view to a stream. Then go back and take more pictures and show them to the people, particularly those who object or have a complacent attitude on preservation. We are doing this in Wisconsin.

This will do more to generate enthusiasm for this work than any ten years of talking about problems and policies and procedures. It will put understanding and interest on your side, and that is what is needed.

Then move on to the protection of undisturbed areas which offer unusual benefits. By this time you will have an understanding of the work and resistance will have disintegrated.

I believe these are the best ways you can communicate the program to the people involved, and I believe the program will move on this basis.

Be in a position to show positive results first, and you'll go a long way. Pride will replace apathy.

NEGATIVE ATTITUDE

It was indicated in conversations with persons who have been successful in the acquisition of scenic easements that a selling or public relation job is necessary for the scenic easement program. The current study indicates that by and large the local highway district offices take a negative attitude toward the acquisition of scenic easements.

For this reason and because of the required flexibility of the negotiations, it is felt that the negotiators assigned to a scenic easement program should be among the best the State has to offer. It was noted further, after reviewing State agencies who have worked with scenic easements, that in many cases this type of work was used as a fill-in job and did not get the type of individual who should be negotiating for scenic easements.

The negotiator should make a preliminary visit to the property owner prior to any compensation being offered. He should not at this time engage in any conversation concerning compensation for the property, but should discuss and fully explain the aspects of the scenic easement program as they pertain to that property owner. As a result of this visit, any objections to specific easement restrictions or permitted uses can be noted for review by the local district and the central State control.

As mentioned previously, this type of give-and-take negotiation with the property owner will reduce the chances of the property going into litigation. As noted in Mr. Leverich's speech,[119] the Highway District of LaCrosse, Wis., has acquired some 560 easements with only three going into condemnation. This is a remarkable record and indicates that scenic easements can be successfully acquired.

In the beginning stages of the State program the negotiator should be assigned to the Central Committee and function with the Committee. The negotiator must believe in the scenic easement program and make changes in the agreements to make them worthwhile and yet preserve the scenic beauty. He has to be knowledgeable enough to answer any and all questions that the property owner may have concerning this particular program.

At the first meeting of the negotiator and landowner a booklet (such as suggested earlier) can be given to the property owner to help explain the program.

After the easement agreements have been worked out, the information can be passed with proper instructions and exhibits to the real estate appraiser for valuation purposes. When the compensation is estimated, the information can be relayed back to the negotiator, who then in turn can negotiate for the final settlement. It is recommended that the negotiator keep a diary pertaining to his calls, as the information can be helpful for successful negotiations later in the program.

The negotiator should be knowledgeable in what the appraisal contains pertaining to a realistic analysis of the

development potential of the area and the effect of land value pertaining to the scenic easement area. If the appraisal report was prepared properly and the negotiator is knowledgeable in his particular field, he should be able to answer any or all questions pertaining to this program. In addition, he should explain all of the restrictions and permitted uses so that the property owner is well aware of what he is signing and what the consequences are as a result of the easement.

A scenic easement project, not unlike a highway program, would be subject to formal hearings and a gathering of the prospective landowners. Along these lines the reader is referred to Appendix D, which contains letters of explanation to property owners that may be helpful. Figure 9 is a field examination form used by one State to detail the intended specifications for a scenic strip acquisition.

In conjunction with the public relations aspects of the scenic easement program, it is recommended that State highways be designated on the State maps as scenic corridors or highways. If possible, signs should also be posted along these roads so that the public will be made aware of the program.

It is strongly suggested that in the initial stages of the court actions pertaining to scenic easements the State's best attorney be used, because the program is new and the legal implications are wide and varied.

NO NECESSITY FOR ACQUISITION BY FEE-TYPE COMPENSATION

It is thought to be unnecessary for the State to acquire scenic easement areas in fee title. This is evidenced by the LaCrosse Highway District of Wisconsin, where the vast majority of the easements are less-than-fee-type acquisitions. It appears that highway departments that advocate fee takings do not comprehend the scenic easement program and are not aggressive or ambitious enough for successful acquisition on a less-than-fee-type compensation basis.

GENERAL OWNERS' COMMENTS AND HELPFUL INFORMATION

Pertaining to the sales portion or selling of the existing program, reference is made to Figure 7, which is a negotiator's sheet that can be filled out. Information of this type is helpful for keeping a progress report on a project as well as what ideas can be used for successful negotiations. Figure 8 is a form that can be used at the time of sale to estimate what effect the scenic easement has had on a parcel of real estate.

The following are some comments made by various negotiators as a result of their interviews for scenic easements:

Comment

Mr. _____ (owner) reports that the State is asking too much for too little, and wouldn't consider the offer. He has been offered $3,000 for the six acres on the south side. He wants it for homesites for some of his five children and has no intention of hurting the appearance. He suggested less depth for scenic easement and permission to build would not be so bad.

[It would appear from the owner's comments that this easement could be worked out with permission to allow some homesites and with a positive approach to the particular problem pertaining to the condemnation proceedings.]

Comment

Mr. _____ has considered the offer and feels that the scenic easement agreement is entirely too restrictive. He has no intention of rendering the property unsightly and, in fact, has improved it on his own. No amount of money could interest him unless the State bought the entire area. He might want to sell or remodel and "should not have to get permission and check with an outsider" on this activity on what lies on his land.

[In this instance any plans for remodeling could be incorporated into the scenic easement agreement and it could be conveyed to him that his property could be sold without any permission from outsiders.]

Comment

Mr. _____ feels resentful of any taking on the Interstate; does not like the procedures. As of today, is not interested.

[It would appear that Mr. _____ may be more interested if the threat of condemnation were imposed and if the easements were purchased at the same time as the Interstate right-of-way.

Comment

Mr. _____ and his wife said they would not sign; too restrictive. If you want to buy the whole thing, okay. They suggested the State take 200 ft along the front and then screen the balance of the area.

[It is possible that screening of this particular area might be a better choice than the actual taking of the scenic easement.

Comment

Mr. _____ still mad over the right-of-way taking. Calls the State highway department "those crooked liars," including all the employees. Previous negotiator lied to him. Not paid what the land was worth. Cooled off in about 30 min., said he was sorry he got so mad, and told the negotiator the advantages of holding out (always got more money and cited the instances). Offer not enough and will contact State with counter offer.

[Maybe he is right!]

Comment

Mr. _____ says that the highway department has always been anything but cordial in acquiring land for the Interstate system. Definitely feels that the State was unreasonable and unrealistic and wishes he could go to Washington and straighten them out. He rehashed all his differences with us and others.

Obviously, to offset the difficulties in obtaining a scenic easement from the property owner it is necessary to have a good public relations program and highway negotiators who are knowledgeable and enthusiastic about the program.

THREAT OF CONDEMNATION

In the negotiation stages of the scenic easement program, and especially in dealing with the property owners, it is essential from the outset that the State have the will, the manpower, and the money to enter into condemnation proceedings. The owners of the property affected by the scenic restrictions are more inclined to accept the easement when the threat and carrying out of condemnation is a reality.

To be sure this is an essential part of negotiations, but

NEGOTIATION FORM

STATE OF
DEPARTMENT OF PUBLIC WORKS AND BUILDINGS
DIVISION OF HIGHWAYS

NEGOTIATOR'S TRACT REPORT
(To be kept in front of tract file; entries for preceding week to be made not later than Monday)

Tract No. _____
Route _____
Section _____
Project _____
County _____
Job No. _____

Owner _____

Address _____ Phone No. _____

Interested parties (not shown in title report), interests, addresses and telephone numbers

_____

_____

Approved appraisal_____ Date approved_____ Date to _____

Date negotiations opened_____ How: Personal call____Phone____Mail____

Counter proposals (date & am't)_____Final_____

Date agreement reached_____ Amount_____(see note)

Short synopsis of each contact with interested party, date and place:

DATE	* OWNER ATTITUDE	REMARKS	INITIAL

* Owner attitude: (a) easy to talk to (b) hard to talk to (c) apathetic
(d) cooperative (e) reasonable (f) unreasonable
(g) contrary (h) antagonistic (i) belligerent
(j) _____

(Signed)_____
Negotiator

Figure 7. Example of negotiation form used for scenic easement acquisition.

INTERVIEWER FORM
(After Sale)

Grantor:_____ Date: _____

Address:_____ Town: _____

Grantee:_____ Range: _____

Address:_____ Section:_____

Quarter:_____

1. Do you understand the terms and conditions of the scenic easement?

Yes_____ No_____

2. Did the fact that a scenic easement existed on this land have any effect on your (purchase) (sale)?

Yes_____ No_____

3. Did you (pay) (receive) a premium because of the scenic easement?

Yes_____ No_____

4. Do you feel the scenic easements on the adjoining properties will tend to enhance your property?

Yes_____ No_____

5. What did you (pay) (receive) for the property? $_____.
Number of acres_____, Lot size_____.

6. Could you sell the property for (more) (less) without the scenic easement?

7. Was the property (purchased) (sold) through a realtor?
Who?_____

Remarks:

_____

_____

_____

_____

_____

Project_____ County_____ Parcel_____

Figure 8. Example of interview form for scenic easement impact on sale of property.

FIELD EXAMINATION

SCENIC STRIP SPECIFICATIONS

BPR & MDSH

Scenic Strip No._____
Rte & Rd Sec._____
Control_____

DESIGN:

1. Dimensions
2. Shape
3. Adjustments for Property Lines

EASEMENT

1. Future Development:
2. Tree Removal & Brushing:
3. Occupation:
4. Dumping:
5. Pasturing:
6. Agricultural Use:
7. Utilities:
8. Access:
9. Shore Line:
10. Other

FEE

1. Reason:
2. Access:
3. Other:

General Comments:

Field Inspection Team:

B.P.R. ROW_____ M.D.S.H. ROW_____

B.P.R. Engr._____ M.D.S.H. Rdside Devel._____

Date_____

Figure 9. Example of field examination form for specifications to be applied to a scenic strip.

some highway districts reviewed have taken a "take-it-or-leave-it" attitude and stated that they would not condemn. Based on this approach, the landowner did not accept and the program was a failure and a waste of money and effort.

In conjunction with condemnation proceedings, this review indicates that juries and courts have put excessive compensation on scenic easements and it behooves the State agencies to use the best appraisers and lawyers to handle litigation. The problem of valuation is extremely difficult for the layman to understand and it takes a combination of highly trained professional-type personnel and exhibits to insure sound jury and court findings.

POLICING AND CONTROL OF THE EASEMENT AREA

Figure 4 shows various scenic controls over varying parcels of land pertaining to the policing of the scenic easement areas. It should be the responsibility of the district office to maintain control over any scenic easement area.

A map of this type lends itself to a quick check on the type of property and the various restrictions that are applicable to it. On the various shaded areas of this figure (tracts 19 through 29) highway personnel quickly ascertain the use in a given area. It should be noted that the State allowed two homesites on Parcel 20 and this is so indicated on the map. The shaded areas indicate general crop or livestock farming, no advertising, no trash dumps, controlled clearing, and screened planting. Another shade indicates existing residential use only—no advertising, no trash dumps, controlled clearing, and screened planting. Another is the existing commercial and agricultural use, no advertising, no trash dumps; the white areas are unrestricted use, no advertising, no trash dumps, controlled clearing, or screening. Anything out of the ordinary is also listed, such as for Parcel 20. The same minimum restrictions and permitted uses and symbols should be used in a given State, another strong reason for central control at the State level.

The suggestion has been made in some States that markers be used for scenic easement areas. This method has some merit. Furthermore, there is no question that the maintenance of scenic easement areas will add more work for State maintenance crews. However, the general policing of the area pertaining to maps, etc., could be handled very quickly by adding the restrictions of the various uses to the plat maps located in the district office.

APPRAISAL FEES VERSUS COMPENSATION

There appears to be a school of thought that the appraisal fee should not exceed the compensation for the property.

It should be pointed out that professional appraisers sell time and it may in some instances require more fee time than the final estimate of compensation. Furthermore, the property owner should be given the maximum amount of appraisal consideration, and if the cost of this service exceeds the final compensation the owner is entitled to this type of consideration. A standard rule pertaining to appraisal fees, based on any amount of compensation, is unrealistic and extremely unfair to the property owner.

RECAPITULATION

The following are considered necessary for the initiation and application of a successful scenic easement program within a State:

1. A State board for administration, status, application and control in conjunction with liaison individuals at the district offices.
2. The permitted uses and restrictions placed on the scenic easements must have some standard restrictions or permitted uses; however, there should be some flexibility in their application.
3. Selling the program and negotiating for the scenic easements is the crux of the whole matter pertaining to the scenic easement acquisition. Without a good selling program or without good public relations and good negotiations, the scenic easement program within the State will never be successful.
4. Proper policing, maintaining, and general review of the scenic easement program is necessary after the taking to insure a sound program and continued success.

CHAPTER SIX

VALUATION PROBLEMS AND PROCEDURES

APPLICATION OF APPRAISAL PROCEDURES

In the valuation of properties encumbered with scenic easements for highway beautification purposes, the generally accepted principles and techniques as applied to real estate appraising are applicable. That is, the prescribed methods of valuation or the estimation of value as indicated by the American Institute of Real Estate Appraisers, the Society of Real Estate Appraisers, the American Society of Appraisers, and the American Right-of-Way Association are germane to the valuation of the property encumbered with scenic easements.

The same procedures pertaining to market trends, analysis of market data, interest rates, vacancy rates, collection

ratios, marketability, sell-off and any and all factors that pertain to the valuation of the real estate are applicable to the scenic easement appraisal.

In this chapter, an attempt is made to indicate certain aspects of valuation that appear to be applicable to the scenic easement appraisal. However, pertaining to the gathering of information, value estimate, and general appraisal techniques, it is assumed that the reader is a knowledgeable appraiser and has a general working background of the appraisal process. Therefore, this chapter in no way attempts to teach basic appraisal methods.

SPECIFIC TOPICS APPLICABLE TO A SCENIC EASEMENT APPRAISAL

In the valuation of lands for scenic easement purposes, specific items or topics designated separately are helpful in gaining all the necessary information to arrive at a sound estimate of value. Obviously, various appraisers and appraisal organizations will have different procedures. For the sake of uniformity, therefore, the following are the suggested topics to be incorporate in scenic easement appraisal reports:

1. Legal description.
2. Restrictions.
3. Permitted uses.
4. Valuation date.
5. Neighborhood data and general trends.
6. Zoning.
7. Description of the whole property and location.
8. Description of the restricted area (scenic easement) and location.
9. Availability of utilities.
10. Topography of the whole property.
11. Topography of the restricted area (scenic easement).
12. Present use of the whole property.
13. Present use of the restricted area (scenic easement).
14. Access to the whole property.
15. Access to the restricted area (scenic easement).
16. Highest and best use of the whole property (before taking of the easement rights).
17. Highest and best use of the whole property (after taking of the easement rights).
18. Highest and best use of the restricted area (scenic easement).
19. Real estate taxes and assessment.
20. Market data.
21. Correlation.
22. Exhibits and pictures.

The following paragraphs discuss some of the aspects pertaining to the individual items listed and the reasons for their use in the scenic easement appraisal report. Some of the topics listed are quite obvious; however, it has been found that these items include, by and large, the bulk of the information required for scenic easement appraisals. It should be noted that a market data section has been included. In some instances it also may be necessary to indicate an income and a cost approach to value if all three approaches are warranted. However, the largest number of properties that have been reviewed for scenic easement acquisition have used only a market comparison method of valuation, due to the generally outlying nature of the property and the rural aspects of the area. However, any and all aspects pertaining to the income, cost, and market approach, if necessary, should be added to the appraisal report.

Basically, in the appraisal report pertaining to a valuation for a scenic easement, it is necessary to arrive at a before-and-after appraisal. The difference between the two appraisals of the subject property is considered to be the amount of compensation for the loss of the rights as taken by the imposition of the easement. As mentioned previously, this is a suggested outline and variations will be necessary and warranted, depending on the situation.

1. Legal Description

A legal description is necessary to any appraisal report as to the size of the whole property and also the size and location, etc., of the scenic easement area.

2. Restrictions

The real estate appraiser should be thoroughly familiar with the type of restrictions that are imposed on the subject property. The degree of the restrictions imposed will affect the amount of compensation awarded to the land owner. The restrictions should be read and understood thoroughly by the real estate appraiser prior to any appraisal assignment. If the real estate appraiser, after reviewing the restrictions imposed on the subject property, feels that some of the restrictions could possibly be eliminated or changed so that less compensation is awarded and the view maintained, he should convey his opinion to the various right-of-way offices for their consideration.

3. Permitted Uses

The comments under "Restrictions" also apply here. Some easements will contain combined restrictions and permitted uses.

4. Valuation Date

The valuation date applied to a scenic easement appraisal or to any real estate appraisal is generally the last inspection date of the subject property by the real estate appraiser. This date is important because it is the date that the value is affixed on the subject property. In litigation there may be a considerable time lapse between the valuation date and the date of filing a petition for the taking. Any variance of the valuation date for court purposes would result in a complete review of the value findings and revision to the new date. Not only in the appraisals of scenic easements, but also in other condemnation appraisal matters, it is necessary to revise the appraisal reports to the date of filing. Consequently, time should be allowed by the attorneys so that current valuations are correct. Many highway departments and attorneys are remiss on this point; the appraiser should be given ample advance warning that revisions are necessary.

5. Neighborhood Data and General Trends

Probably one of the most important parts of the appraisal report pertaining to the acquisition of scenic easements is the analysis of the neighborhood and general trends for

highest and best use changes. The trend in the general area should be carefully analyzed as to possible changes in the highest and best use factors that will influence the value of property. The real estate appraiser should make himself aware of any changes that could affect the highest and best use of the subject property and anticipate (to a degree) these changes. In general, scenic easement property is outlying rural-type land and is not adjacent to metropolitan areas. However, any influence or growth patterns in the general direction should be carefully analyzed pertaining to compensation lost due to scenic easement restriction.

6. Zoning

The zoning should be checked as to the type of buildings or the various codes that apply to the subject property and the varying uses under that particular heading.

7. Description of the Whole Property and Location

This involves the general fixing of the property as to its location and use pertaining to the surrounding land areas and communities.

8. Description of the Restricted Area (Scenic Easement) and Location

The description of the scenic easement area and its location as it pertains to the whole tract and to the surrounding land uses will be extremely helpful to the appraiser in isolating the importance of the scenic easement area in relationship to the whole parcel. The highest and best use of the restricted area or the scenic easement area may be different from that of the parent tract and under this particular heading this type of information can be isolated for consideration.

9. Availability of Utilities

The exact location of the utilities pertaining to the subject property is important to the estimation of the total valuation. This topic is similar to any standard appraisal process. (Highly important for court work and testimony).

10. Topography of the Whole Property

The topography of the whole property is the general information for the estimation and consideration in the final value estimate.

11. Topography of the Restricted Area (Scenic Easement)

This topic is separated out for the same reason as the description of the restricted area and location, which is to ascertain if the restricted area takes on a different use from the parent tract.

12. Present Use of the Whole Property

The present use of the whole proprety, as in any standard appraisal report, is needed to arrive at the estimation of the value pertaining to the use and the type of use of the whole property.

13. Present Use of the Restricted Area

(Self-explanatory.)

14. Access to the Whole Property

(Self-explanatory.)

15. Access to the Restricted Area

(Self-explanatory.)

16. Highest and Best Use of the Whole Property (Before Taking of the Easement Rights)

As every good appraiser knows, the highest and best use of the whole property is the key to many of the matters pertaining to the estimation of the values. The scenic easement appraisal is quite similar to the standard appraisal in this respect.

17. Highest and Best Use of the Whole Property (After Taking of the Easement Rights)

The true test of the scenic easement appraisal, as well as the standard partial taking condemnation appraisal, is the highest and best use of the whole property both before and after the taking. If there should be a highest and best use change, naturally the value or the compensation would be changed; therefore, the highest and best use analyzation is of paramount importance.

18. Highest and Best Use of the Restricted Area

The highest and best use of the restricted area both before and after the taking gives some indication as to the amount of compensation due the subject property because of a possible highest and best use change.

19. Real Estate Taxes and Assessment

Real estate taxes and assessments are necessary in any good appraisal report.

20. Market Data

The market data section and marketing information pertaining to the subject property are necessary in any good appraisal report and are imperative in any scenic easement type of appraisal. It is highly questionable at this early date whether there will be a great deal of information assembled on the after values pertaining to scenic easement appraisals. However, in the case studies listed in this report, many aspects pertaining to the before and after values of the scenic easement properties have been reviewed. The case studies listed are a start, and hopefully may prove helpful. Pertaining to the specific problem, the market data should be established and justified sufficiently; factual information should be listed. In the market data section of the appraisal report the various approaches to value can be listed and used if necessary. All supporting information, etc., for income and cost approaches should be added and justified. As mentioned previously, the vast majority of the scenic easement appraisals completed or reviewed involved outlying rural properties and the market approach was relied upon as the basic approach.

21. Correlation

The correlation, as in any standard appraisal report, is necessary in rounding out the final information and the final value estimate.

22. Exhibits and Pictures

The exhibits and pictures should be clear and concise so as to convey to the reader the necessary information and outline pertaining to this specific appraisal problem.

The topics indicated are ones that have been used in the preparation of appraisals for scenic easement purposes. It has been found that the subjects and topics used in this manner help to isolate the various factors pertaining to a knowledgeable and sound value estimate.

Once again, it is pointed out that the justification, documentation, methods of comparison, etc., used in the scenic easement appraisal are the same as used in the standard real estate appraisal. The foregoing outline is suggested, but it will and should have variances due to the specific appraisal assignments and appraisers.

VARIOUS TYPES OF SCENIC EASEMENT APPRAISALS

From a highway standpoint, scenic easement appraisals are restricted to a great extent to three specific types, as follows:

1. Scenic easements adjacent to new or proposed Interstate highways.
2. Scenic easements adjacent to primary or secondary roads.
3. Scenic easements adjacent to rest areas.

These three types of scenic easement appraisals are similar to those involved in such situations as are shown in Figures 3, 4, 5, and 6. Scenic easements on the Interstate System generally are located in open areas, because, with the exception of the dense metropolitan areas, the Interstate System extends through areas where no dwellings or commercial buildings are located. The scenic easement appraisals required in the outlying areas are generally those confined to that portion of the farmlands adjacent to the Interstate System. For the most part, the properties located along a new Interstate highway are orientated to other roadways. For this reason the appraisals are generally of vacant lands with access from another source (see Fig. 5).

It has been noted that the lands located at the crossroads of Interstate with secondary roads and with no direct access to the Interstate route are used for residential purposes. The scenic easement restrictions on this particular type of property at these locations could limit the use to a homesite, and acreage adjacent to these roads may have the highest and best use as homesites. To a great extent, the lands between these bisecting roads are generally agricultural or rural in nature, probably do not have any buildings, and are the rear portions of farmlands or dormant-type properties. The scenic easements imposed on these properties will be to a great extent agricultural in nature.

The primary or secondary system is quite different from the Interstate System, as the scenic easements will also apply to commercial-type properties that in all probability have been located along the roadway for a number of years. The appraisal problems on the secondary or primary system are quite different from those on the outlying Interstate routes, as the appraisals will in all probability go into the various types of commercial properties located along a secondary road. The third type of scenic easement is generally located adjacent to a rest area to enhance its scenic beauty. These scenic easements will vary to a great extent depending on the specific location. By and large, these scenic easements also will be of a rural agricultural nature and the parent tract or the whole tract will be oriented to a secondary outlying roadway.

To summarize, there are currently three main types of properties that are being encumbered by scenic easements. However, in the near future this could change rapidly. Based on this study, the greatest number of appraisals are on outlying residential, commercial, and farm acreage, because the scenic easements are in outlying areas rather than in close-in metropolitan neighborhoods. Obviously, the persons defining the areas for scenic easements are applying these easements to lands with rough-type terrain—lands which lend themselves to various types of vistas. This same terrain limits the types of construction and the use pertaining to these properties.

HIGHEST AND BEST USE

In the valuation of properties for scenic easement acquisition or for any condemnation-type purposes, the first step is to value the whole property, because the area restricted (scenic easement) area partakes in the value of the whole. As an example, if a scenic easement encumbers 3 acres of a 300-acre farm it is necessary to estimate the before value of the total 300-acre farm and what part the scenic easement restrictions contribute to that general overall valuation.

In condemnation appraising a basic premise is to make the property whole, in the sense that a property worth $80,000 before the taking must have a value of $80,000 in the part remaining, the part taken, damages, compensation, etc., after the taking.

The prime factor in appraisal of the scenic easement is the highest and best use of the subject property before and after the taking. The definition of the highest and best use as given by the American Institute of Real Estate Appraisers is as follows:

> The most profitable likely use to which a property can be put. The opinion of such use may be based on the highest and most profitable continuous use to which the property is adapted and needed, or likely to be in demand in the reasonably near future. However, elements affecting value which depend upon events or combination of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration. Also, if the intended use is dependent on an uncertain act of another person, the intention cannot be considered. That use of land which may be reasonably expected to produce the greatest net return to land over a given period of time. That legal use which will yield the land the highest present value. Sometimes called the optimum use.

Any reasonable probability of a change in zoning patterns should be considered in determining the valuation of the subject property. It appears from this study of scenic easements that the most obvious compensation is based on a definite highest and best use change.

> *Example:* The highest and best use of a property before the taking is as a residential homesite. The restrictions of the scenic easement would limit this property to agricultural use, resulting in a highest and best use change. For purposes of this example, assume a homesite of 1 acre and a value of $500. However, the value of this particular property for agricultural use is $200. Therefore, based on this simple example, the compensation due the property owner is the loss in the highest and best use from residential to agricultural, or $300, due to the scenic easement restriction. See the case studies listed in Appendices E, F, and G for specific examples of highest and best use changes.

Another example of a highest and best use change is the change of a grove of woods with an estimated value of $1,000 per acre to pasture land worth, say $100 per

acre through the restrictions and permitted uses contained in a scenic easement. In this case the compensation due the landowner would be the difference, or $900 per acre. In estimating the highest and best use, a complete before-and-after analysis of the whole property should be made.

It has been noted both in the case studies used in this report and in conversations with knowledgeable appraisers, that in many cases the highest and best use of the whole property and the restricted area remained the same after the taking. That is to say, a 300-acre farm with 15 acres of scenic easement restrictions and a valuation of $300 per acre could have the same value before and after the taking. However, the landowner has given up a percentage of his rights in a certain portion of the whole property. Due to various factors (location, demand, and others), a before-and-after-type basis of appraisal probably will not indicate a minor damage loss. (Nevertheless, the landowner is entitled to some form of "nominal" compensation.) This could be due to a great extent to local appreciation or inflationary trends, which may influence property values and make it extremely difficult to isolate certain factors pertaining to damage aspects. To be sure, the restrictions and permitted uses imposed upon a tract of land, depending on the severity of these restrictions, may alter the compensation awarded to the subject landowner.

In analyzing a specific route for appraisal of scenic easements, any and all aspects pertaining to a highest and best use change and any and all anticipated valuation changes in this specific area should be fully investigated.

Compensation due the landowner for loss caused by scenic easement restrictions should be approximately 15 percent of the full valuation of the acreage involved (the scenic easement area only). This is borne out by the review of successful negotiations in Wisconsin and Illinois. In addition, it was noted in this review that the various utility companies had successfully negotiated for power and gas line easements, both everhead and underground, at 40 to 50 percent of the market value of the restricted area.

The scenic easement does not restrict the landowner from using the property for the use being made of it at the time of acquisition. However, it does restrict or prevent the owner from making any future change in the property.

The appraiser can only make his valuation estimate as of the date of his inspection, which has to be his date of compensation. Within reason, however, he can anticipate to a degree possible happenings in the future. Nevertheless, the greatest percentage of the real estate appraisals pertaining to scenic easements that were reviewed in this study involved properties on which the highest and best use has remained the same; that is, large farm holdings where the compensation due the owner is more to offset the nuisance value of the easement and loss of possible or remote future appreciation.

Based on the case studies reviewed in this project, successful negotiations for scenic easements in Illinois and Wisconsin, and the percentage paid for power line and utility easements, it appears that 15 percent of the market value of the restricted area is applicable for compensation in large-acreage tracts where the highest and best use and the value remain the same before and after the taking. This is a nominal-type compensation or a compensation for nuisance-type use. It should be noted particularly that the 15 percent figure is not applicable to smaller tracts or homesites, various buildings or additions, etc.; these properties would have to be considered on their own factors and are discussed later herein.

In reviewing many appraisal reports used by various highway departments for scenic easements, percentages based on the same value before and after of large-acreage tracts have been found to vary substantially with no justification whatsoever. As mentioned, each and every scenic easement appraisal will have to be based on its own merit and the principles as applied by the professional appraisal organizations. Due to the outlying nature of the scenic easement properties reviewed and the many large-acreage tracts available for scenic easements, nominal-type compensation due to the same before and after valuation is one of the most important questions involved in the scenic easement appraisal.

NOMINAL COMPENSATION

The particular category of property considered here does not include such properties as large-acreage tracts with similar before and after valuations, which have been discussed in the foregoing.

Examples of this type of nominal compensation are evidenced in the various case studies included in the appendices. A prime example is case studies 1 and 2, which indicate a nominal consideration of $15 awarded by the State for compensation. There is no question that the subject landowner has spent some time due to imposition of the easement. In addition, there is some question as to the clarity of title after the restrictions are applied and there is definitely some hardship suffered by the landowner due to the application of the scenic easement. Therefore, it is suggested that $100 be considered as a minimum for any nominal-type compensation for any type of property encumbered with scenic easement restrictions. This opinion obviously will vary from appraiser to appraiser and from area to area.

METHODS OF INVESTIGATION

In investigation of the case studies used herein, personal contact was made with the various State and Federal agencies in areas where scenic easements have been acquired and where some history of the data could be used for study.

The case studies listed in the appendices are of three types—(1) before and after sale where a scenic easement has encumbered the property; (2) a comparison sale of scenic easement property to properties not encumbered with scenic easements; and (3) exchange properties where

there has been an exchange of scenic easement property for lands free of easements and deeded in fee. The best method of analyzing damages or lack of damages is the before and after sales appraisals or valuations.

Seven before-and-after-type sales located along the Great River Road in Wisconsin were investigated. These sales were reviewed and the sales dates, prices, and information pertaining to the particular transaction were gathered from the buyers, the sellers, and in some cases, the brokers. These people were personally interviewed to insure as much accuracy as possible pertaining to the effect the scenic easement restrictions had upon the specific property.

These case studies are presented for their factual ininformation and, so far as is known, the facts are correct as to all aspects of the sale. Due to the limited number of agencies using scenic easements and the limited number of sales transactions that can be used on a before and after basis, it is considered fortunate that seven before and after sales were found that could be used for case studies.

The comparison-type sale compares a scenic easement property that has been sold with other properties unencumbered by scenic easements. To a great extent the appraisers' judgment factors had to be applied to these case studies to arrive at any conclusion as to what has resulted from the scenic easement restrictions. For research purposes the comparison sales are not nearly as good as the straight before and after sales; however they have been included in the case studies because of the lack of strictly before-and-after-type sales.

The exchange case study involves an exchange of property encumbered with scenic easements for properties not encumbered with easements. This method gives some indication of the buyers' and sellers' line of thought concerning scenic easement properties. Here again the buyers, sellers, lawyers, or other persons involved in the specific transactions were interviewed to insure as much accuracy as possible.

The various diagrams, plates, etc., came about as a direct result of the review of the various agencies' records and public documents.

It should be noted that the case studies and the comparable sales information used herein are the residual of the information gathered from visits to many States and areas. Little information is available on before and after sales pertaining to scenic easements in the United States. It would have been preferred to have made a study strictly of before and after sales; however, it is fortunate that even the seven cases along the Great River Road were available. The balance of the case studies used are of a comparison type, and not, to be sure, as good as the information from a direct before and after sale. However, the case studies have been written with the professional real estate appraiser in mind and it is hoped that this information will be helpful for scenic easement documentation.

As mentioned previously, more of this type of information should be added as years go by to add greater clarity to this appraisal problem.

APPRAISALS MADE TO DATE AND RECOMMENDATIONS

In this review of appraisals that have been made for scenic easement purposes, one particular result is apparent—there is no set pattern pertaining to the appraisal methods that are being used for easement acquisition. By and large, the appraisers appear to be using any even vaguely acceptable means to achieve an end. There should be a greater effort made to study this particular problem as it pertains not only to scenic easements but also to any easements for partial taking of the bundle of rights.

The appraisal work reviewed and the research that has been conducted on valuation of scenic easements at the present time indicates an extreme lack in this area. The scenic easement appraisal follows the same general format as a standard appraisal; however, the thinking at this time on scenic easements is confused.

It is hoped that the case studies reviewed will be of some help to appraisers in analyzing various types of properties for the scenic easement appraisal. Although the available information of this type is relatively sparse, this is a start in the right direction. The various State highway commissions and departments should make a bona fide effort to review what has happened to properties encumbered with scenic easements on a before and after basis, and so establish what effect the scenic easements have upon property value.

It was noted from the reports of the various court cases involving scenic easements that the public is generally unaware of the scenic easement and how it affects property values. It would seem to behoove the various State and Federal agencies to have documented evidence in their files of case studies or exhibits to demonstrate to the juries and the courts what effects scenic easements are having upon property values.

Due to the lack of understanding of the appraising of the scenic easements and the various uses of unsound appraisal techniques to explain or attempt to justify scenic easement acquisition, it is recommended that the various appraisal organizations, severally or individually, should research this particular field and conduct schools and/or seminars to offset the rather naive thinking on this problem. Actually, the whole area of easement valuations should be completely reviewed by the various professional appraisal organizations.

By and large, the appraisal work on scenic easements reviewed to date—and it is recognized that it is only in the beginning stages—is extremely confusing. Wide variation of opinion exists as to how this problem should be handled. It is hoped that some of the poor judgment used previously has been offset by principles exemplified in the case studies included herein.

CHAPTER SEVEN

SUGGESTED RESEARCH

It is obvious from this study of the scenic easement program in the United States that the number of States or agencies actively engaged in the acquisition of scenic easements is quite limited.

As more and more agencies become involved, more information pertaining to the acquisition and the valuation aspects of this program will be available for study and review. As mentioned previously, the seven before and after case studies of sales that were found are as extensive as found anywhere in the United States at the present time. To a great extent, reliance had to be placed on comparison sales and exchange sales to justify some of the various valuation aspects. As time goes on and this program is initiated in more and more States, there will be more areas to study pertaining to these valuation and legal problems.

From the response received from various agencies, there appears to be a present as well as a future need for information on this particular subject. Future research should encompass the valuation of signboards and junkyards, which was not included in the present segment of the scenic easement study but is part of the Highway Beautification Act of 1965.

In summary, it is suggested that this research be continued, inasmuch as the program is in its initial stages and more information on the legal, valuation, and acquisition problems of the scenic easement program will be available as the years go by. As in any condemnation-type study, more information pertaining to the subject of justification and acquisition is essential.

APPENDIX A

STATE ENABLING STATUTES WHICH AUTHORIZE ACQUISITION OF SCENIC EASEMENTS

Alaska Statutes § 19.05.040 (1962).

Arkansas Statutes Annotated §§ 76-532(f) (1957), 76-1801 to 76-1811 (1957), 76-1812 to 76-1818 (Supp. 1967), 76-2520 and 76-2521 (Supp. 1967).

California Civil Procedure Code § 1238(18) (Deering 1958).

California Government Code §§ 191 and 192 (Deering 1958), 7000 and 7001 (Deering Supp. 1966).

California Streets and Highways Code § 104.3 (Deering 1965), §§ 895 and 896 (Deering Supp. 1966).

Colorado Revised Statutes Annotated § 120-3-10(2) (1963), as amended by Colorado Acts 1966, ch. 38, p. 178.

Connecticut General Statutes Annotated § 13a-85a (Supp. 1966).

Delaware Code Annotated title 17, § 132(b)(4) (1953) (semble).

Georgia Laws 1967, No. 270.

Hawaii Revised Laws § 129-12 (1955), as amended by Hawaii Acts 1966, No. 43.

Idaho Code Annotated §§ 40-2801, 40-2802 (Supp. 1967).

Illinois Annotated Statutes title 121, § 4-201.15 (Supp. 1966).

Indiana Annotated Statutes § 36.2946 (Supp. 1967).

Iowa Code Annotated §§ 308.1 to 308.5, 313.67 (Supp. 1967).

Kentucky Revised Statutes § 177.090 (Supp. 1966).

Louisiana Revised Statutes § 48.269 (Supp. 1966).

Maine Revised Statutes Annotated title 23, §§ 153, 154 (Supp. 1966).

Maryland Code Annotated article 89B, §§ 236 to 238 (Supp. 1967).

Massachusetts General Laws chapter 81, § 13B, added by Massachusetts Acts 1967, ch. 397.

Michigan Compiled Laws §§ 252.251 to 252.253 (Supp. 1966).

Minnesota Statutes Annotated §§ 161.20, 161.1419 to 161.145, 173.01 to 173.05, 173.31 to 173.35 (Supp. 1966).

Mississippi Code Annotated §§ 5964 to 5974, 5978 to 5984 (1952), § 8023.3 (Supp. 1966).

Missouri Annotated Statutes §§ 226.280 to 226.430 (1949), §§ 226.750 to 226.770 (Supp. 1966).

Montana Revised Codes Annotated §§ 32-2422 to 32-2425 (Supp. 1967).

Nebraska Revised Statutes § 39.1320(f) (1960).
New Jersey Statutes Annotated §§ 27:7-22.4, 27:7-22.5 (Supp. 1966).
New Mexico Statutes Annotated § 55-11-14 (Supp. 1967).
New York Highway Law § 21 (McKinney Supp. 1967).
North Dakota Century Code § 24-17-09, para. 4 (Supp. 1967).
Ohio Revised Code Annotated § 5529.03, 5529.04 (1954), as amended by Ohio Laws 1967, S.B. 66, §§ 1-3.
Oregon Revised Statutes § 366.345 (1965).
Pennsylvania Statutes Annotated title 36, § 670-413.1 (Supp. 1966).
Rhode Island General Laws Annotated §§ 37-6.2-1 to 37-6.2-4 (Supp. 1966).
South Carolina Code Annotated § 33-74.1 (Supp. 1966).
South Dakota Laws 1966, ch. 85.
Texas Revised Civil Statutes art. 6674w-3, § 1(a) (1960).
Utah Code Annotated §§ 27-12-109.1 to 27-12-109.3 (Supp. 1967).
Vermont Statutes Annotated title 10, §§ 261, 262 (Supp. 1967).
Virginia Code Annotated §§ 33-133, 33-134 (Supp. 1966).
Washington Revised Code § 47.12.250 (Supp. 1965).
West Virginia Code § 17-2A-17(h) (Supp. 1967).
Wisconsin Statutes §§ 84.09, 84.105, 15.60 (i) (1965).

APPENDIX B

STATE CONSTITUTIONAL ANTI-DIVERSION PROVISIONS*

STATE	CITATION	FUNDS INVOLVED	PURPOSES SPECIFIED
Ala.	Amdt. 93	Fees, excises, taxes levied by State relating to registration, operation or use of vehicles on public highways.	Cost of construction, reconstruction, maintenance and repair of public highways and bridges, cost of right-of-way, payment of highway obligations, cost of traffic regulation and enforcement of State motor vehicle and traffic laws.
Ariz.	Art. 9 § 14	Fees, excises or license taxes relating to registration, operation or use of vehicles on public highways or fuels used for such vehicles.	Payment of highway obligations; cost of construction, maintenance and repair of public highways and bridges, county, city and town roads and streets; and distribution to counties, incorporated cities and towns under Act of 7/1/52; cost of State enforcement of traffic laws; publication of Arizona Highways Magazine.
Calif.	Art. 26	State taxes on motor vehicle fuel for use on public highways.	Construction, improvement, repair and maintenance of public streets and highways; payment for property taken or damaged for such purposes.
			Specified percentage of tax may be used for payment of special assessments or bonds for streets or highways.
		State motor vehicle registration fees.	Cost of administering and enforcing laws concerned with use, operation or registration of vehicles used on public highways, and for State highway patrol. Also, street and highway purposes noted in regard to fuel tax above.
Colo.	Art. 10	Licenses, registration fees or other charges regarding operation of motor vehicle on public highways; taxes on liquid motor fuel.	Cost of construction, maintenance, and supervision of public highways.
Ga.	Art. 7 § 9	Motor fuel taxes received by State.	All activities incident to providing and maintaining an adequate system of public roads and bridges; grants to counties for road construction and maintenance.
Id.	Art. 7 § 17	Taxes on gasoline and like motor fuels sold and used to propel vehicles on highways; fees or taxes for registration of motor vehicles.	Construction, repair, maintenance and traffic supervision of public highways; payment of interest and principal of obligations incurred for these purposes.

STATE	CITATION	FUNDS INVOLVED	PURPOSES SPECIFIED
Iowa	Art. 7 § 8	Motor vehicle registration fees; all licenses and excise taxes on motor vehicle fuel.	Construction, maintenance and supervision of public highways and payment of bonds issued for construction of highways.
Kans.	Art. 11 § 10	Special taxes on motor vehicles and motor fuels.	Highway purposes.
Ky.	§ 230	Excise or license taxes relating to gasoline or other motor fuels; fees, excises or licenses relating to registration, operation or use of vehicles on public highways.	Payment of highway obligations; costs of construction, reconstruction, rights-of-way, maintenance and repair of public highways and bridges; expense of State traffic and motor vehicle law enforcement.
La.	Art. 6 § 23	Taxes on fuel, lubricating oil; licenses for vehicles on public highways.	Special fund known as Long-Range Highway Fund.
Me.	Art. 9 § 11	Fees, excises and license taxes relating to registration, operation and use of vehicles on public highways, and to fuels for propulsion of said vehicles.	Payment of debts and liabilities incurred in construction and reconstruction; cost of construction, reconstruction, maintenance and repair of State highways and bridges; expense of traffic law enforcement.
Mass.	Art. 78	Fees, duties, excises relating to registration, operation or use of vehicles on public highways, and to fuels used for such vehicles.	Payment of highway obligations; costs of construction, reconstruction, maintenance and repair of highways and bridges; cost of State traffic law enforcement.
Mich.	Art. 9 § 9	Specific taxes (except general sales taxes and regulatory fees) on fuel sold or used to propel motor vehicles, and on registered motor vehicles.	Highway purposes as defined by law.
Minn.	Art. 16 §§ 5, 9, 10	Taxes on motor vehicles; taxes on motor fuels or business of selling or producing motor fuels.	Special fund known as Highway User Tax Distribution Fund to be used for highway purposes according to statutory formula for apportionment among road systems.
Mo.	Art. 4 § 30(b)	Revenue derived from highway users as an incident of their use or right to use the highways, including State license fees and taxes on motor vehicles, motor fuels or manufacture or distribution thereof.	Payment of road bonds; complete, widen or improve State highway system; reimburse counties for costs of certain road construction; locate, relocate, acquire, construct and maintain State highways and bridges; acquire materials, equipment and buildings for purposes described; and such other purposes and contingencies relating to the construction and maintenance of such highways as the commission may deem necessary and proper.
Mont.	Art. 12 § 1(b)	Fees, excises, or license taxes on registration, operation or use of vehicles on public highways, or to fuels used for propulsion of such vehicles.	Payment of highway obligations; cost of construction, reconstruction, maintenance and repair of public highways, roads, streets and bridges; expenses of public information relating to public highways.
Nev.	Art. 9 § 5	Licenses or registration fees and other charges regarding operation of motor vehicles on public highways; excise taxes on gasoline or other motor fuel.	Construction, maintenance and repair of public highways.
N. H.	Part II Art. 6a	Registration fees, operators' licenses, gasoline, road tolls, or any other special charges or taxes with respect to the operation of motor vehicles or the sale or consumption of motor vehicle fuel.	Construction, reconstruction and maintenance of public highways, including supervision of traffic and payment of obligations incurred for said purposes.
N. Dak.	Art. 56 § 1	Gasoline and other motor vehicle fuel license and excise taxes; motor vehicle license and registration.	Construction, reconstruction, repair and maintenance of public highways; payment of obligations incurred for said purposes.
Ohio	Art. 12 § 5a	Fees, excises, license taxes relating to registration, operation or use of motor vehicles on public highways, or to fuels used for propelling such vehicles.	Payment of highway obligations; costs of construction, reconstruction, maintenance and repair of highways and bridges, and other statutory highway purposes; expense of State traffic law enforcement and hospitalization of indigent persons injured in highway accidents.
Ore.	Art. 9 § 3	Taxes on motor fuel; taxes or excise on ownership, operation or use of motor vehicles.	Construction, reconstruction, improvement, repair, maintenance, operation, use, and policing of public highways, roads and streets; acquisition, develop-

STATE	CITATION	FUNDS INVOLVED	PURPOSES SPECIFIED
			ment, maintenance, care and use of parks, recreational, scenic or other historic places; and publicizing of any of these uses and things.
Pa.	Art. 9 § 18	Gasoline and other motor fuel excise taxes, motor vehicle registration fees and license, operators' license fees, other excise taxes imposed on products used in motor transportation.	Payment of obligations incurred in construction and reconstruction of public highways; apportionment among political subdivisions for construction, reconstruction, repair and maintenance of and safety of public highways and bridges and air navigation facilities.
S. Dak.	Art. 9 § 8	License, registration fees and other charges relating to operation of motor vehicles on public highways; excise tax on gasoline or other liquid motor fuel.	Maintenance, construction and supervision of highways and bridges.
Tex.	Art. 8 § 7-a	Motor vehicle registration fees; taxes on motor fuel and lubricants.	Acquisition of right-of-way; construction, maintenance and policing of public roadways; supervision of traffic and safety; payment of county and road district bonds. One-fourth of net revenue from the motor fuel tax is available for school fund.
Utah	Art. 13 § 13	License taxes, registration fees, driver education tax, or other charges related to operation of motor vehicles; excise taxes on gasoline and other liquid fuels for motor vehicles.	Construction, improvement, repair and maintenance of city streets, county roads and State highways; including payment for rights-of-way; administrative costs of driver education program; expenses of enforcement of State traffic laws; tourist and publicity expenses.
Wash.	Art. 2 § 40	License fees on motor vehicles; excises on motor vehicle fuel; and all other State revenue intended to be used for highway purposes.	Necessary operating, engineering and legal expenses connected with administration of highway system; construction, reconstruction, repair and betterment of public highways, including costs of right-of-way, signing, policing, operation of bridges and ferries; payment of obligations for which said revenue may be pledged.
W. Va.	Art. 6 § 52	Gasoline and other motor fuel excise and license taxes; motor vehicle registration and license fees; other revenue derived from motor vehicle fuel.	Construction, reconstruction, repair and maintenance of public highways.
Wyo.	Art. 15 § 16	Fees, excises or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles.	Payment of highway obligations; costs of construction, reconstruction, maintenance, repair of public highways, roads, bridges, streets, alleys; expense of State traffic law enforcement.

* Derived from notes for a speech by Ross D. Netherton at a seminar held by the Nevada Department of Highways in the fall of 1966.

APPENDIX C

SELECTED SCENIC EASEMENT FORMS

HAWAII

SCENIC EASEMENT

THIS INDENTURE made this _____ day of _____, 19__, by and between _____

_____

_____

as GRANTOR(S), in consideration of the sum of _____

($_____), paid by the STATE OF HAWAII, GRANTEE, the receipt whereof is hereby acknowledged, do(es) hereby grant, bargain, sell and convey unto the GRANTEE an easement and right in perpetuity, together with certain vehicle access rights, for the purpose of preserving and protecting for scenic purposes the natural beauty of those certain lands designated as Parcel(s) _____, hereinafter referred to as the Scenic Area, situated at _____

_____,

State of Hawaii, as shown on the Right-of-Way Map—Landscaping and Scenic Enhancement of the _____

_____,

filed in the Highways Division, Department of Transportation, State of Hawaii, and more particularly described hereinafter.

TERMS AND CONDITIONS

Scenic Area Restrictions

1. No use or occupation, other than the permitted use, shall hereafter be established or maintained within or upon the Scenic Area.

2. No dumping of ashes, trash, junk, rubbish, sawdust, garbage, or offal, or any other unsanitary, unsightly or offensive materials shall hereafter be placed within or on the Scenic Area. Existing dumps or offensive materials shall be removed by the GRANTEE at its own cost.

3. The flora within the Scenic Area, such as the trees, shrubs, flowers and undergrowth, shall not be removed, cut or destroyed except as may be incidental to the occupation or permitted use of said Scenic Area or for reasons of sanitation and disease control or for selective cutting of timber as prescribed by a written permit from the State of Hawaii, by its Director of Transportation.

4. No new installation of utility poles or pole lines shall be placed upon or within the Scenic Area, except as required for a permitted use and then only pursuant to a written permit from the Director of Transportation.

5. No new structures of any kind shall hereafter be placed or constructed within or upon said Scenic Area.

6. No advertising signs of any kind or nature shall be located on or within said Scenic Area.

7. All new plantings by the GRANTOR(S) shall be confined to native plants characteristic of _____

_____

except flowers, vegetables, berries, fruit trees and farm crops.

8. No use of the Scenic Area, which, in the judgment of the Director of Transportation, will or does materially alter the landscape or other attractive scenic features of said Scenic Area, or will be inconsistent with the abovementioned purpose shall be allowed without the prior written consent of the Director of Transportation.

9. No mining, excavation, quarrying or removal or storing of any minerals or materials shall be allowed within the Scenic Area.

10. The GRANTEE may enter upon the Scenic Area for the purpose of inspection and enforcement of the terms and covenants contained herein. In furtherance thereof, the GRANTEE (1) may cause the removal from the Scenic Area of any advertising devices or unauthorized materials, (2) shall have the right to cut and remove brush, undergrowth, and dead or diseased trees, and (3) shall have the right to perform selective tree cutting and trimming in the Scenic Area. Further, to preserve and enhance the beauty of the Scenic Area, the GRANTEE may plant within the Scenic Area trees, shrubs and other native plants characteristic of _____; provided that it shall consult with the GRANTOR(S), prior to any plantings, to insure that the GRANTOR(S) (is) (are) in accord with the landscaping plan(s).

11. *Special Conditions.* Notwithstanding the Scenic Area restrictions set forth above, the following special terms and conditions shall apply and shall control when inconsistent with the said Scenic Area restrictions:

_____

_____

Scenic Area Use

1. Nothing in this instrument shall be construed to affect the right of the GRANTOR(S) to lay, operate, maintain, repair, or remove water and sewer pipelines, conduits, or drains below the surface of the Scenic Area insofar as such activities do not permanently impair or ruin the natural beauty of said Scenic Area nor interfere with the exercise by the GRANTEE of the rights herein granted.

2. This easement does not grant the public the right to enter the Scenic Area for any purpose whatsoever.

3. This Grant of Scenic Easement shall be binding upon the heirs and assigns of the said GRANTOR(S) and shall constitute a servitude upon the land(s) hereinafter described.

4. The GRANTOR(S) reserve(s) the right to continue the present occupation and use of the Scenic Area, to wit: _____

_____

_____

5. *Special Conditions.* Notwithstanding the Scenic Area use conditions set forth above, the following special terms and conditions shall apply and shall control when inconsistent with the said Scenic Area use conditions:

_____

_____

IN WITNESS WHEREOF, the GRANTOR(S) (has) (have) caused these presents to be executed as of the day and year first above written.

ILLINOIS

CROPLAND SCENIC EASEMENT

1. The land use within the scenic easement must remain as cropland, or may, by permission of the grantee, be changed to a higher use aesthetically (i.e., permanent pasture or woodland).

2. Written outdoor advertising leases which cover at least a three-year period may be permitted to expire, but may not be renewed. All such signs must be removed at the expiration of the written lease period by the owner of the sign at his own expense.

3. The grantor may construct not more than two single-family residences, using standard aluminum or wood siding, or brick or stone exteriors, or such conventional combinations that represent quality construction standards. (These building requirements usually conform to governing standards.)

4. The grantor or his agent may not move in old houses, cottages, house trailers, mobile homes, fishing or hunting shacks, portable structures, or any other low-quality unattractive or unpermanent improvement or structure into the easement area.

5. The State reserves the right of ingress and egress to accomplish such "brushing out" as is necessary by its agents in order to maintain the scenic easement view or features for the benefit of the public.

6. No crops in excess of twelve feet in height shall be grown within the easement area after _____.

7. No tree, shrub or other form of screen shall be planted or placed within the easement area which would tend to obstruct the scenic view of the public.

8. No parking of mobile or semi-mobile units shall be permitted within the easement area.

9. The grantor will be permitted _____ residential building sites within the scenic easement area.

10. Objectionable and non-compatible land uses (such as junkyards or auto salvage yards) are prohibited within the scenic easement area.

11. The grantor agrees to a minimum setback line for improvements of 50 feet from the present right-of-way and the scenic easement boundary.

12. Buildings, pole lines, and structures may be erected on such lands only for farm and residential purposes. New buildings or major alterations to existing buildings shall be subject to the prior approval of the grantee, or its assigns. No commercial buildings, power lines, or other industrial or commercial structures shall be erected on such lands, except existing commercial buildings may be altered or the property may be otherwise improved for the purpose of continuing established use after plans have been approved by the grantee, or its assigns.

13. No mature trees or shrubs shall be removed or destroyed on such land without the consent of the grantee, or its assigns, except such seedling shrubbery or trees as may be grubbed up or cut down in accordance with good farm practices and residential maintenance.

14. No building or premises shall be used and no building shall hereafter be erected or structurally altered except for one or more of the following uses:

A. General farming, including farm buildings, except fur farms and farms operated for the disposal of garbage, rubbish, offal or sewage.

B. Uses incident to any of the above permitted uses, including accessory buildings.

C. Any use existing on the premises at the time of the execution of this easement. Existing commercial and industrial uses of lands and buildings may be continued, maintained and repaired, but may not be expanded nor shall any structural alteration be made.

15. No dump of ashes, trash, sawdust or any unsightly or offensive material shall be placed upon such restricted area except as is incidental to the occupation and use of the land for normal agricultural or horticultural purposes.

16. No sign, billboard, outdoor advertising structure or advertisement of any kind shall be erected, displayed, placed or maintained upon or within the restricted area, except one sign of not more than eight square feet in area to advertise the sale, hire, or lease of the property.

17. The conditions of this easement shall not prevent any permanent excavation or works necessary to the occupation or use of the restricted area for purposes of the permitted uses.

18. No trees or shrubs shall be removed or destroyed on the land covered by this easement, except as may be incidental to the permitted uses.

19. The grantee reserves the right to erect permanent markers along the boundaries of the easement.

20. The grant of this easement does in no way grant the public the right to enter such area for any purpose

Illinois has also developed scenic easement forms for woodlands and grazing lands. Items 2 through 5 and 7 through 20 in the cropland scenic easement appear in the grazing land scenic easement. Items 2, 4, 5, 7, 8, and 10 through 20 also appear in the woodland scenic easement. Items which appear in the grazing land scenic easement or the woodland scenic easement, but not in the cropland scenic easement, are listed in the following.

GRAZING LAND SCENIC EASEMENT

1. The land use within the scenic easement must remain as grazing land, or may, by permission of the grantee, be changed to a higher use aesthetically (i e., woodland).
2. The land contained in the scenic easement must be covered by a farm management plan prepared by the local agent of the U. S. Soil Conservation Service.
3. The grantor will not overgraze by overstocking.
4. The grantor will delay or defer grazing in the spring until the soil is firm and vegetative growth is at least four inches high. (Seven inches if legumes.)
5. The grantor will not mow or graze below a height of four inches.
6. The grantor will not graze perennial legumes between September 15 and October 20th.
7. The grantor will allow a period of growth between each grazing to provide a satisfactory recovery.

WOODLAND SCENIC EASEMENT

The land use must not be changed, but must remain in woods.

1. The area will not be pastured.
2. The area will not be burned knowingly or purposely. The grantor will agree to make an effort to suppress any fires that may occur on the scenic easement area. This will mean, at least, notifying the local fire department, highway section crew or State Forester so that action may be taken. To insure fire protection, the State, or its assigns, reserves the right to enter onto the property to construct and maintain fire lanes at least 15 feet in width around the boundary of the easement where needed. This need will be determined by a State Forester in a woodland management plan prepared by him.
3. Timber may be harvested by the grantor on the area covered by the scenic easement subject to the following conditions:

   a. The area must be covered by a woodland management plan drawn up by the local State Forester in accordance with the existing cutting practices guide of the Illinois Technical Forester's Association.
   b. The timber to be sold must be marked by a State Forester and must not interfere with the original intent of the scenic easement.
   c. Stocking cannot be lowered below 60% by any cut.
   d. Within six months from cutting, the residues such as crown, limbs, etc. will be reduced to piles no greater than four feet in height and scattered as much as possible so that vegetation can grow in the area. The residue may be used for fuel, etc.
   e. The trees to be removed will be marked by a State Forester with the primary objective of maintaining the scenic qualities and the secondary interest of timber stand improvement.
   f. Selection for marking of species to be removed will be on the basis of beauty and not whether the species will produce timber. This does not mean that timber trees should be removed if healthy and properly spaced.
   g. The trees will be cut and stumps treated with a herbicide such as 2,4,5-T.
   h. The Division of Highways retains the right to remove any trees it deems necessary to enhance the beauty of the easement.

4. If reforestation is carried out on the easement, the species, amount and spacing will be specified by the local State Forester in a management plan.

* * * * * *

6. The grantor may construct not more than one single-family residence using standard aluminum or wood siding, or brick or stone exteriors, or such conventional combinations that represent quality construction standards. (These building requirements usually conform to governing standards.)

IOWA

CONTRACT

(Scenic Beautification)

Parcel No. _____ County _____
Road No. _____ Project _____

THIS AGREEMENT made and entered into this _____ of _____, A.D. 19____ by and between _____

_____

of the County of _____ Address _____ Party of the first part, and the Iowa State Highway Commission, acting for the State of Iowa, Party of the Second part.

WITNESSETH:

In consideration of the agreements, convenants and provisions herein contained, first party hereby agrees to convey to the second party a scenic easement to the real estate situated in Sec. _____, T _____, R _____, _____ County, Iowa, to-wit: From Sta. _____ to Sta. _____ a strip _____ ft. wide _____ side, measured from centerline of { proposed / present } highway as shown on the plans for said project and shown with reference to its location as to lands affected on the plat Exhibit A attached hereto and by this reference made a part hereof.

_____

_____

The above described property, consisting of _____ acres, more or less, is now being used for _____

_____

and is hereinafter designated as the SCENIC AREA. This easement and right in perpetuity, is to be given by the first party to restrict in accordance with the terms and conditions hereinafter prescribed, the future use and development of the above described parcel.

TERMS AND CONDITIONS

This Easement will grant the State of Iowa, its agents and contractors the right to enter upon the easement area for the purpose of inspection and enforcement of the terms and convenants contained herein, and together with such right, shall have the right to cause to be removed from the scenic area any unauthorized advertising devices or unauthorized materials. They shall have the right to cut and remove brush, undergrowth, dead or diseased trees and to perform selective tree cutting and trimming in the scenic area. If it becomes necessary to revegetate (grass or trees) for conservation purposes the grantee has the right to enter upon the scenic area for such purposes.

Permitted Use or Occupation of Restricted Area

1. General crop or livestock farming, including construction, erection, maintenance and repair of buildings incidental to such use, also the establishment of recommended soil and game conservation practices.
2. Any other use specified as existing upon or within the restricted area at the time of execution of this contract may continue but shall not be expanded, nor shall any structures be erected or structural alterations be permitted within the boundaries of this easement.
3. Underground telephone, telegraph, electric or pipe lines for the purpose of transmitting messages, heat, light or power.
4. Signs of not more than _____ square feet in size may be erected, under rules and regulations promulgated from time to time by the Iowa State Highway Commission, to advertise the sale or rental of personal property and real property and to advertise activities being conducted on the property where the signs are located
5. _____

Restrictions

1. No use or occupation other than the aforementioned uses shall be established or maintained within the boundaries of this easement area.
2. No dumps for the disposal of ashes, trash, rubbish, sawdust, garbage, offal or any unsightly and offensive material shall exist. Storage of accumulated junked automobiles, farm implements or parts thereof and other salvaged material now existing shall be terminated upon the date of this instrument.
3. No overhead pipes, conduits or wires for the purpose of transmitting messages, heat, light or power shall be erected.
4. No trees or shrubs shall be planted, destroyed, cut or removed from this area except as are incidental to a permitted occupation or use of the property or required for reasons of sanitation or disease control, and except for selective cutting of timber or other soil and game conservation practices as permitted in writing by the grantee.
5. No rights are to be granted to the general public to enter upon this area for any purpose.
6. _____

Any and all verbal agreements are merged in this written contract. No other acts or deeds are written or implied. Any additions to or modifications of this agreement shall be in writing, and to be executed with the same formalities as this instrument. When so executed, they shall be as much a part of this instrument as if fully set out herein.

In consideration of the terms of this agreement, the Party of the second part agrees to pay _____ Dollars ($_____) to the Party of the first part on or before _____. Signed _____

Party of the First Part

Approval Recommended _____, 19____ (Signed) IOWA STATE HIGHWAY COMMISSION
Party of the Second Part

By _____ By _____
Right-of-Way Agent Right-of-Way Engineer

MICHIGAN

HIGHWAY SCENIC AREA EASEMENT RELEASE

For and in consideration of the improvement of State Trunkline Highway _____ and other valuable consideration, the receipt whereof is acknowledged, the undersigned, _____ hereby grant and convey to the State of Michigan, whose address is _____, Michigan, an easement for highway purposes, in, over, and upon the parcels of land described as:

A. The above described property, consisting of _____ acres, more or less, is now being used for _____ and is hereinafter designated as the SCENIC AREA.

B. The State of Michigan and its agents shall have the right to enter upon the scenic area for the purpose of inspection and enforcement of the terms and convenants contained herein, and together with such right, shall have the right to remove from the scenic area any unauthorized advertising devices or unauthorized materials and shall have the right to cut and remove brush, undergrowth, and dead or diseased trees from the scenic area, and shall have the right to perform selective tree cutting and trimming in the scenic area, provided that no rights are granted to the general motoring public to enter upon the scenic area for any purpose.

C. The grantor(s) _____, _____ heirs, successors, executers, and assigns, do(es) covenant that:

1. No use or occupation hereinafter prohibited shall hereafter be made, established or maintained within or upon the scenic area.

2. No dumping of ashes, trash, junk, rubbish, sawdust, garbage, or offal, or any other unsightly or offensive materials shall hereafter be allowed upon the scenic area. Existing use for any such purpose shall be terminated.

3. No trees or shrubs shall be destroyed, cut, damaged, or removed by the grantor(s) from the scenic area without a written permit from the Michigan State Highway Commission.

4. No new installation of utility structures or lines shall be made upon or within the scenic area without a written permit from the Michigan State Highway Commission.

5. No new or additional structures shall be constructed upon the scenic area without a written permit from the Michigan State Highway Commission.

6. Additional covenants:

D. The grantor(s) reserve(s) to _____, _____ heirs, successors, executors, and assigns, the right to continue the present use of the scenic area.

The undersigned mortgagee hereby releases and discharges the lands described from the mortgage lien. IN WITNESS WHEREOF, We have hereunto set our hands and seals this _____ day of _____, A.D. 19____. In Presence of

MINNESOTA

SCENIC AREA EASEMENT

S P. _____ Parcel _____ County of _____.

Grantor(s) of _____ Minnesota, for and in consideration of _____ Dollars ($_____) hereby convey(s) and warrant(s) to the State of Minnesota, Grantee, an easement and right in perpetuity to control and restrict, in accordance with the terms and conditions hereinafter prescribed, the use and development of the parcel of real estate in the County of _____, in the State of Minnesota, described as follows:

The above described property, consisting of _____ acres, more or less, is now being used for _____ and is hereinafter designated as the SCENIC AREA.

The State of Minnesota and its agents shall have the right to enter upon the scenic area for the purpose of inspection and enforcement of the terms and covenants contained herein, and together with such right, shall have the right to cause to be removed from the scenic area any unauthorized advertising devices or unauthorized materials and shall have the right to cut and remove brush, undergrowth, and dead or diseased trees from the scenic area, and shall have the right to perform selective tree cutting and trimming in the scenic area, provided that no rights are granted to the general public to enter upon the scenic area for any purpose.

The grantor(s) for _____, _____ heirs, executors and assigns, do(es) _____ covenant that:

1. No use or occupation other than the hereinafter permitted use shall hereafter be made, established or maintained within or upon the scenic area.

2. No dumping of ashes, trash, junk, rubbish, sawdust, garbage, or offal, or any other unsightly or offensive materials shall hereafter be allowed upon the scenic area. Existing use for any such purpose shall be terminated, and the above described materials shall be removed within ninety (90) days of the date of this instrument.

3. No trees or shrubs shall be destroyed, cut or removed from the scenic area except as may be required for reasons of sanitation and disease control and except for selective cutting of timber by methods prescribed by written permit from the Commissioner of Highways, provided that the grantee may cut and remove brush, undergrowth and dead or diseased trees from the scenic area and may perform selective tree cutting and trimming in the scenic area.

4. No new installation of utility poles or pole lines shall be made upon or within the scenic area except as required for a permitted use and then only pursuant to a written permit from the Commissioner of Highways.

5. No new or additional structures shall be constructed upon the scenic area within one hundred (100) feet of the trunk highway right-of-way as now established without a written permit from the Commissioner of Highways.

The grantor(s) reserve(s) to _____, _____ heirs, executors and assigns, the right to continue the present use of the scenic area, including any present use not herein specifically set forth, in a manner not inconsistent with the above described terms and conditions.

The grantor(s) further reserve(s) to _____, _____ heirs, executors and assigns, the right to develop the land described herein as hereinafter set forth:

The amount of the State Deed tax due in this deed, as required by Minnesota Statutes 1961, Chapter 287 and acts mandatory thereto, is the sum of $_____.
IN WITNESS WHEREOF, the party _____ hereto set _____ hand _____ and seal(s) this _____ day of _____, 19 _____.
In presence of

NORTH DAKOTA

SCENIC EASEMENT

THIS INDENTURE, Made this _____ day of _____, 19_____ between _____ whose post office address is _____ part _____ of the first part and the State of North Dakota for the Use and Benefit of the State Highway Department, Bismarck, North Dakota, party of the second part:

WITNESSETH, that in consideration of the sum of _____ Dollars, ($_____) receipt whereof is herewith acknowledged, the part _____ of the first part, do _____ hereby Grant to the party of the second part, its successors and assigns, an easement and right in perpetuity to restrict, in accordance with the terms and conditions hereinafter prescribed, the future use and development of the following described parcel of real estate in the County of _____, State of North Dakota, to wit:

Said parcel consisting of _____ acres, more or less, and is hereinafter designated as the "restricted area".

TERMS AND CONDITIONS

Whereas, the State of North Dakota desires to preserve and protect, for scenic purposes, the natural beauty of said restricted area and to prevent any future developments which may tend to detract therefrom, the following restrictions on future use and development and the following permitted uses are hereby established.

Restrictions

1. No use or occupation other than the hereinafter permitted use shall hereafter be established or maintained within or upon the restricted area.
2. No dump of ashes, trash, rubbish, sawdust, garbage, or offal, or any other unsightly or offensive material shall hereafter be placed upon the restricted area. Existing use for any such purpose shall be discontinued except where such use is incidental to the present occupation and use of the land and when it conforms to applicable State and local requirements.
3. No signs, billboards, outdoor advertising structures or advertisement of any kind shall be hereafter erected, displayed, placed or maintained upon or within the restricted area. Except that one sign of not more than _____ square feet in size may be erected and maintained to advertise the sale, hire or lease of the property.
4. Telephone, telegraph, electric or pipe lines or micro-wave relay structures for the purpose of transmitting messages, heat, light or power except that which may be incidental to a permitted occupation or use of the land and then only pursuant to a written permit from the Highway Commissioner.
5. No junkyards, dumpgrounds or strippings shall be placed within the restricted area hereafter.
6. The restricted area shall not be hereafter developed as industrial or heavy commercial property tracts.
7. No trees or shrubs shall be destroyed, cut, or removed fom the restricted area, except as may be incidental to a permitted occupation or use of the property, or required for reasons of sanitation and disease control.

Permitted Use or Occupation of Restricted Area

1. General livestock farming including construction, maintenance or establishment of recommended soil conservation structures or practices.
2. Residential and light commercial common to residential development including shopping centers.
3. Any use not heretofore specified which exists upon or within the restricted area as of the time of execution of this easement, including normal maintenance and repair of existing buildings, structures and appurtenances, but such use shall not be expanded nor shall any structures be erected or structural alterations be made within the restricted area.
4. Any structures necessary for drilling for oil or pumping of oil from a well on the restricted area are permissible.
5. Signs specifically advertising activities conducted, services rendered, goods sold, stored or produced, or the name of the enterprise on the property and which are within fifty feet of the area used for the purpose advertised and upon which they are located are permissible.

The conditions of this easement shall not prevent any permanent excavation or work necessary for purposes of the permitted uses.

This easement grants to the State of North Dakota, and its Agents, the right to enter upon the restricted area only for the purpose of inspection and enforcement of the terms of this easement.

This easement does not grant the public the right to enter the restricted area for any purpose.

IN WITNESS WHEREOF, the said part _____ of the first part hereunto set their hand _____ the day and year first above written.

OHIO

EASEMENT FOR SCENIC PROTECTION

KNOW ALL MEN BY THESE PRESENTS:

That _____, the Grantor_____, for and in consideration of the sum of_____ Dollars ($_____) and for other good and valuable considerations to _____ paid by the State of Ohio, the

Grantee, the receipt whereof is hereby acknowledged, do ____ hereby grant, bargain, sell, convey and release to the said Grantee, its successors and assigns forever, a perpetual easement to restrict the future use and development, in accordance with the terms and conditions hereinafter precribed, in, upon and over the lands hereinafter described, situated in _____ County, Ohio, _____ Township, Section _____, Town _____, Range _____, and bounded and described as follows:

Said parcel consisting of _____ acres, more or less, is now being used for _____ and is hereinafter designated as the RESTRICTED AREA.

TERMS AND CONDITIONS

Whereas, the State of Ohio desires to preserve and protect, for scenic purposes, the natural beauty of said restricted area and to prevent any future developments which may tend to detract therefrom, the following restrictions on future use and development and the following permitted uses are hereby established.

Restrictions

1. No use or occupation other than the hereinafter permitted use shall hereafter be established or maintained within or upon the restricted area, except by written permit from the grantee.
2. No dump of ashes, trash, rubbish, sawdust, garbage, or offal, or any other unsightly or offensive material shall hereafter be placed upon the restricted area. Existing use for any such purpose shall be discontinued except where such use is incidental to the present occupation and use of the land, and when it conforms to applicable State and local requirements.
3. No signs, billboards, outdoor advertising structures or advertisement of any kind shall be hereafter erected, displayed, placed or maintained upon or within the restricted area. Existing use for any such purpose shall be terminated and any such signs shall be removed on or before _____ except that one sign of not more than _____ square feet in size may be erected and maintained to advertise the sale, hire or lease of the property, or the sale and/or manufacture of any goods, products or services incidental to a permitted occupation or use of the land.
4. No trees or shrubs shall be destroyed, cut, or removed from the restricted area, except as may be incidental to a permitted occupation or use of the property, or required for reasons of sanitation and disease control, and except for selective cutting of timber by methods prescribed by written permit from the grantee.
5. (Other restrictions)

TEXAS

SCENIC EASEMENT

KNOW ALL MEN BY THESE PRESENTS:

That _____ of the County of _____, State of Texas, hereinafter referred to as Grantors, whether one or more, for and in consideration of the sum of _____ DOLLARS to Grantors in hand paid by the State of Texas, acting by and through the State Highway Commission, receipt of which is hereby acknowledged, and for which no lien is retained, either expressed or implied, do by these presents grant, bargain, sell and convey unto the State of Texas, an easement and right to restrict, in accordance with the terms and conditions hereinafter prescribed, the future use and development of the following described property located in _____ County, Texas, and being more fully described as follows, to wit:

Said property consisting of _____ acres, more or less, is now being used for _____, and is hereinafter designated as the RESTRICTED AREA.

TERMS AND CONDITIONS

Restrictions

1. No use or occupation other than the hereinafter permitted use shall hereafter be established or maintained upon or within the restricted area.
2. No dump of ashes, trash, rubbish, sawdust, garbage or offal, or any other unsightly or offensive material shall hereafter be placed upon the restricted area.
3. No signs, billboards, outdoor advertising structures or advertisement of any kind shall hereafter be erected, displayed, placed or maintained upon or within the restricted area. Existing use for any such purpose shall be terminated and any such signs shall be removed on or before _____, except that one sign may be erected and/or maintained to advertise the sale, hire or lease of the property, or to advertise activities conducted thereon, and one additional sign may be erected and/or maintained to designate the ownership of the property.
4. No trees or shrubs shall be destroyed, cut or removed from the restricted area, except as may be incidental to a permitted occupation or use of the property, or required for reasons of sanitation and disease control, and except for selective cutting of timber by methods prescribed by written permit from the Texas Highway Department.
5. (Additional restrictions)

Permitted Use or Occupation of Restricted Area

1. General crop or livestock farming, including construction, erection, maintenance and repair of buildings incident to such use, and construction, maintenance or establishment of recommended soil conservation structures or practices, and normal farm or ranch improvements.
2. Telephone, telegraph, electric or pipe lines or micro-wave relay structures for the purpose of transmitting messages, fuels, light or power.
3. Any use not heretofore specified which exists upon or within the restricted area as of the time of execution of this instrument, including normal maintenance and repair of existing buildings, structures and appurtenances, but such use shall not be expanded nor shall any structures be erected or structural alterations be made within the restricted area.
4. Roads and driveways as may be necessary to serve lands of Grantors which abut on the restricted area, whether or not in existence at the time of execution of this instrument; provided, however, that the establishment of new access driveways shall be subject to current Texas Highway Department regulations at the time application therefor is made.
5. (Additional permitted uses)

The State or its agents may from time to time enter upon the restricted area for the purpose of doing any and all things necessary to restore, preserve and protect, for scenic purposes, the natural beauty of said restricted area, and for the purpose of inspection and enforcement of the terms of this easement.
This easement does not grant the public the right to enter upon the restricted area for any purpose.
TO HAVE AND TO HOLD said easement together with all and singular the rights, privileges and appurtenances thereto in any manner belonging unto the said State of Texas forever.
IN WITNESS WHEREOF, Grantors have caused this instrument to be executed on the _____ day of _____, 19____.

(Add acknowledgements as required)

WISCONSIN

SCENIC EASEMENT

WHEREAS, the State of Wisconsin desires to preserve, protect and improve where necessary for scenic purposes, a panoramic view of the _____ and to prevent any future development which may tend to detract therefrom.
This Indenture, made by _____, grantors, hereby conveys and warrants to the State of Wisconsin, grantee, for the sum of _____ ($_____) dollars, scenic rights in perpetuity as hereinafter prescribed, in and to the following described parcel of real estate in _____ County, State of Wisconsin, to wit:

The specific rights and interests hereby acquired are as follows:

1. The right for the State of Wisconsin, its agents and contractors, to enter upon the easement area:
   (a) To inspect for violations of the provisions of this easement and to remove or eliminate advertising displays, signs and billboards, stored or accumulated junk automobiles, farm implements or parts thereof, and other salvage materials or debris, and to perform such scenic restoration as may be deemed necessary or desirable.
   (b) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures.

The grantor's rights to engage in specified activities are acquired as follows:

1. The right to erect, display, place or maintain upon or within the scenic area any signs, billboards, outdoor advertising structures or advertising structures or advertisement of any kind, except that one (1) on-premise sign of not more than _____ square feet in size may be erected and maintained to advertise the sale, hire or lease of the property, or the sale and/or manufacture of any goods, products or services upon the land. Any existing signs, other than the one on-premise sign, and/or advertisements as described above shall be terminated and removed on or before _____.
2. The right to dump or maintain a dump of ashes, trash, rubbish, sawdust, garbage, offal, storage of vehicle bodies or parts, storage of farm implements or parts, and any other unsightly or offensive material.
3. The right to cut or remove any trees, except marketable timber and then only in compliance with local forest cropping practices; however, at no time will the scenic area be denuded of trees.
4. The right to park trailer houses, mobile homes, or any portable living quarters.
5. The right to develop the easement area except for limited residential development consistent with applicable State and local regulations. Such limited rights retained by the owner are as follows:
   (a) Each single-family residential lot fronting on and abutting State Trunk Highway ___ shall be limited to a minimum width of _____ feet as measured parallel to the highway;
   (b) A total of _____ single-family residential lots is the maximum number authorized for the easement area.
6. The right to change the use of the easement area from residential to any other use.

The rights hereby acquired do *not* grant the public the right to enter the above-described area for any purpose. The rights hereby acquired do not grant the state of Wisconsin, or its agents, the right to enter the above-described area except for the purpose of inspection and enforcement of said rights, or as specifically set forth herein
IN WITNESS WHEREOF, the said grantors have hereunto set their hands and seals this _____ day of _____, A.D. 19____.
ALSO IN WITNESS WHEREOF, _____ being the owner ___ and holder ___ of ___ certain _____ lien ___ against said premises, hereby join in and consent to said easement free of said lien.

APPENDIX D

LETTERS OF EXPLANATION OF EASEMENT TO PROPERTY OWNER AND EXPLANATORY BROCHURE

LETTERS OF EXPLANATION

State Highway Commission

LETTER OF EXPLANATION OF THE SCENIC EASEMENT
TO PROPERTY OWNER

Subject: Scenic Easements

The _____State Highway Commission has been authorized to proceed with the acquisition of Scenic Easements in your area. As your property may be affected by this program, we wish to provide you with as much information as possible on the history, purpose and scope of the program so that you may better understand the intention of the easement rights which you may be asked to convey to the State of_____.

It is our most earnest hope that all property owners will accept the program in the spirit in which it was originally conceived--the desire to preserve for all of us, and future generations, an area which lends so much not only to the history and beauty of our state, but to other states.

In all programs of this type, it is conceivable that owners may suffer personal loss because of the conveyance of interests or rights in their property. Others may gain over the years because there are certain beneficial effects to the scenic easement. We sincerely hope that in all contacts with this department you will feel your rights have been considered fairly, and that you have been adequately compensated for any property loss you may sustain. One thing is certain, information supplied freely to appraisers and negotiators will be thoroughly considered, and we will make every attempt to fairly consider the effect of the proposed easement on your property.

We invite you to read the attached summary which attempts to clarify the purpose or intent of this program.

Sincerely,

_____

LETTER OF EXPLANATION

The Scenic Easement

As in most other instances of easement acquisition, some misunderstanding arises over the terms and conditions imposed by easements. Property owners who convey land in fee are certain of one thing, they have conveyed all their interest in the property and thereby they have little interest or concern over the future use of the land. Easements, however, usually concern themselves with the exercise of certain rights of ownership in property, such as the right to use it, to lease it, to sell it, to enter it, or even to give it away. The scenic easement concerns itself primarily with permitted or non-permitted property uses. It is hoped that the following will clarify the more important aspects of this easement.

Purpose - The purpose possibly is already clear; however, it might be stated as "to preserve insofar as is reasonably possible, the natural scenic beauty of the roadside, to prevent unsightly developments which may tend to mar or detract from such natural beauty, or which may result in danger to travel, and to that end to exercise such reasonable controls over the land within the restricted area as may be necessary to accomplish this objective." To this end property owners are being asked to convey easements which impose certain restrictions on the future use and development of land in the easement area.

"Restricted" or "Easement" Area - Many affected property owners misunderstood the term "Restricted Area". At this time it may generally be stated that the area within which the restriction or use applies, has been established as all that land which lies within a variable distance of the highway centerline, or in other words, a strip of land of variable width, one boundary or side of which is the centerline of the highway. Thus a variable acreage from various owners might be expected to be affected, depending on the present width of the highway right of way. The terms of the easement do not apply beyond a distance acceptable to both parties.

Compensation - To some extent the easement may be considered as a zoning ordinance, similar to those in effect today in many cities, towns and counties. One primary difference, however, might be noted. Zoning ordinances are normally applied by proceedings, without compensation, whereas with the scenic easement the possible effect of the restriction or use, on property value is considered prior to asking the owner to actually convey a scenic easement, and the owner is offered compensation for a possible loss or damage to his property. Thus, if the property exhibits a marked desirability for a use other than a permitted use, the owner will receive the appraised value of this difference as compensation. In cases where differences of opinion exists as to the value, the owner may retain the right to contest the appraised value, by offering evidence of additional value that may not have been previously considered.

LETTER OF EXPLANATION (continued)

Easement Terms - In general, the terms and conditions or use prescribed are as follows: (Note: To by filled in by State Agency).

Various other restrictions or permitted uses dependent on conditions, may be included in the terms of the easement. Where this is true, you will find them included on the actual conveyance. It should also be noted that the easement in no way grants the public the right to enter or use the area described.

It is hoped that the foregoing brief explanation will serve to answer a few of the many questions which arise about the new scenic enhancement program. We will welcome your cooperation in assisting in the preservation of one of the most beautiful areas of our state.

National Park Service

LETTER OF EXPLANATION OF THE SCENIC EASEMENT TO PROPERTY OWNER

DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
Natchez Trace Parkway
Tupelo, Mississippi

Dear Neighbor:

Our records show that you are the owner or a tenant of lands adjoining the Natchez Trace Parkway having scenic easement restrictions on portions next to the property of the Federal Government. This scenic easement control was purchased by your State Highway Department at the time the right of way was obtained and later deeded to the United States for parkway purposes. The question of your rights and ours in regard to these easements keeps coming up along the line, which is to be expected, we suppose, because of the nature of the thing itself. As one farmer puts it, "I own the land and I don't"; and we have to admit that he is right except that he makes it sound worse than needs be.

If we could have our way we'd sit down on your porch and talk it out with each of you, and we still feel that your questions are best answered by the Ranger in your territory who will be glad to do just that.

The general idea behind the scenic easement is simple enough. It allows the farmer to use the land for farming and it prevents his using it for other business. The reason behind it from our point of view is that we want the farms as part of the picture and we do not want factories or hot-dog stands or billboards. It means that the land has been earmarked for farm use. This is like town zoning, which guarantees to a man who has just built a home that a factory will not be built on the next lot.

From the State's point of view in buying the Parkway right of way it was cheaper in most cases than it would have been to buy the same land outright.

Some see it differently, but we have always believed the scenic easement had good points for the landowner, too. It meant that he could continue to farm just about as he always had, and often meant the difference between leaving enough land to make a farm unit or buying the whole place outright.

The thing which keeps bothering the landowner about the easement is the question of his rights on his land, and it is important to remember that as far as farming and crops are concerned the land is still his. When the States bought the scenic easements they bought for us certain definite rights and they are clearly stated in the deed. All of them are for the purpose of preventing unsightly development within view of the Parkway motor road. Taking each one of these agreements in turn, we have this to say:

LETTER OF EXPLANATION (continued)

The easement states that no building, pole lines, or structures shall be erected on such land without the approval of the Government. This prevents the landowner from building a hot-dog shanty, a gasoline station, or any building intended for a new use or a new sort of business. We realize that when there are farm buildings already on the land they must be repaired from time to time, and we expect that such work will be done upon them. If such work is in the nature of ordinary repair and maintenance, it is not necessary to obtain permission from us or from the Ranger. If, however, the landowner wants to rebuild or add to the size of an existing building he should talk to the Ranger about it. Unless we feel that your plans will result in a building which is unsightly from the Parkway, you will find that the Ranger will seldom object. While the scenic easement intends that any new farm buildings should be built elsewhere on the farm than on the land covered by the scenic easement, we can see that a farmer may often have a good reason for desiring to put a farm building on the easement land, and there is no reason that this cannot be taken up with the Ranger. If such a new farm building would not be unsightly from the Parkway, we would no doubt permit its construction. If, on the other hand, the building would blank out a view that we would like to keep open for the tourist, we would have the right to refuse and you would have to build elsewhere.

With reference to plant material the easement reads that "no tree, plant, or shrub shall be removed or destroyed on such lands." This refers to the mature trees and shrubs which we feel are important to the scenery, including those shrubs and vines along fences which will provide food and protection for birds (which assist in destroying insects). We do not intend to stop the owner from trimming orchard or fruit trees or from removing diseased trees or from setting out new trees, plants, shrubbery, or crops. We also realize that it is only good farming to cut sprouts and seedlings that crop up from year to year in pastures, and we have no objection to your cutting down trees four inches or smaller to open up a pasture, clear a field, or maintain an open yard around a residence. We would expect that the landowner would do this general work as he has always done. But it will be necessary to secure written permission before cutting trees over four inches in diameter.

When it comes to the piling of ashes, trash, sawdust, and the like upon the scenic easement lands, you can readily see that we had in mind keeping the picture as neat and clean as possible, and we would expect full cooperation from the landowner in this. Likewise, for reasons that you will also understand, we do not expect to make any exceptions to the clause with regard to signs, billboards, and advertisements which would take away from the beauty of the rural picture along the Parkway.

All in all, the scenic easement seems to us to be a very reasonable agreement and like most agreements, it can work well if both parties enter into the spirit of the general idea. On the other hand, agreements seldom work if all the "agreeing" has

LETTER OF EXPLANATION (continued)

to come from one of the parties and none from the other. In a number of cases the States paid the people's good money to buy the scenic easements for the Parkway, and both your rights and our rights under the easement are fully protected by law.

Your continued cooperation in preserving an attractive appearance along the Parkway by preventing the unnecessary destruction of trees by cutting, removal by fire, or other unsightly conditions will be appreciated. If at any time you see a fire along the Parkway, you will do us a real service by reporting it to the nearest Ranger, if at all possible.

Sincerely yours,

_____

EXPLANATORY BROCHURE

How and Why the State Buys Scenic Easements

A guide for property owners concerning the scenic easements in the State of _____.

Purpose of the Scenic Easement Program

The basic purpose of the scenic easement program is to conserve the natural beauty adjacent to and along our highways. The program is to prevent unsightly developments which may tend to mar or detract from the natural beauty or which may result in danger to travel, and to exercise such reasonable control over the land and within the restricted areas as may be necessary to accomplish this objective.

The purpose of the scenic easement program is to eliminate as much as possible undue harshness to the eyes and general chaos which crops up along side of the roadways here in the State of _____ and to insure a pleasant view free from clutter and/or eyesores.

What is a Scenic Easement?

A scenic easement quite simply is a legal instrument conveying to the State of _____ certain property rights or restrictions intended to allow or encourage the natural scenic beauty of the land that is covered by the easement.

The scenic easement transfers to the State of _____ the right to effectively prevent future use which will destroy scenic beauty and may, in some instances, also provide for rights which will enable the State to restore or enhance scenic beauty as conditions change.

As illustrations, the easement normally always includes a prohibition against dumping trash or unsightly materials or the complete destruction of natural cover or trees. In addition, the easement normally will include a right to restore unsightly spots or to selectively cut trees to enhance a view which might be blocked by tree growth in years to come.

The basic premise for easement control is that the owners may continue the normal use of the land, but the basic beauty remains protected against unforeseen desecration in the years ahead. In this respect it is somewhat of a conservation program.

Unlike zoning ordinances, the owners of scenic easement property are compensated for any decrease in land value which they may incur as a direct result of an encumbrance by a scenic easement.

How Are Easement Areas Selected and Limits Defined?

The State of _____ select various highways to enhance with a scenic easement and the easements are basically to conserve the roadway adjacent to the existing rights-of-way pertaining to their scenic beauty. The selection of the route is to provide an outstanding travel experience along a given roadway The scenic easement consists of approximately three parts, or has three various functions: (1) to look at, (2) to look through the easement at something else, and (3) to block out an unsightly view. A scenic easement consists of many views which include timberland, pasture lands, lake areas, bluffs, rivers, creeks, roadside rest areas, streams, agricultural lands, and any and all scenic-type viewing. It should be noted that although these lands are encumbered with scenic-type easements the property owner still owns the land and has nearly all of the basic uses of the lands prior to the encumbrance wtih the scenic easement. The general public is *not allowed access* to the easement areas.

In What Area Do the Terms of the Scenic Easement Apply?

The terms of the scenic easement do not apply beyond the described area as indicated in the easement agreement.

How Are the Land Owners Compensated?

The easements may be considered as a zoning ordinance, similar to those in effect today in many cities, towns, and

counties. One primary difference, however, might be noted —zoning ordinances are normally applied by proceedings without compensation, whereas with the scenic easement the possible effect of the restriction or use on the property value is considered prior to asking the owner to actually convey a scenic easement and the owner is offered compensation for a possible loss or damage to his property. Thus, if the property exhibits a marked desirability for use other than for the permitted use, the owner will receive the appraised market value of this difference as compensation.

Who Estimates the Value Pertaining to Compensation for Scenic Easement Areas?

The estimated value of any damages or compensation for scenic easements are established by professional real estate appraisers as selected by the State of _____.

What Are the Usual Scenic Easement Requirements?

In general, the terms and conditions of use are described as follows:

1. The scenic area should be maintained free of advertising signs and billboards.
2. Dumps established for the disposal or storage of ashes, trash, rubbish, sawdust, garbage, offal, or any unsightly or offensive material are not permitted.
3. Trees or shrubs should not be destroyed, cut or removed except when cutting is necessary in conformance with a permitted use. The intention is to preserve the natural beauty of wooded areas as far as is reasonably possible.
4. General farming, including the addition or expansion of building, is normally permitted and encouraged. However, fur farming or farms operated for the disposal of garbage or related materials are prohibited.
5. Residential, commercial or industrial use may be prohibited or the lot size restricted to retain an open land appearance and present desirable views from becoming obstructed.
6. The right to selectively cut trees or brush to improve a scenic view or to screen or restore unsightly areas may be included. The cost of the work is to be paid by the State and is not charged to the owner.
7. The scenic easements do *not* allow the public access to the property nor do they permit use for highway construction or any other similar public use such as wayside construction or turn-outs.

[Note: Many of the above permitted uses and restrictions vary from easement to easement. These restrictions or permitted uses will be discussed fully with you by the State negotiator.]

How May an Owner Benefit?

Scenic easements offer several advantages which from past experiences often enhance property values:

1. They help eliminate factors which tend to depreciate property values, such as trash dumps and other unsightly views.
2. They provide for more orderly development of land, and prospective purchasers tend to select sites in protected easement areas.
3. They provide for a more orderly and harmonious display of advertising signs.

It has been noted in many areas that scenic easements are quite similar to good zoning measures, and that scenic easement provisions have enhanced property values.

Can the Terms of the Scenic Easement Be Changed Prior to the Enactment of the Easement?

Easement provisions cannot be changed arbitrarily by the State without the owner's consent. However, when the State and the owner agree that there is a mutual benefit to the scenic easement, provisions may be revised to meet changing conditions. Changes have often been made at the owner's request when the use change was not contrary to the intention of the easement program. Any changes or suggestions should be discussed with the State's negotiator.

Do Owners Ever Dedicate Scenic Easements to the State?

Many owners today are dedicating easements to the State at no cost to insure preservation of beauty spots. In some instances this dedication may also be considered tax deductible. Naturally, this type of program is gaining wide acceptance and insuring preservation of many lands for which purchase funds are presently not available.

Does the State Have the Power to Condemn for Scenic Easements?

Although the State is reluctant in many cases to condemn for this particular purpose, the State will condemn for scenic easements if necessary.

What if the Owner Is Dissatisfied with the State's Offer of Compensation?

It is suggested that if the owner is dissatisfied with the offer of compensation by the State he acquire his own experts pertaining to the valuation and legalities. From this point the property will go into a condemnation proceeding and the issue will be settled by court action.

Who May I Contact for Further Information?

Questions concerning scenic easements may be directed to any district office of the State Highway Commission and inquiries will be answered promptly.

APPENDIX E

CASE STUDIES: BEFORE AND AFTER SALES

CASE STUDY 1 (Before and After Sale)

Location: In Buffalo County approximately 3 miles north of Alma, Wis., on State Highway 35.
Present use: Residential site.
Purpose of the scenic easement: To provide a pleasant view east of State Route 35 to a valley with a good growth of trees.
Area: Scenic easement, 100′ x 120′ = 12,000 sq ft. Whole property, 100′ x 120′ = 12,000 sq ft.
Description of neighborhood: Outlying in nature; the vast majority of lands at this location are agricultural. The immediate area is residential, with approximately 10 to 12 homes located on a frontage road adjacent to State Route 35. These homes for the most part were built within the past 10 years and are located on lots similar to the subject property. This entire area is within the scenic easement area as imposed by the State of Wisconsin in 1963. The homes at this location have a view of the Mississippi River and could be rated as static to slightly increasing in value at the present time.
Use of the property on date of sales: Vacant residential homesite.
Highest and best use of the property on date of sales: Residential, homesite.
Highest and best use of the property as of June 1967: Residential, homesite, with or without the scenic easement restrictions.
Zoning: Open.
Market activity between the before and after sale: No appreciable market effects were noted between the before and after sale.
Date of notice of proposed scenic easement: January 1963.
State appraisal date: Feb. 21, 1963.
Restrictions and permitted uses:
Restrictions:

[a]1. No use or occupation other than the hereinafter permitted use shall hereafter be established or maintained within or upon the restricted area.
[a]2. No dump of ashes, trash, rubbish, sawdust, garbage, or offal, or any other unsightly or offensive material shall hereafter be placed upon the restricted area. Existing use for any such purpose shall be discontinued except where such use is incidental to the present occupation and use of the land, and when it conforms to applicable State and local requirements.
[a]3. No signs, billboards, outdoor advertising structures or advertisement of any kind shall be hereafter erected, displayed, placed or maintained upon or within the restricted area. Existing use for any such purpose shall be terminated and any such signs shall be removed except that one sign of not more than 8 sq ft in size may be erected and maintained to advertise the sale, hire or lease of the property, or the sale and/or manufacture of any goods, products or services incidental to a permitted occupation or use of the land.
[a]4. No trees or shrubs shall be destroyed, cut, or removed from the restricted area, except as may be incidental to a permitted occupation or use of the property, or required for reasons of sanitation and disease control, and except for selective cutting of timber by methods prescribed by written permit from the grantee.

Permitted Use:

[b]1. General crop or livestock farming including construction, erection, maintenance and repair of buildings incident to such use, and construction, maintenance or establishment of recommended soil conservation structures or practices, and normal farm improvements.
[b]2. Telephone, telegraph, electric or pipe lines or microwave relay structures for the purpose of transmitting messages, heat, light or power.
[b]3. Any use not heretofore specified which exists upon or within the restricted area as of the time of execution of this easement, including normal maintenance and repair of existing buildings, structures and appurtenances, but such use shall not be expanded nor shall any structures be erected or structural alterations be made within the restricted area.
[c]4. One single-family residence on the restricted area described herein.

Before sale: Vol. 107, p. 76.

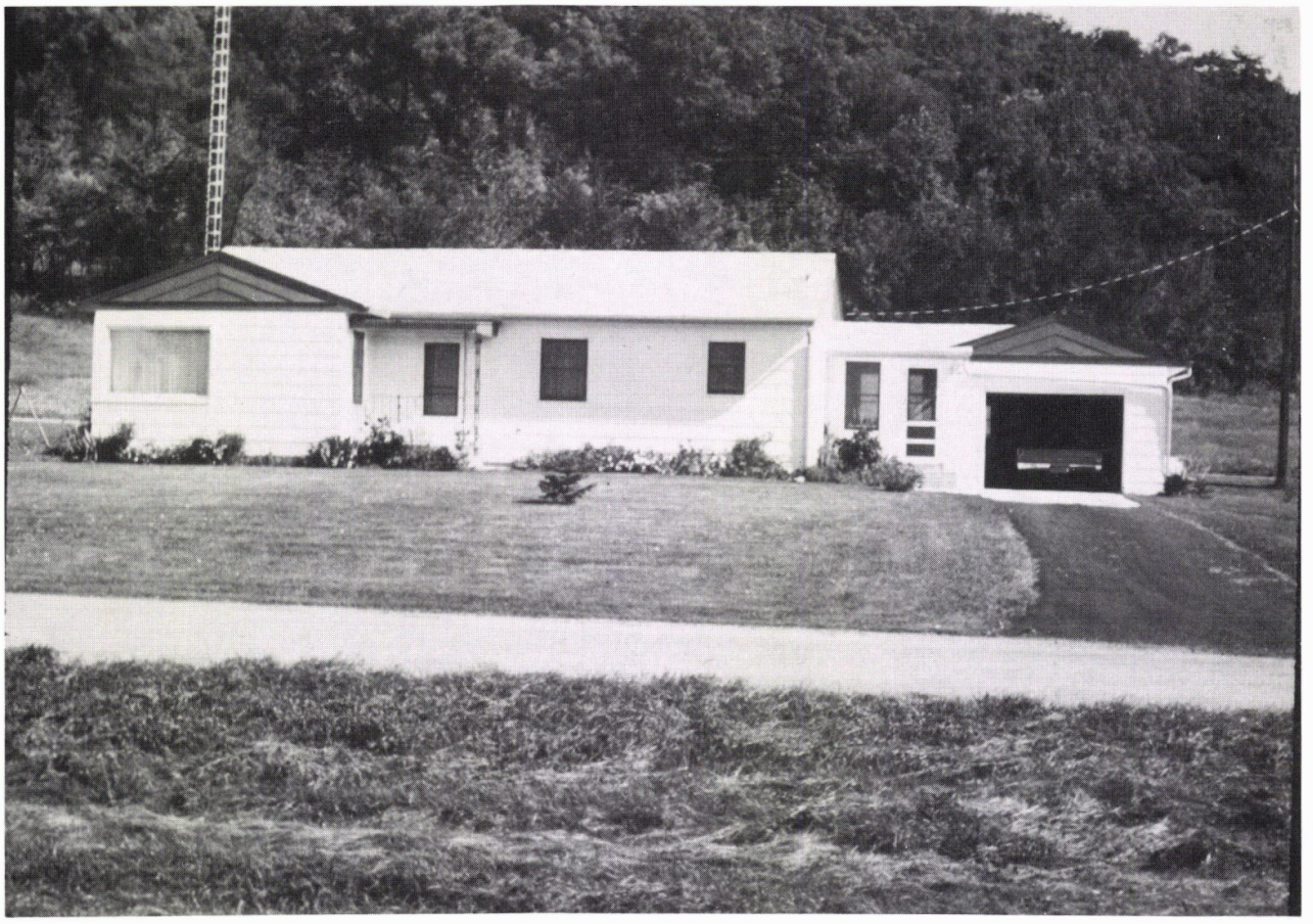
Grantor:	C. Ambuehl
Grantee:	H. Laehn
Sale date:	11/13/61
Sale price:	$500
Verified by:	C. Ambuehl
Type of conveyance:	Warranty deed

After sale: Vol. 107, p. 530.

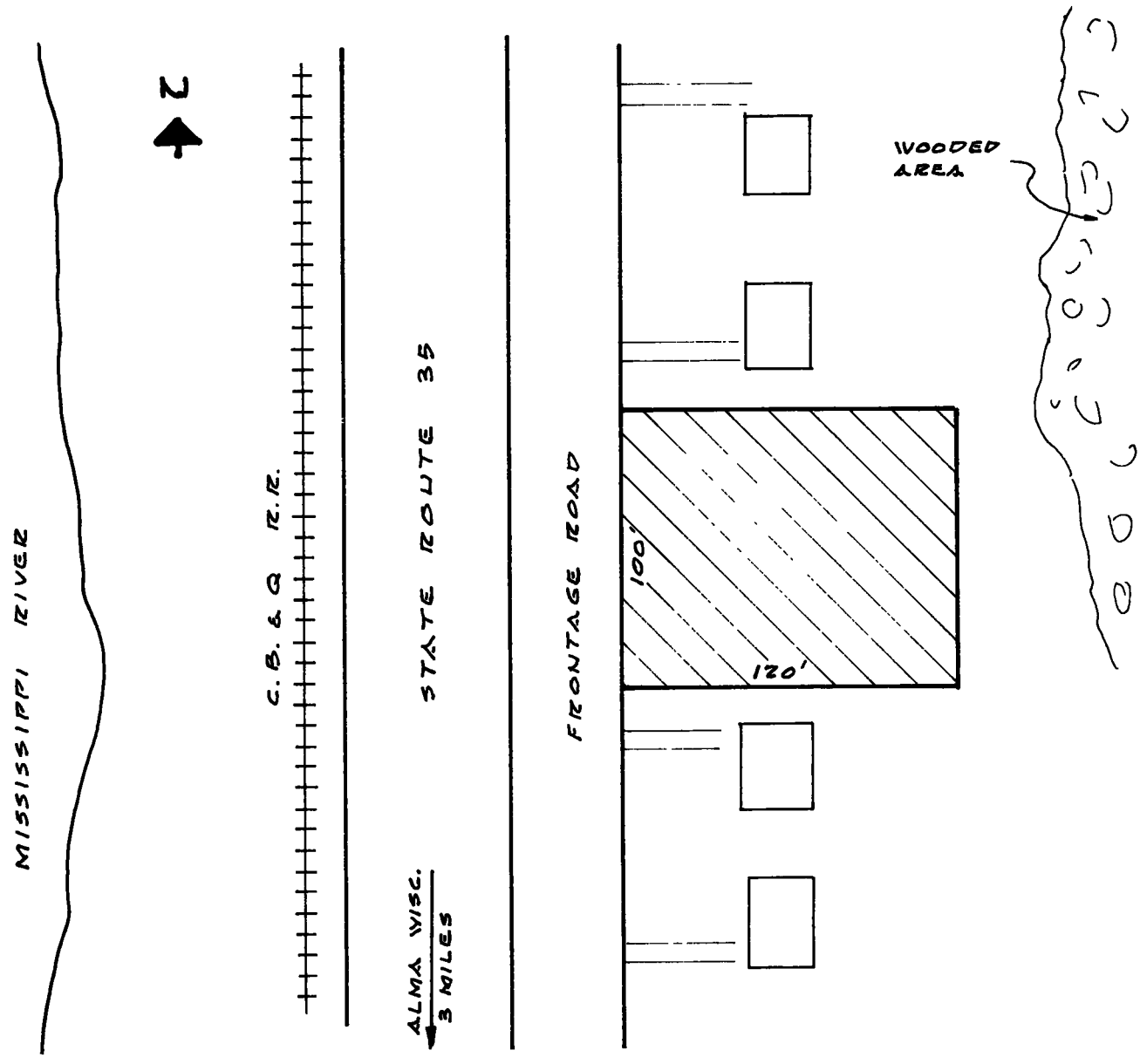
Grantor:	H. Laehn
Grantee:	B. Schlaet
Sale date:	11/22/63
Sale price:	$550
Verified by:	C. Ambuehl
Type of conveyance:	Warranty deed

Compensation awarded by State and accepted: $15 (nominal).
Conclusion: The subject property sold as vacant property before and after the taking for easement purposes. Conversations with the various owners indicated that the easement had no effect on the property values. It should be noted that the easement agreement allowed construction of a single-family home. The State compensation award of "nominal" appears to be accurate.

[a] Standard restrictions at date of the easement.
[b] Standard permitted uses at date of the easement.
[c] Added to the agreement by the negotiator.



Case Study 1. Looking easterly from State Route 35.



CASE STUDY 2 (Before and After Sale)

Location: In Buffalo County approximately 3 miles north of Alma, Wis., on State Highway 35.

Present use: Residential site.

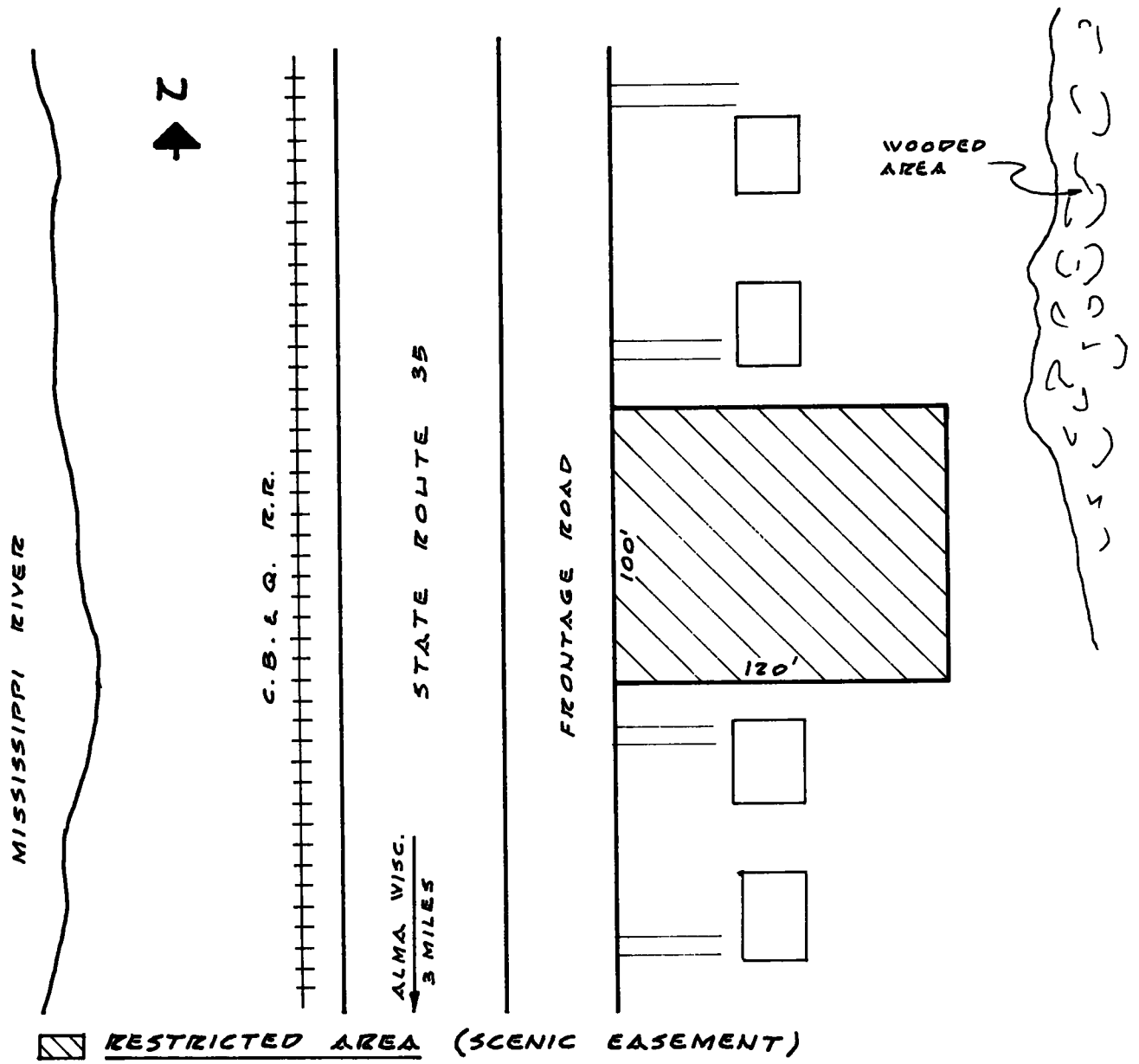
Purpose of the scenic easement: To provide a pleasant view east of State Route 35 to a valley with a good growth of trees.

Area: Scenic easement, 100′ x 120′ = 12,000 sq ft. Whole property, 100′ x 120′ = 12,000 sq ft.

Description of neighborhood: Outlying in nature; the vast majority of lands at this location are agricultural. The immediate area is residential, with approximately 10 to 12 homes located on a frontage road adjacent to State Route 35. These homes for the most part were built within the past 10 years and are located on lots similar to the subject property. This entire area is within the scenic easement area as imposed by the State of Wisconsin in 1963. The homes at this location have a view of the Mississippi River and could be rated as static to slightly increasing in value at the present time.

Use of the property on date of sales: Vacant residential homesite.

Highest and best use of the property on date of sales: Residential, homesite.



Highest and best use of the property as of June 1967: Residential, homesite, with or without the scenic easement restrictions.
Zoning: Open.
Market activity between the before and after sale: No appreciable market effects were noted between the before and after sale.
Date of notice of proposed scenic easement: January 1963.
State appraisal date: Feb. 21, 1963.
Restrictions and permitted uses:
Restrictions: (Same as for Case Study 1).
Permitted Use: (Same as for Case Study 1).
Before sale: Vol. 104, p. 442.

Grantor:	C. Ambuehl
Grantee:	M. Meier
Sale date:	10/29/58
Sale price:	$500
Verified by:	C. Ambuehl
Type of conveyance:	Warranty deed

Interim sale: Vol. 107, p. 309.

Grantor:	M. Meier
Grantee:	C. Ambuehl
Sale date:	12/27/62
Sale price:	$600
Verified by:	C. Ambuehl
Type of conveyance:	Warranty deed

After sale: Vol. 111, p. 27.

Grantor:	C. Ambuehl

Case Study 2. Looking easterly from State Route 35.

Grantee:	L. H. Boyd
Sale date:	6/4/64
Sale price:	$650
Verified by:	C. Ambuehl
Type of conveyance:	Warranty deed

Compensation awarded by State and accepted: $15 (nominal).

Conclusion: Before the scenic restrictions were imposed the subject property was a vacant single-family homesite. The State was wise in this instance in allowing the site to be built upon as one home site. If the full normal restrictions were imposed the damage would have been the difference between outlying acreage lands and a home site. The negotiator in this instance was flexible enough to insert the use as one homesite and the State still maintained the scenic view and acquired a scenic easement at a nominal cost and a minimum of confusion.

The State awarded a nominal compensation. As evidenced by the before and after sales and the previous owner, the restrictions in this specific case did not damage the property. Based on the before and after sales, the subject property as vacant was not damaged as a result of the taking and the State's estimate of nominal compensation appears to be correct.

CASE STUDY 3 (Before and After Sale)

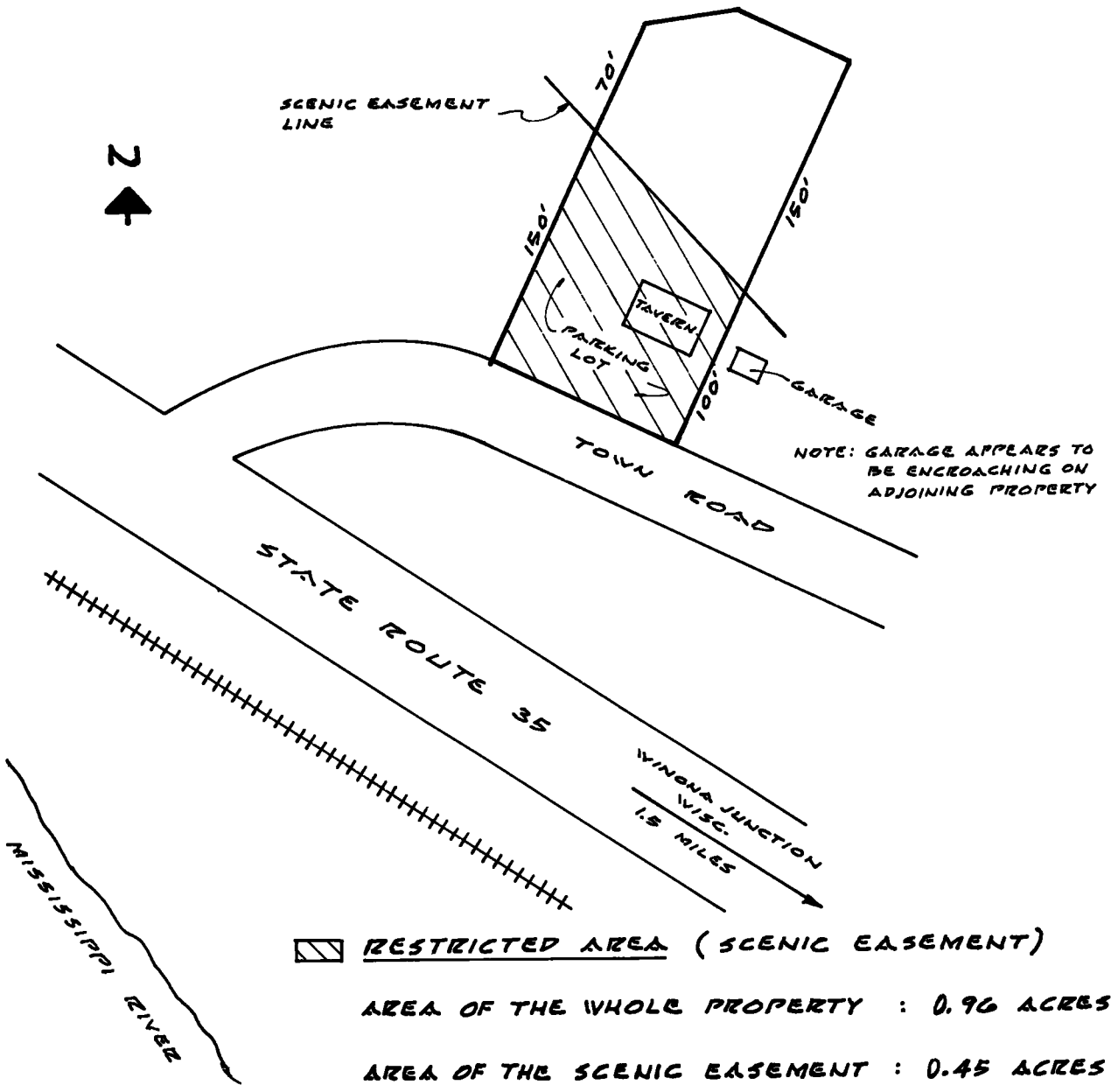
Location: In Buffalo County on the northeast side of State Highway 35 approximately 1½ miles northwest of Winona Junction, Wis.

Present use: Both at the present time and at the date of the imposition of the scenic easement restrictions was and is used for the Midway Tavern and Supper Club.

Purpose of the scenic easement: To provide a view to a wooded hill located to the east of Town Road and State Route 35. This easement is to preserve the setting as it is now and to eliminate any encroachments of a commercial nature to spoil the existing view.

Area: Scenic easement, 0.45 acres; Whole property, 0.96 acres.

Description of neighborhood: Largely rural in nature. The subject property is adjacent to State Route 35, which is the Great River Road and has traffic of a tourist nature during the warmer months. At the specific location there is a scattering of residential development; however, this is an outlying rural-type area and the tavern and supper club services the local area as well as the people in transit along State Route 35. The area could be rated as static to slightly increasing in value at the present time. The specific location of the subject property has a view of the Missis-



sippi River and is quite scenic pertaining to the hills, valleys, and the wooded areas.

Use of the property on date of sales: The property was sold originally in 1962 and then resold in 1965. The use at both dates was a tavern, restaurant, and supper club.

Highest and best use of the property on date of sale: As used, commercial.

Highest and best use of the property as of June 1967: As used, commercial.

Zoning: Open.

Market activity between the before and after sale: There was no appreciable market effect pertaining to the general area of the subject property. Therefore, the market conditions were approximately the same both before and after the sale dates.

Date of notice of proposed scenic easement: Approximately January 1963. Document was received for record July 17, 1963.

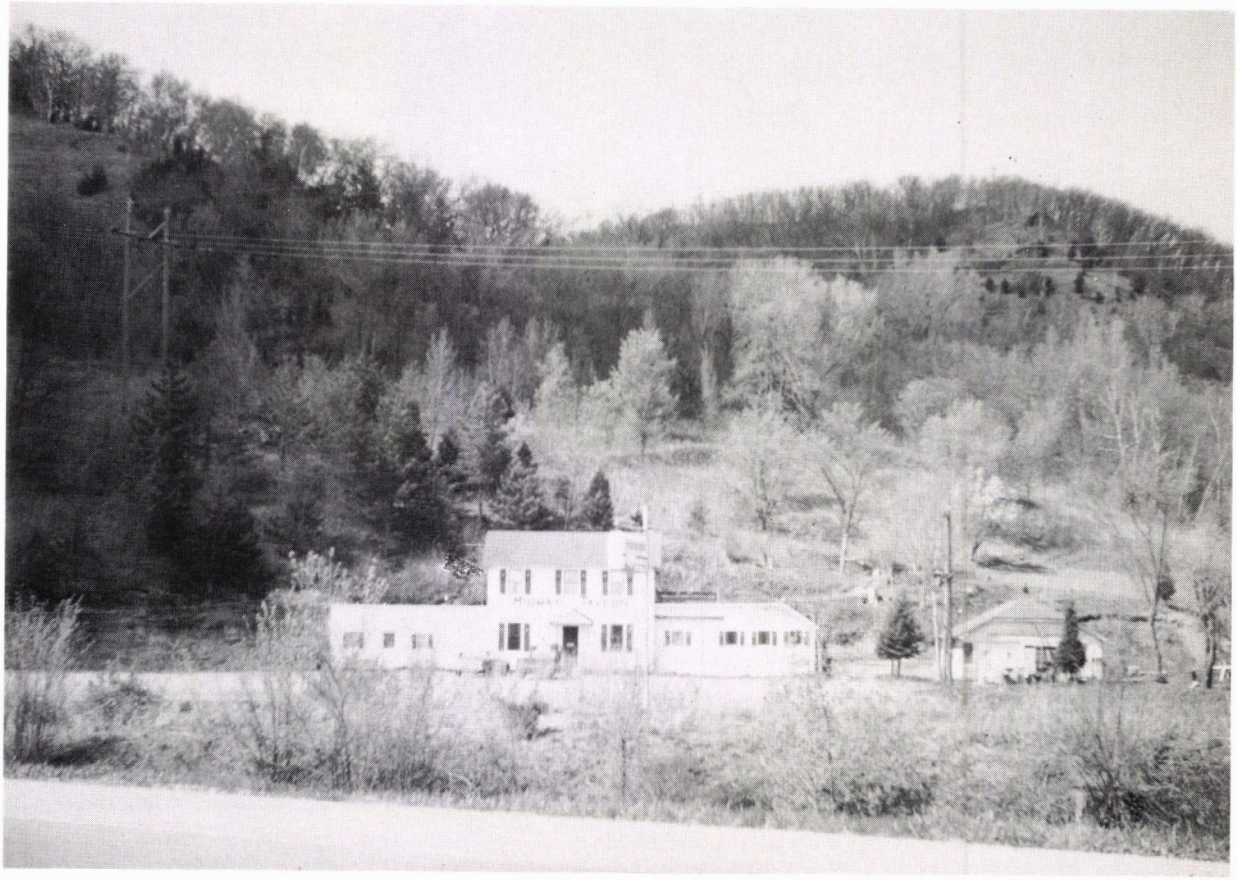
State appraisal date: Mar. 20, 1963.

Restrictions: (Same as for Case Study 1, with following addition).

"5. Grantors reserve the right to maintain the two existing signs in connection with their businesses now on said premises, with the right to replace same with any replacement signs, but not to exceed a total of two at any one time.

Permitted Use: (Same as for Case Study 1, with following additions).

'4. Owner reserves the right to continue present use of property as a combination tavern and residence and to complete alterations and improvement project now under way on the building.



Case Study 3. Looking easterly from State Route 35.

[c]5. Owner further reserves the right to add restaurant facilities at some future date in order to achieve a "supper club" type operation, with the restaurant and tavern operated in conjunction with each other and in the same building. It is understood and agreed that such facilities may be in the form of an addition to the present structure, or a project of complete remodeling, or of completely new construction for such purposes.

Before sale: Vol. 110, p. 15.

Grantor:	Weidman & Blake
Grantee:	Midway Tavern, Inc.
Sale date:	6/26/62
Sale price:	$25,000
Verified by:	Arnold Kohner, former manager of Midway Tavern, Inc., and had an interest in the business.
Type of conveyance:	Warranty deed

After sale: Vol. 113, p. 531.

Grantor:	Midway Tavern, Inc.; A. Kohner
Grantee:	Victor Gibbons
Sale date:	2/3/65
Sale price:	$42,000
Verified by:	V. Gibbons and A. Kohner
Type of conveyance:	Land contract

Compensation awarded by State and accepted: $200 (nominal).

Conclusion: In conversations with Messrs. Gibbons and Kohner pertaining to the sales of this property, Mr. Kohner said that after the original purchase in 1962 he built an addition to the property and added new bar fixtures, etc. The variation in the price paid for the property is from $25,000 in 1962 to $42,000 in 1965. Mr. Kohner estimates that his total investment in the property for additions, new fixtures, etc., was approximately $14,000. This would indicate an increase in the value of the real estate over this period of time of approximately $3,000. The inventory items were not included in the original price paid ($25,000), nor were items of inventory included in the price paid in 1965 ($42,000). In addition, it should be noted that the present owner, Mr. Gibbons, is purchasing the property on a land contract, which may have had some influence on the price paid.

It would appear from conversations with Messrs. Kohner and Gibbons that the scenic easement restrictions had no effect whatsoever on the real estate or the resale value. In fact, both felt that due to the restrictions on other commercial properties or other vacant properties along this highway the tavern business has increased and there has been a benefit to the subject property. Both reported that they were aware of the scenic easement restrictions at the time of the 1965 sale. It should be noted further that the negotiator had inserted into the scenic easement agreement additional permitted uses which allowed the owner to construct an addition and remodel the building.

Restriction 5 states that the grantor has the right to maintain the two existing signs in connection with the business now on said premises and has the right to replace same with any replacement signs, but not to exceed the total of two at any one time. In addition, under permitted use 4 the owner reserves the right to continue the present use of the property as a combination tavern and residence and to complete alterations and improvements. The improvements were under construction at the date of the agreement. In addition he was given the right to add restaurant facilities at some future date in order to achieve a supper club operation. It was understood and agreed that such facilities may be in the form of an addition to the present structure or a project to completely remodel the existing structure. The negotiator in this case was flexible enough to offset many of the factors that would have been of a heavily damaging nature. He realized that the tavern building was there, and the building at the time of the scenic easement taking was not in as good repair as it is at the present time. Therefore, it was wise to allow the addition and improvements. This in no way would further affect the scenic view and it would protect this area against further commercial development that would be of an unsightly nature. The State in this instance has acquired a scenic easement area, has maintained the area from a scenic point of view, and has obtained this scenic-type view with a minimum expense to the State. This is largely due to the negotiator and the flexibility of the permitted uses and restrictions.

Pertaining to compensation, the State offered $200, which was accepted by the owners and considered to be of a nominal nature. If the restrictions and permitted uses had been rigidly enforced in this particular instance the damages would have been extensive due to the restrictions on the property. Therefore, the scenic easement restrictions as they were imposed on this property have had little or no effect on the sale price.

CASE STUDY 4 (Before and After Sale)

Location: In Buffalo County on the northeast side of State Highway 35 approximately ½ mile north of the corporate limits of Fountain City, Wis.

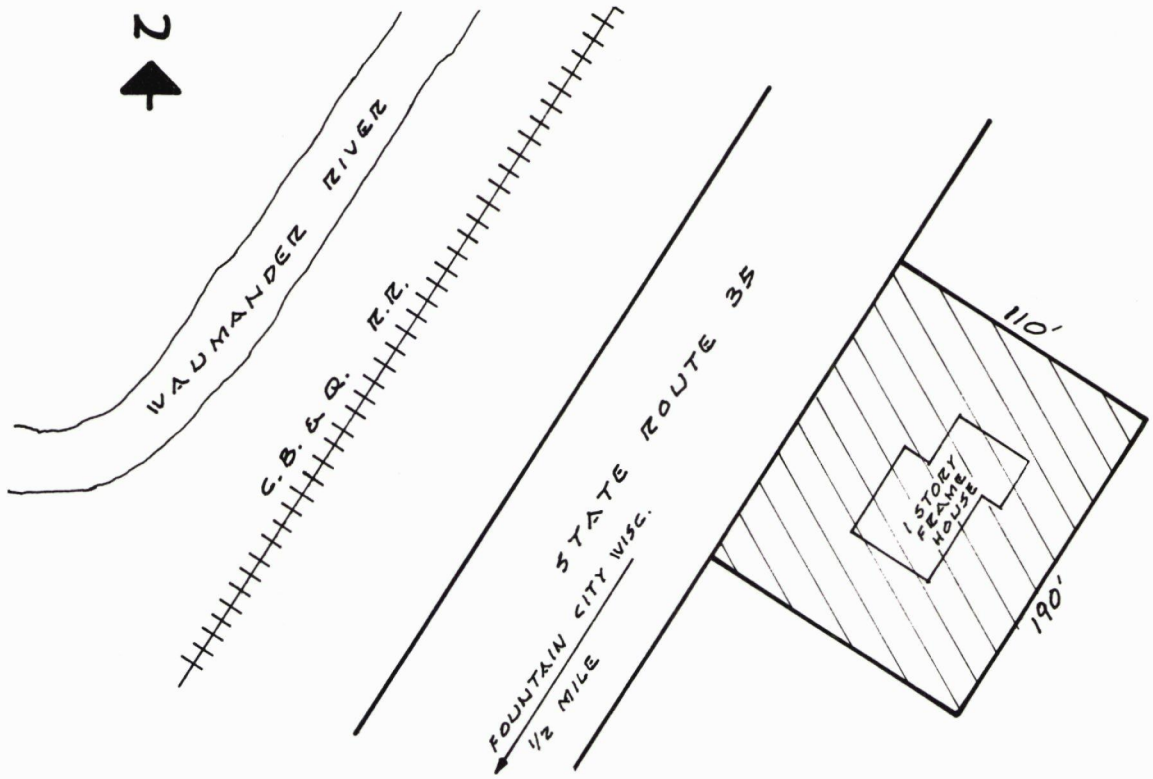
Present use: Residence.

Purpose of the scenic easement: To provide a scenic view from State Route 35 easterly into some pasture land and wooded groves.

Area: Scenic easement, 110′ x 190′ = 20,900 sq ft. Whole property, 110′ x 190′ = 20,900 sq ft.

Description of neighborhood: Outlying agricultural-type, with some individual homes located along State Route 35 (the Great River Road). The general area could be rated as static to slightly increasing in value at the present time.

[c] Added to the agreement by the negotiator.



RESTRICTED AREA (SCENIC EASEMENT)

AREA OF THE WHOLE PROPERTY = 110'×190' = 20,900 S.F. (0.48 Ac.)

AREA OF THE SCENIC EASEMENT = 110'×190' = 20,900 S.F. (0.48 Ac.)

Case Study 4. Looking easterly from State Route 35.

Use of the property on date of sales: Residential.
Highest and best use of the property on date of sales: Residential.
Highest and best use of the property as of June 1967: Residential.
Zoning: Open.
Market activity between the before and after sale: The sales dates extending from August 1960 through May 1966 indicate a slightly upward trend in value in this general area. However, the sales dates between July 1963 and May 1966 indicate a slight upward adjustment in the value of property in this general location.
Date of notice of proposed scenic easement: January 1963.
State appraisal date: Mar. 7, 1963.
Restrictions and permitted uses:
Restrictions: (Same as for Case Study 1).
Permitted Use: (Same as for Case Study 1).
Before sale: Vol. 108, p. 77.

Grantor:	Luehman
Grantee:	L. Wolfe
Sale date:	8/12/60
Sale price:	$10,500
Verified by:	L. Wolfe
Type of conveyance:	Warranty deed

After sale: Vol. 110, p. 463.

Grantor:	L. Wolfe
Grantee:	W. A. Haigh
Sale date:	7/10/63
Sale price:	$11,900
Verified by:	W. Haigh
Type of conveyance:	Warranty deed

After sale: Vol. 111, p. 478.

Grantor:	W. A. Haigh
Grantee:	G. F. Freimark
Sale date:	5/20/66
Sale price:	$13,500
Verified by:	Mrs. Freimark
Type of conveyance:	Warranty deed

Compensation awarded by State and accepted: $15 (nominal).
Conclusion: From conversations with Messrs. Wolfe and Haigh, and Mrs. Freimark, it appears that the property was in the same general physical condition and size between the sales of 1960 through 1966 as on the inspection date (June 1967). There has been an increase in value of the property in this general area between the indicated dates. The sales prices indicate a range from $10,500 to $13,500. The 1963 sale after the scenic easement was imposed was $11,900, and the current sale (1966) was $13,500. The difference is $1,600, which indicates a gain of approximately 15 percent. The before and after sales in the years 1960 and 1963 indicate an increase of $1,400, or a gain of 13 percent. The total increase between 1960 and 1966 was $3,000, a gain of 28 percent. Based on a 6-year time difference between sales, the increase was approximately 4½ percent per year, which appears to be applicable to property at this general location.

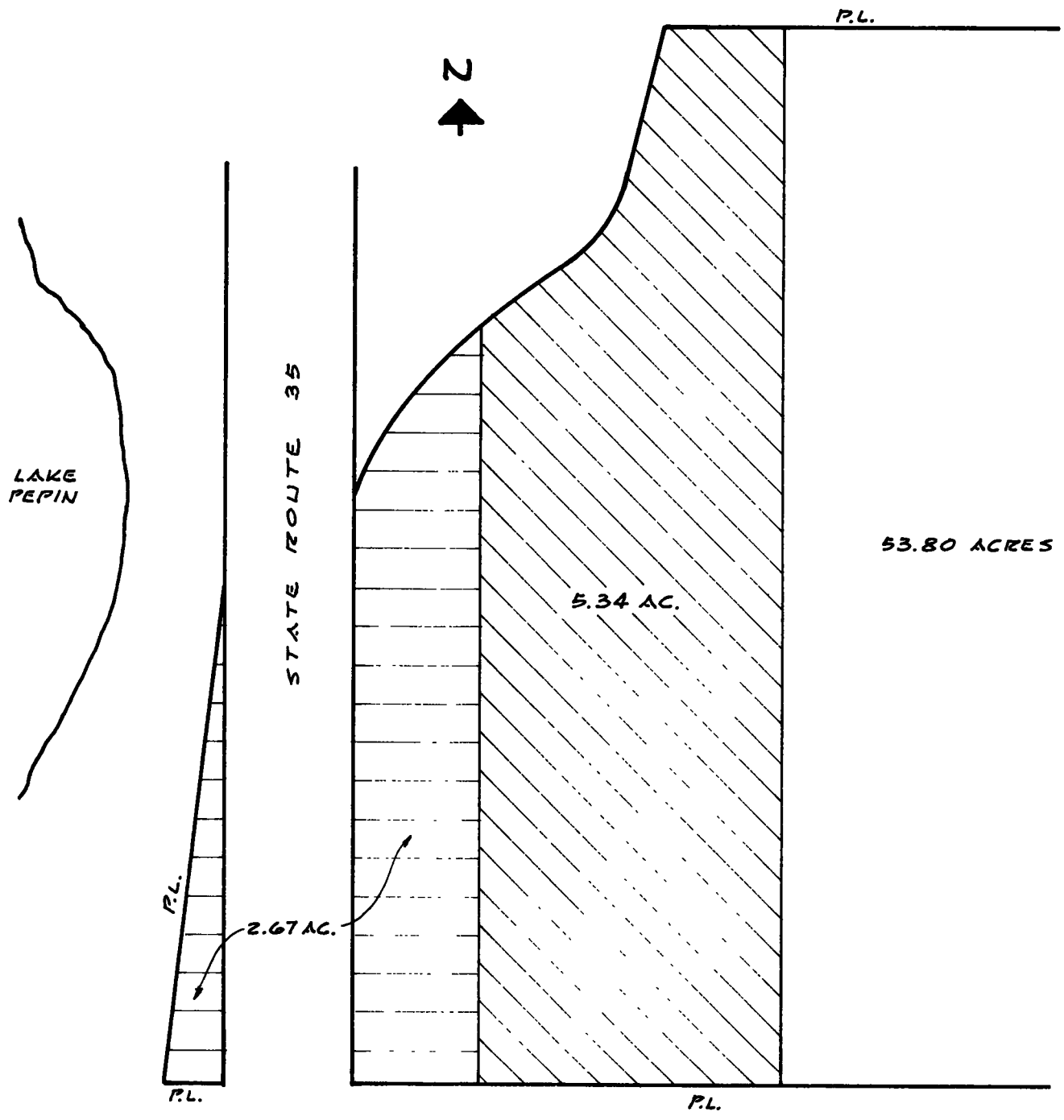
Based on the sales and the verifying conversations, the scenic easement restrictions and permitted uses imposed in 1963 have not damaged the subject property to any extent whatsoever and the highest and best use of this property has remained the same. It appears that the State's compensation as nominal was an accurate estimate.

CASE STUDY 5 (Before and After Sale)

Location: In Pepin County, Wis., on State Route 35 adjacent to Lake Pepin.
Present use: The whole property has two uses—one includes that portion of the lands lying easterly from State Route 35 (25 to 30 acres), which is level tillable farmland; the other includes the balance of the property, located on the side of the bluff that extends from a high point above State Route 35 to the existing grade of the road. Those lands lying adjacent to State Route 35 have some possible residential use; however, at present they are vacant and in a natural state. The general terrain could be described as hilly.
Purpose of the scenic easement: The scenic easement area contains approximately 5.34 acres adjacent to State Route 35. This is the area looking upward from State Route 35 to the top of the bluff and would encompass that area which is heavily wooded and in a natural state.
Area: Scenic easement, 5.34 acres. Whole property, 59.14 acres after the taking (2.67 acres) for the permanent right-of-way; 61.81 acres prior to the taking for the right-of-way.
Description of neighborhood: Along State Route 35 at this location are bluff-type lands—very hilly with heavily wooded terrain. To the west of State Route 35 is the Mississippi River, any lands west of State Route 35 are agricultural in use. The area could be described as agricultural in nature, with a scattering of homesites located along State Route 35. The area could be rated as static to slightly increasing in value at the present time.
Use of the property on date of sales: Agricultural on the easterly 30 acres; the balance is vacant and in a natural state.
Highest and best use of the property on date of sales: Agricultural.
Highest and best use of the property as of June 1967: Agricultural and minor residential.
Zoning: Open.
Market activity between the before and after sale: No appreciable market effects were noted between the before and after sale.
Date of notice of proposed scenic easement: September 1962.
State appraisal date: February 1963.
Restrictions and permitted uses:
Restrictions: (Same as for Case Study 1, with following addition).
"5. One single-family residence on tracts having a frontage on the adjacent State trunk highway of not less than 300 ft.
Permitted Use: (Same as for Case Study 1).
Before sale: Vol. (unrecorded).

Grantor:	Quainstrom
Grantee:	Paul L. King
Sale date:	6/19/62
Sale price:	$1,500

' Added to the agreement by the negotiator.



PART TAKEN FOR STATE ROUTE 35

RESTRICTED AREA (SCENIC EASEMENT)

AREA OF THE WHOLE PROPERTY : 61.81 ACRES

AREA TAKEN FOR PERMANENT R.O.W. : 2.67 ACRES

AREA OF THE SCENIC EASEMENT : 5.34 ACRES

Sale price/acre: $24.26
Verified by: P. L. King

Note: The subject property total area 61.81 acres was purchased in June 1962 and prior to the resale the State Highway Department acquired 2.67 acres for permanent right-of-way. The area of the after sale contains 59.14 acres and includes 5.34 acres encumbered with scenic easement restrictions.

Case Study 5. Looking easterly from State Route 35.

After sale: Vol. 23, p. 151.

Grantor:	P. L. King
Grantee:	L. E. Hedin
Sale date:	2/27/64
Sale price:	$2,700
Sale price/acre:	$45.65
Verified by:	L. Hedin and P. King
Type of conveyance:	Warranty deed

Compensation awarded by State and accepted: $25 (nominal).

Conclusion: The property was originally sold in June 1962 for $1,500 and then was resold to Mrs. Hedin in February 1964 for $2,700. The scenic easement restriction was conveyed in February 1963. In the opinion of Mr. King and Mrs. Hedin the scenic easement restrictions in no way hampered the resale of this property. It should be noted further that the negotiator in this case added a clause pertaining to homesites located along State Route 35. This was a wise move in offsetting possible litigation pertaining to this point. The conclusion in this particular case is that the scenic easement did not damage the subject property based on the permitted uses and restrictions imposed. The State's nominal compensation appears to be correct.

CASE STUDY 6 (Before and After Sale)

Location: In Crawford County 3 miles north of Prairie du Chien, Wis., on the east side of State Route 35.

Present use: Single-family residence.

Purpose of the scenic easement: To provide a view from State Route 35 into open fields to the east.

Area: Scenic easement, 1.93 acres. Whole property, 2.7 acres.

Description of neighborhood: Largely agricultural in nature; however, there is a scattering of commercial and residential development along the highway. Considered rural in nature, and property values at this location could be rated as static to slightly increasing in value at the present time.

Use of the property on date of sales: In the original sale or the land contract sale in 1961, and the warranty deed transaction in 1965, the property was used for a residence and a dog kennel. At present the property is used for residential purposes only. The physical size and condition of the property has remained approximately the same.

Highest and best use of the property on date of sales: Residential.

Highest and best use of the property as of June 1967: Residential.

Zoning: Open.

Market activity between the before and after sale: In the time range from April 1961 to February 1965 a minor appreciation in value is evident.

Date of notice of proposed scenic easement: Approximately February 1963; date of conveyance, July 31, 1963.

State appraisal date: Mar. 29, 1963.

Restrictions and permitted uses:

Restrictions: (Same as for Case Study 1).

Permitted Use: (Same as for Case Study 1, with following additions).

[c]4. One single family residence in addition to the present residence now located within the restricted area.

[c]5. Owner hereby reserves the right to continue in and to expand the business of dog breeding and to construct such buildings, kennels, fences, etc., as are necessary in and pertinent to such business.

Before sale: Vol. 219, p. 91.

Grantor:	Eva Powell
Grantee:	Daniel LaPointe
Sale date:	4/21/61
Sale price:	$9,000
Verified by:	Daniel LaPointe
Type of conveyance:	Land contract

Interim sale: Vol. 230, p. 299.

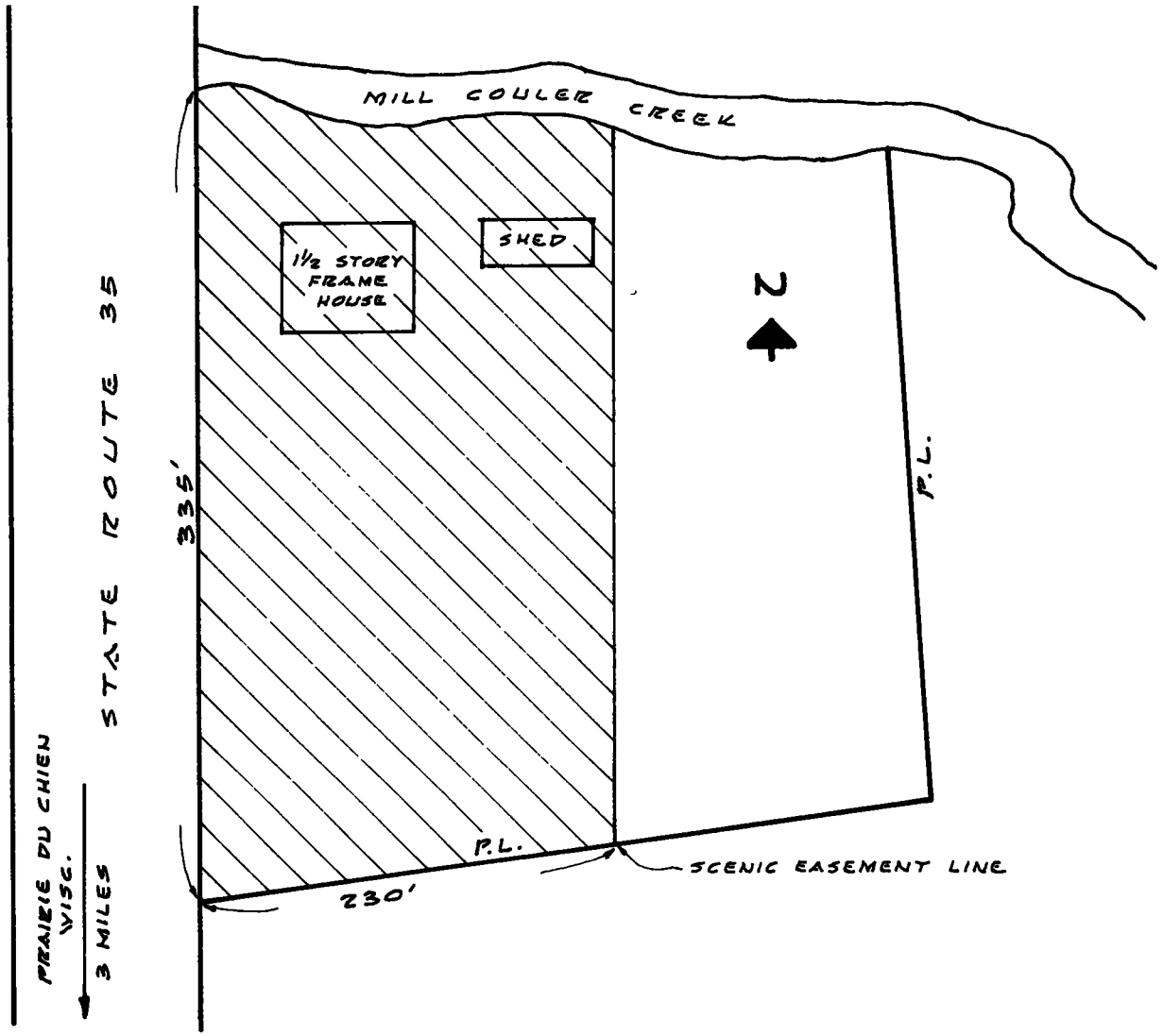
Grantor:	Eva Powell
Grantee:	Daniel LaPointe
Sale date:	4/21/61
Sale price:	$9,000
Date of conveyance:	2/12/65
Type of conveyance:	Warranty deed final execution of the original land contract

After sale: Vol. 230, p. 300.

Grantor:	Daniel LaPointe
Grantee:	Valley Builders
Sale date:	2/12/65

[c] Added to the agreement by the negotiator.

Case Study 6. Looking easterly from State Route 35.



RESTRICTED AREA (SCENIC EASEMENT)

AREA OF THE WHOLE PROPERTY : 2.7 ACRES ±

AREA OF THE SCENIC EASEMENT : 1.93 ACRES ±

Sale price: $9,000
Verified by: LaPointe and Valley Bldrs.
Type of conveyance: Warranty deed

After sale: Vol. 258, p. 167
Grantor: Valley Builders
Grantee: Shulka
Sale date: 6/28/65
Sale price: $8,500.
Verified by: Shulka and Valley Bldrs.
Type of conveyance: Warranty deed

Compensation awarded by State and accepted: $15 (nominal).

Conclusion: In the transaction from LaPointe to Valley Builders, LaPointe purchased a trailer from the Valley Builders Co. In the sale of June 1965 from Valley Builders to Shulka, Valley Builders sold the property for $500 less than the previous sale. Both sales were under the scenic easement restrictions. However, Valley Builders have indicated that the profit margin in the sale of the trailer had some influence on this transaction. In the original (1961) land contract LaPointe purchased this property for $9,000; in the 1965 transaction to Valley Builders with the scenic easement restrictions imposed, the property sold for $9,000. In conversations with the owners of Valley Builders, Shulka, and LaPointe, they all stated that the scenic easement restrictions in no way hampered the sale effort concerning the subject property.

In the negotiating stages, permitted uses 4 and 5 were added to allow the owner an extra homesite and the right to continue or to expand the dog kennel operation. This extra homesite allowed by the agreement would permit the subject property to achieve the highest use pertaining to residential homesites located along State Highway 35.

It should be noted that the property is not used for a dog kennel by the present owner. The property when purchased on land contract in 1961 and resold in 1965 with the scenic easement agreement showed little or no damage. Valley Builders have estimated a value in excess of $9,000 pertaining to their dealings concerning the trailer sale to La-Pointe.

The highest and best use of this property was not affected due to flexible handling by the negotiator. The scenic easement restriction has had little or no effect on resale, and the State's original compensation of nominal was correct.

CASE STUDY 7 (Before and After Sale)

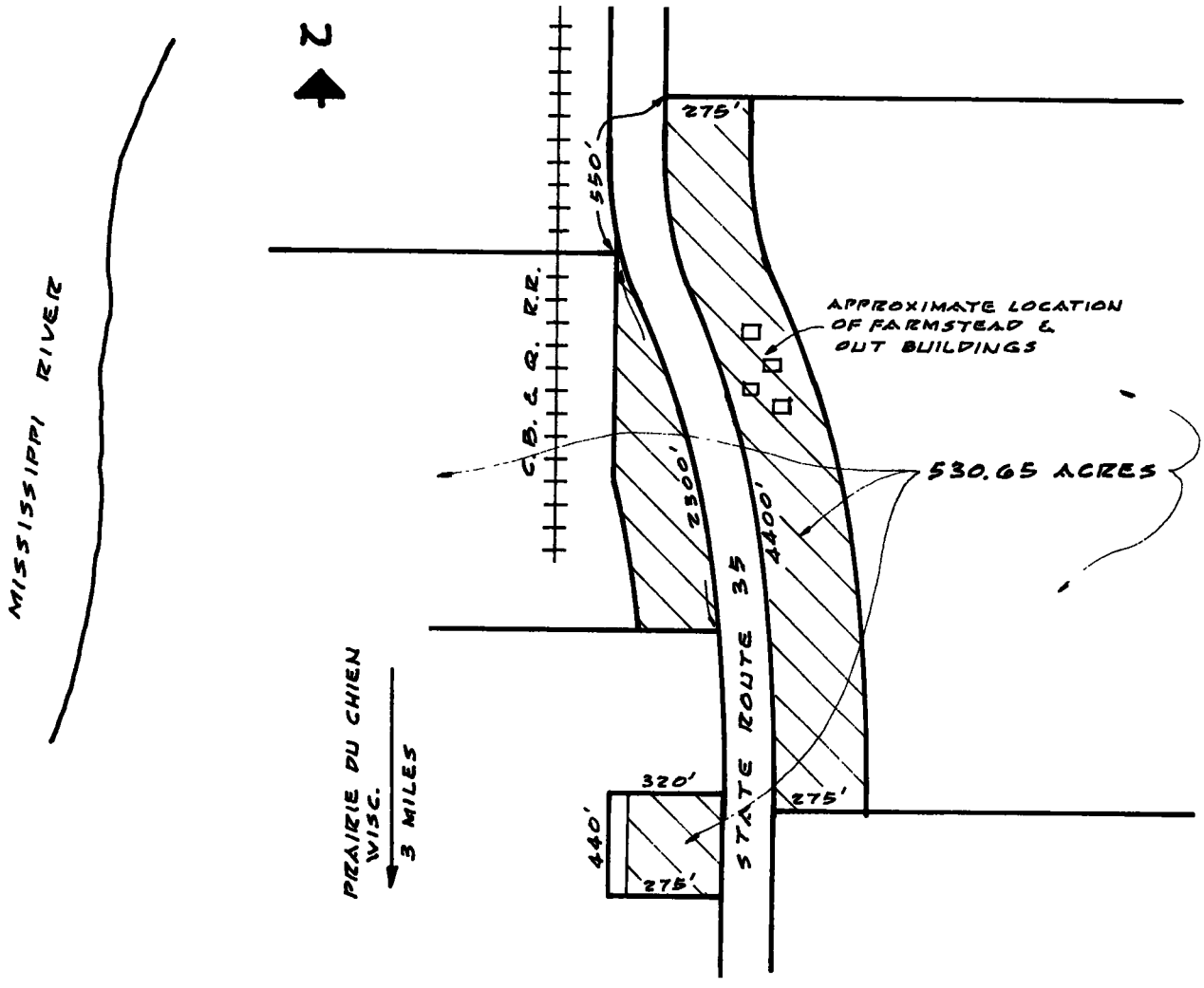
Location: In Crawford County on both sides of State Highway 35 approximately 3 miles north of Prairie du Chien, Wis.

Present use: Farming and beef cattle raising.

Purpose of the scenic easement: To provide a view of the bluffs to the east and the open fields to the west of State Highway 35.

Area: Scenic easement, 38.81 acres; Whole property, 530.65 acres; Highway frontage, 3,858 ft.

Description of improvements: House No. 1 is a large older brick home containing 8 rooms and 1½ baths. House No.



Case Study 7. Looking easterly from State Route 35.

2 is a guest house with double garage. There are two barns, two concrete-stave silos, a granary, a machine shed, and a corncrib.

Use of the property on date of sales: Farming and beef cattle raising, with 140 acres in cropland, 70 acres in pasture, and 320 acres in woods.

Highest and best use of the property on date of sales: Farming and beef cattle raising.

Highest and best use of the property as of September 1967: Farming and beef cattle raising.

Zoning: Open.

Market activity between the before and after sales: From conversations with local real estate brokers and business people it appears that the market has gradually appreciated for the time period from 1958 to 1964.

Date of notice of proposed scenic easement: Dec. 23, 1963.

Restrictions and permitted uses:

Restrictions: (Same as for Case Study 1).

Permitted Uses: (Same as for Case Study 1, with following addition).

[c]3. Owner retains the right to use the living quarters above the garage as rental property for either permanent or transient tenants.

Before sale: Vol. 208, p. 65.

Grantor:	C. J. Knight
Grantee:	Edward J. Haas
Sale date:	2/10/58
Sale price:	$40,000
Sale price/acre:	$75.38
Verified by:	Public records
Type of conveyance:	Land contract
Revenue stamps:	$44

[c] Added to the agreement by the negotiator.

After sale: Vol. 223, p. 574.

Grantor:	Edward J. Haas
Grantee:	Joseph R. Gavin
Sale date:	3/5/64
Sale price:	$41,000
Sale price/acre:	$77.26
Verified by:	Mrs. Gavin and public records
Type of conveyance:	Warranty deed

Compensation awarded by State and accepted: $475.

Conclusion: In the before sale the subject property sold for $40,000 in 1958. The scenic easement was added in December 1963. The property was resold in March 1964 for $41,000. No change in the highest and best use had been made and the use was the same in 1958 and 1964. The original owner paid $40,000 for the property, received $475 in payment for the scenic easement restrictions, and then resold for $41,000. Based on the general market, the scenic easement restrictions had little or no effect on the property resale. According to the current property owner the scenic easement restriction had little or no effect on the sales effort.

It appears that the State compensated the owner on a nominal basis of approximately 15 percent of the whole acreage value of the restricted area. Based on a value of $75 per acre, the following is applicable:

38.81 Acres × $75	= $2,910
State's compensation	= $ 475
Percent of total fee value	= 16.3%

The highest and best use of the scenic easement area remained the same before and after the taking and approximately 15 percent compensation appears to be applicable under these circumstances.

APPENDIX F

CASE STUDIES: COMPARISON SALES

Case Study 8 (Comparison Sale)

Location: In Crawford County on the east side of State Highway 35 at the junction of a Town Road approximately 4¼ miles north of Prairie du Chien, Wis.

Area: Scenic easement, 31.21 acres; Whole property, 488 (±) acres; Highway frontage, approx. 4,300 ft.

Purpose of the scenic easement: To preserve and protect for scenic purposes the natural beauty of the areas adjoining said highway and to prevent any future developments which may tend to detract therefrom.

Restrictions and permitted uses:

Restrictions: (Same as for Case Study 1, with following addition).

[c]5. Lots used, leased, or sold for residential purposes within the restricted area shall have a frontage on the adjacent State Trunk Highway of not less than 300 ft for each residence.

Permitted Use: (Same as for Case Study 1, with following additions).

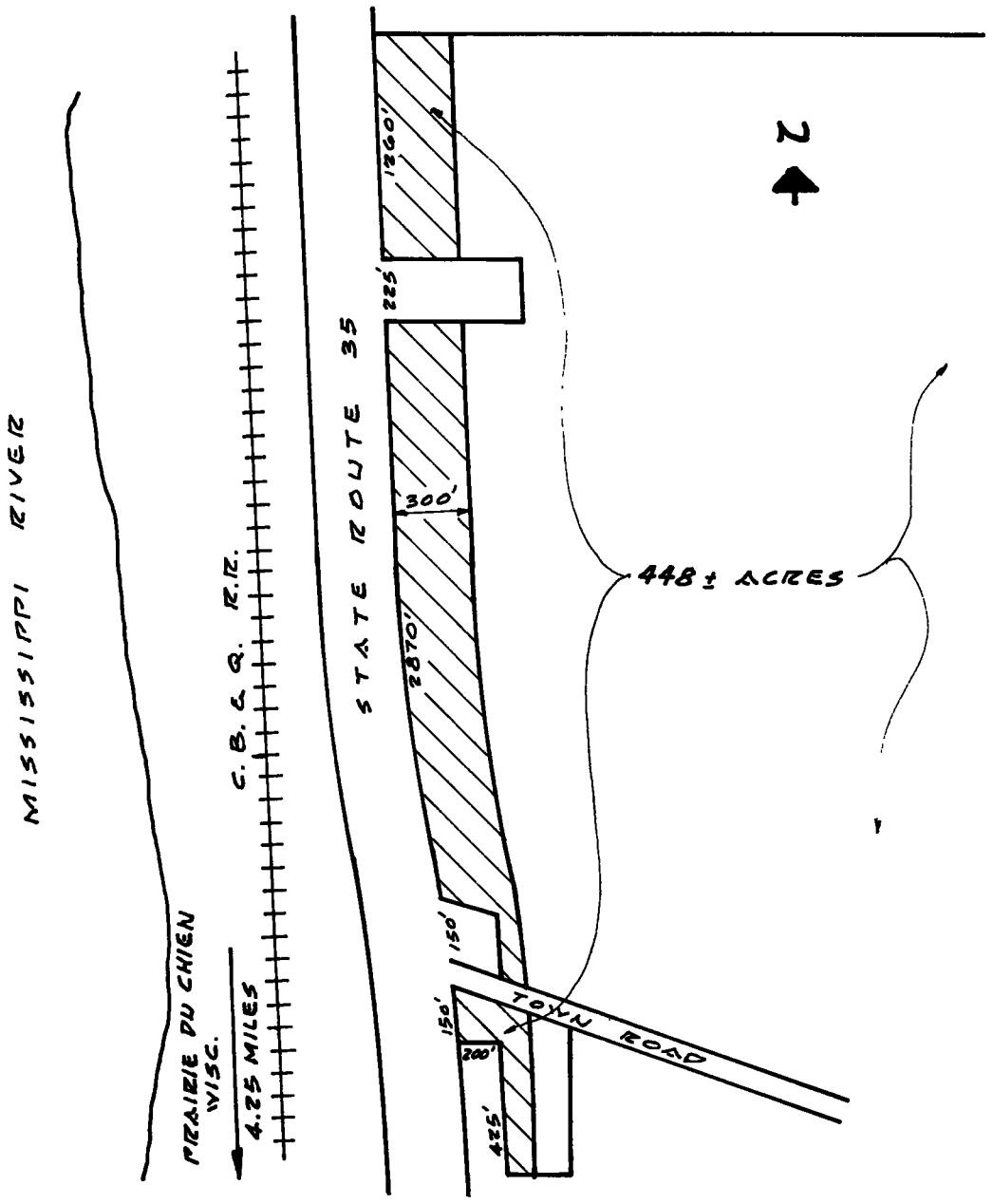
[c]3. Single-family residential use.

[c]4. Operation of two sand pits; one of which is presently located approximately 100 ft east of the intersection of State Trunk Highway 35 and Town Road #55-1 as located and traveled on Sept. 1, 1963, and the other located in the south ½ of Government Lot 5, Sec. 25, T 8 N, R 7 W.

[b]5. Any use not heretofore specified which exists upon or within the restricted area as of the time of recording

[b] Standard permitted use at date of the easement.
[c] Added to the agreement by the negotiator.

Case Study 8. Looking easterly from State Route 35.



this instrument, including normal maintenance and repair of existing buildings, structures and appurtenances, but such use shall not be expanded nor shall any structures be erected or structural alterations be made within the restricted area.

Description of the whole property: As reported by the wife of the grantor, Mrs. Smith, the building improvements were in poor condition at the date of the sale. The buildings probably did not contribute to the acreage value of the land.

Access: Access is good from State Highway 35 and County Road N.

Topography: Most of the highway frontage is rugged bluffs overlooking the Mississippi River. There are two possible building sites on the scenic easement area and the balance of the property is rolling lands, with some pasture, and rugged wooded terrain.

Present use: Agricultural and two sand pits.

Zoning: Open.

Sale data: Vol. 230, p. 281.

Grantor:	Leo E. Smith
Grantee:	Frank J. Bouzek
Sale date:	12/30/64
Sale price:	$12,000
Sale price/acre:	$26.79
Verified by:	Public records and Mrs. Smith
Type of conveyance:	Warranty deed

Inspection date: September 1967.
Effective date of scenic easement: Mar. 2, 1964.
Compensation awarded by State and accepted: $275.
Comparison: Comparable sale 27, located ¾ mile east of the city limits of Prairie du Chien, Wis., has 103 acres, none of which is encumbered by scenic easements. The price paid was $8,000 in April 1965 and the indicated price per acre was $78. This property is comparable to the subject property, as the terrain is similar and only 12 of the 103 acres are in cropland. The buildings of the comparable sale were in poor condition. However, since the purchase the grantee is remodeling the living quarters. Due to the proximity of the comparable sale to the city limits of Prairie du Chien, and the use, the comparable sale is considered superior to the subject property.

Comparable sale 28 is a 177-acre farm, none of which is encumbered by scenic easements. The property sold for $12,000 in June 1966, and the indicated price per acre is $62. Although this farm is also outlying, it has an old house, barn, and outbuildings on it, and is considered superior to the subject property because 50 acres are in cropland and 87 acres are in pasture.

Comparable sale 29 is a 122-acre farm, none of which was encumbered by scenic easement, and the price paid in March 1966 indicated $102 per acre. This comparable sale is similar to the subject property, as the old house and barn had little or no value at the time of sale. However, it is considered superior to the subject property because 60 acres are in cropland and the balance are in pasture.

Conclusion: The subject property is poor farmland and practically the entire highway frontage is rugged bluffs. The balance of the property is rugged terrain, most of which is unsuitable at present for any type of farming or pasture. A portion of the property has a sand pit operation on it.

Although the price paid for the subject property is considerably less than that of the comparable sale, this is not believed due to the restriction of the scenic easement on the property. The property encumbered by scenic easement is a rugged bluff area and because of the topography, the scenic easement had no effect on the price paid. In addition, after comparing the various aspects of the subject property to the comparable sales, the indicated price of approximately $27 per acre would be applicable on a before and after basis.

Therefore, the State's award of $275 appears to be accurate and constitutes approximately 33 percent of the sale price of the scenic easement area. Due to the compensation of $275, as based on a whole sale price of $12,000, the compensation takes on a nominal-type consideration.

CASE STUDY 9 (Comparison Sale)

Location: In Crawford County on the east side of State Highway 35, approximately 4 miles south of Lynxville, Wis., and approximately 11 miles north of Prairie du Chien, Wis.
Area: Scenic easement, 0.75 acres; Whole property, 0.80 acres.
Purpose of the scenic easement: To preserve and protect, for scenic purposes, the natural scene and to prohibit any unsightly encroachments.
Restrictions and permitted uses:
Restrictions: (Same as for Case Study 1).
Permitted Use: (Same as for Case Study 1).
Description of the whole property: A one-story, frame ranch home with three bedrooms, one bath, full basement, approximately 7 years old.
Access: Access is good from blacktop paved State Highway 35.
Topography: The land rises sharply from the road, is generally rugged terrain, and ranges to approximately 60 ft above the road grade.
Present use: Residential.
Zoning: Open.

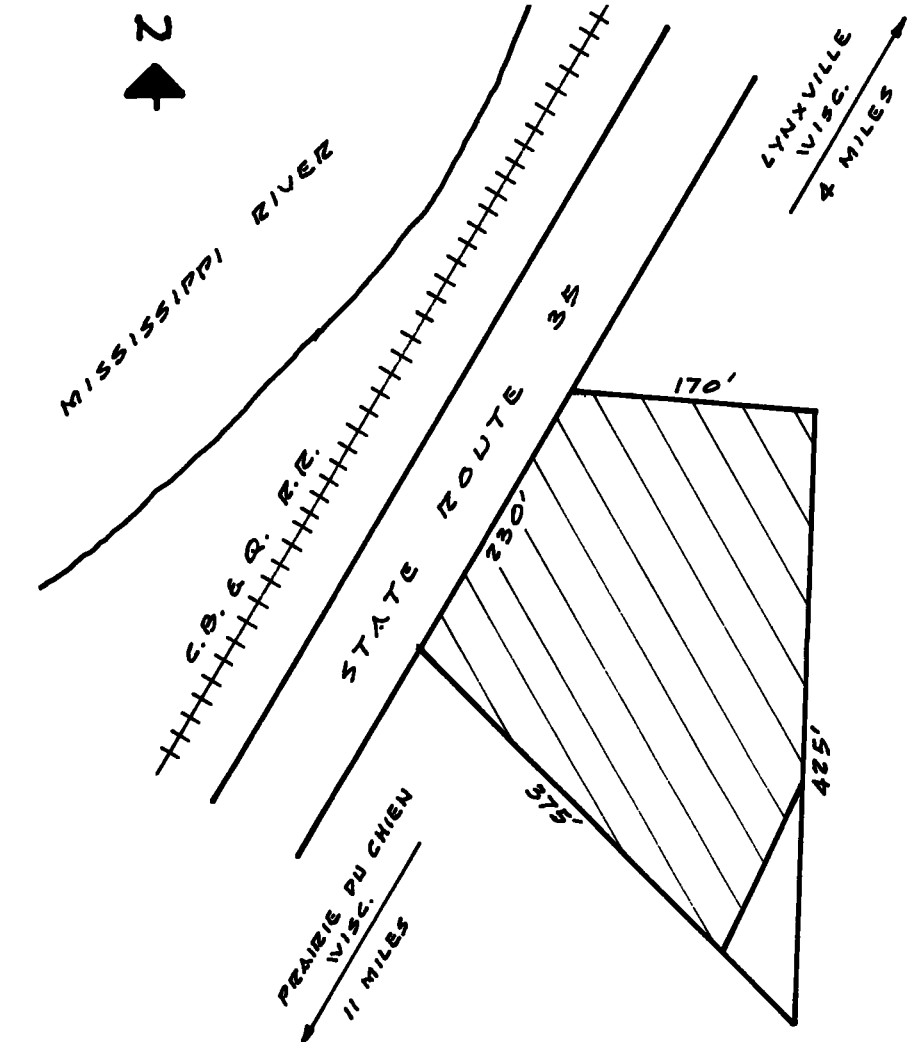
Sale data: Vol. 230, p. 86.

Grantor:	Warren D. Varo
Grantee:	John and Lenora Leonard
Sale date:	2/28/64
Sale price:	$16,200
Verified by:	Grantee and public records
Type of conveyance:	Warranty deed

Comment: The grantee stated that although he could see a need for certain restrictions on property along the highway, he was of the opinion that the economy is so poor in the general area that more commercial enterprises should be permitted. Mr. Leonard also reported that the scenic easement had little or no effect on the sales transaction.
Inspection date: September 1967.
Effective date of the scenic easement: Oct. 8, 1963.
Compensation awarded by State and accepted: $15 (nominal).
Comparison: Comparable sale 20, a frame residence located on the outskirts of Lynxville, Wis., an older frame dwelling is located on a lot approximately 10 ft below the grade of County Road F. The comparable sale building improvements were considered to be in fair to poor condition and inferior to the subject property.

Comparable sale 21 is a residential dwelling with 1,400 sq ft of living area and containing six rooms with three bedrooms. This property sold in January 1964 for $16,300 and is considered slightly superior to the subject property in size. The comparable sale site comprises approximately 3 acres of open land and the subject property site is wooded with a commanding view of the Mississippi River. Therefore, the comparable sale probably is equal to the subject property.

Comparable sale 22 is a 1½-story frame dwelling containing five rooms with two bedrooms, one bath, and a full



RESTRICTED AREA (SCENIC EASEMENT)

AREA OF THE WHOLE PROPERTY : 0.80 ACRES

AREA OF THE SCENIC EASEMENT : 0.75 ACRES

basement. The comparable sale is an older type building on approximately a ½-acre lot. This property was purchased in July 1961 for $11,800, and although it is closer to the city limits of Prairie du Chien, it is much smaller in size, inferior in construction, and does not have a commanding view of the river. It is considered inferior to the subject property.

Conclusion: In the three comparable sales listed, none had the scenic easement encumbrance as has the subject property. Sale 20 was considered inferior due to the building improvements. Due to the residential use of the comparable sales and the subject property, the highest and best use probably will not change in the foreseeable future.

In addition, analysis and investigation of the subject property and the comparable sales indicate that the scenic easement restrictions had little or no effect on the market value of the subject property.

It also appears that the State's nominal compensation award was accurate and correct.

It appears likely that the subject property valuation might be enhanced due to the scenic easement restriction on the neighboring vacant lands.

CASE STUDY 10 (Comparison Sale)

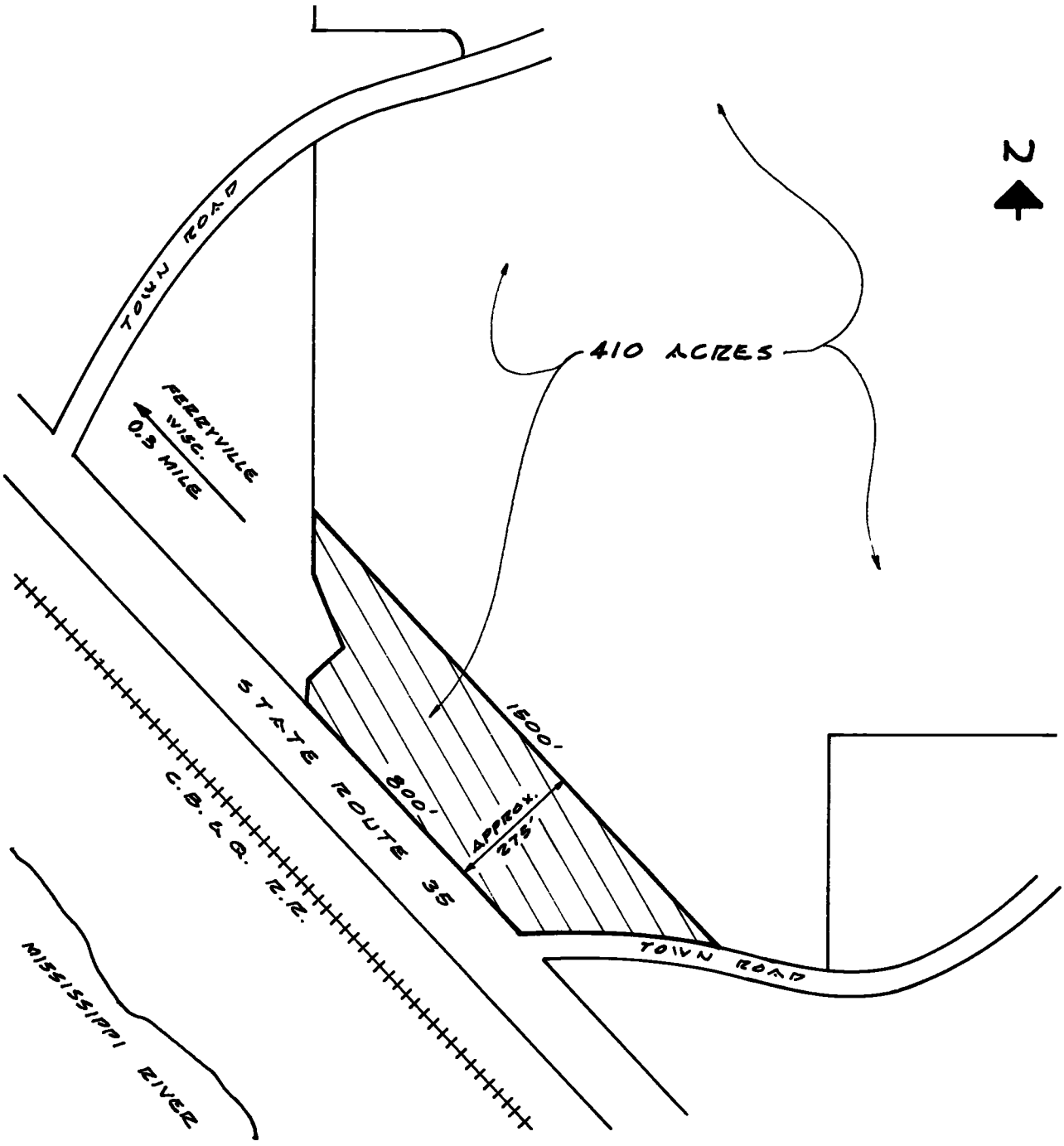
Location: In Crawford County on east side of State Highway 35 approximately 0.3 mile southerly from Ferryville, Wis.

Area: Scenic easement, 7.24 acres; Whole property, approx. 410 acres.

Purpose of the scenic easement: To preserve and protect for scenic purposes the hill effect or view of the area.

Case Study 9. Looking easterly from State Route 35.

Case Study 10. Looking easterly from State Route 35.



Restrictions and permitted uses:
Restrictions: (Same for Case Study 8).
Permitted Use: (Same as for Case Study 1, with following addition).
"4. Single-family residential use.

Description of the whole property: Two older, frame, farm homes and two frame sheds with approximately 100 acres of tillable soil; the balance is rough terrain and pasture.

' Added to the agreement by the negotiator.

Access: Access is good from blacktop paved State Highway 35 and a blacktop paved Town Road.
Topography: The lands immediately adjacent to State Highway 35 are high bluffs and, for the most part, constitute the scenic easement area. The balance is very hilly and rough terrain with the exception of the approximately 100 acres of tillable soil, which are rolling lands.
Present use: Farming.
Zoning: Open.
Sale data: Vol. 208, p. 266.

Grantor:	Carl Everson
Grantee:	Dr. Sampson
Sale date:	1/1/64
Sale price:	$15,000
Sale price/acre:	$36.60
Verified by:	Mr. and Mrs. Everson, Mrs. Sampson, public records
Type of conveyance:	Land contract

Comment: The grantee was not aware of the scenic easement restrictions on the property, but after discussing them she was delighted that the property would remain in its natural state and its beauty would be preserved. She also stated that knowledge of the scenic easement restrictions would not have affected the sale.
Inspection date: September 1967.
Effective date of the scenic easement: Sept. 12, 1963.
Compensation awarded by State and accepted: $132.
Comparison: Comparable sale 24 is a 134-acre farm, none of which is encumbered by scenic easements, which sold in December 1964 for $14,500, or $108 per acre. The property adjoins a golf course and had a two-story, frame house and barn, and a small shed. There are approximately 60 acres of tillable soil and the owner surveyed the property in August 1966 for possible subdivision. Although only 60 acres are in tillable soil, almost the entire property would be considered usable for subdivision purposes; it is level, at grade with the highway, and slightly rolling as compared to the rugged terrain of the subject property. Due to the location, use, and the topography the comparable sale is thought to be superior to the subject property.

Comparable sale 26 is a 160-acre tract of land, none of which is encumbered by scenic easements, which sold in May 1965 for $28,000, or $175 per acre. This is a farm with a large house, barn, silo, granary, and two corn cribs in good condition. Approximately 90 acres of cropland, 30 acres of pasture, and 40 acres of woods comprise the total area. The comparable property is rolling lands, with the majority located on a high ridge. Due to the topography and the higher percentage of usable land, the comparable sale is considered superior to the subject property.

Comparable sale 27 is a 103-acre tract, none of which is encumbered by scenic easements, which sold in April 1965 for $8,000, or $78 per acre. The improvements at the time of purchase were a house, barn, tobacco shed, and several small sheds which were in poor condition. Only 12 acres were in cropland, the balance being generally rugged and unusable for farmland or pasture. The comparable sale is located approximately ¾ mile east of the city limits of Prairie du Chien, Wis., and the grantee stated that he purchased the property mainly for a homesite and a small farming operation. The comparable sale is considered equal to the subject property with the exception of its proximity to the City of Prairie du Chien. This proximity makes the comparable sale superior to the subject property.

Comparable sale 28 is a 177-acre tract, unencumbered with scenic easements, which sold in June 1966 for $11,000, or $62 per acre. The property has an old house, barn, and outbuildings with 50 acres in cropland, 87 acres in pasture and woods, and 47 acres of marshland. Due to the topography, the comparable sale is superior to the subject property.
Conclusion: The comparable sales indicate a range of $62 to $175 per acre. The property most comparable to the subject property is comparable sale 27, at $78 per acre. However, this property is located conveniently to the City of Prairie du Chien and the grantee no doubt paid a premium for this convenience.

The subject property is a large farm of 410 acres, of which only 7.24 acres are encumbered with a scenic easement. The indicated price is $36.60 per acre. The full market value at the date of purchase indicates no loss in value due to the scenic easement restrictions.

It would appear that the State's compensation of a nominal nature was correct.

The State's compensation of $132 equals less than 1 percent of the total area sales price and approximately 50 percent of the indicated average sale price of the scenic easement area.

CASE STUDY 11 (Comparison Sale)

Location: In Crawford County on the east side of State Highway 35 approximately 1 mile north of Ferryville, Wis.
Area: Scenic easement, 0.78 acres; Whole property, 0.78 acres; Highway frontage, approx. 180 ft.
Purpose of the scenic easement: To preserve the view and restrict any future encroachments.
Restrictions and permitted uses:
Restrictions: Same as Case Study 1, with following addition).

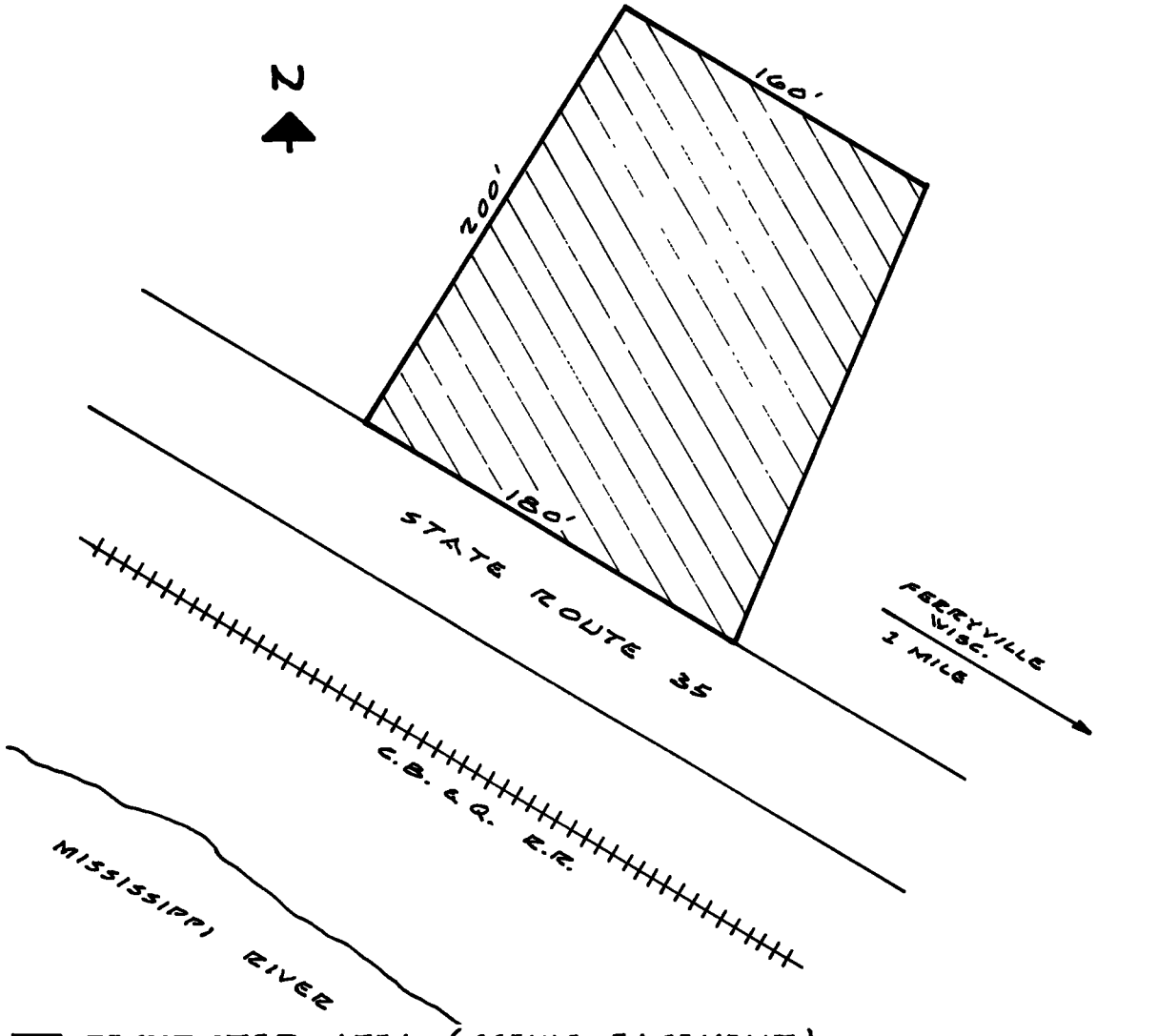
"5. Lots sold, leased or used for residential purposes within the restricted area along the northeast side of the adjacent highway shall have a frontage of not less than 100 ft for each residence. Lots sold, leased, or used for residential purposes within the restricted area along the southwest side of the adjacent highway shall have a frontage of not less than 300 ft for each residence.

Permitted Use: (Same as for Case Study 1, with following addition).

"4. Single-family residential use.

Description of the whole property: Unimproved vacant land at date of sale; presently improved with a residence.
Access: Access to the subject property is good from blacktop paved State Highway 35.
Topography: Approximately 10 ft above the grade of Highway 35 at the frontal portion, and extending upward to a height of 60 to 70 ft above road grade.

" Added to the agreement by the negotiator.



Present use: Residential homesite.
Zoning: Open.
Sale data: Vol. 208, p. 286 *

Grantor:	William Bates, Sr.
Grantee:	William Moses
Sale date:	7/30/64
Sale price:	$1,000
Verified by:	Grantor and public records
Type of conveyance:	Land contract *

Comment: Mrs. Bates reported that all of the parties concerned with this sale were aware of the scenic easement terms and that the easement had no effect on the sale.
Inspection date: September 1967.
Effective date of the scenic easement: Jan. 30, 1964.
Comparison: Comparable sale 13, a residential lot approximately ½ acre in size and not encumbered with scenic easement restrictions, sold for $600 in July 1964. An additional $200 had to be spent for grading for access to the Town Road. This property is located approximately ¼ mile easterly from the Great River Road and had a limited view of the Mississippi River.

Comparable sale 14, a 2-acre tract of land unencumbered by scenic easement restrictions and located approximately

* Land contract superseded by warranty deed issued Feb. 25, 1965, and recorded at Vol 217, p. 393.

Case Study 11. Looking easterly from State Route 35.

3½ miles southeast of Prairie du Chien, sold in June 1965 for $1,000.

Comparable sale 16, a residential lot 80 ft × 150 ft, or slightly larger than a ¼ acre in size, and not encumbered with scenic easement restrictions, sold for $2,000 in August 1966. The comparable sale is located in a good residential area, has a very limited view of the Mississippi River, and the surrounding homes are compatible with the home erected on the subject property.

Comparable sale 19, approximately 1 acre in size and not encumbered with scenic easement restrictions, sold in July 1964 for $1,000. This property is very similar to the subject property, inasmuch as it is located on a blacktop paved highway (US 18) and has a view of the golf course located across the road.

Conclusion: The site of comparable sale 13 was slightly smaller in size, had access problems, and in general was considered inferior to the subject property.

The site of comparable sale 16 was in a better location and was considered superior to the subject property.

The site of comparable sale 14 was larger, but was on a gravel road and did not have any particular view.

The site of comparable sale 19 was rated equal to the subject property, inasmuch as a view was afforded, and the size is approximately the same. Both properties are located on a blacktop paved highway.

Analysis of the comparable sales and the subject property indicated that the subject property was not affected by the scenic easement restrictions.

COMPARABLE SALE 12

Location: Southeast corner of State Highway 35 and Town Road approximately 3 miles north of Lynxville, Wis.
Area: 112 ft × 325 ft (approx.) 36,400 sq ft = 0.84 acres.
Description of the improvements: Vacant at time of purchase.
Access: Access is good from blacktop-paved State Highway 35 and from gravel-paved Town Road.
Topography: Approximately 5 ft below grade at State Highway 35 and rising to grade level at Town Road.
Present use: Residential homesite.
Zoning: Open.
Sale data: Vol. 217, p. 49

Grantor:	William A. Pease
Grantee:	John A. Tillou, et al.
Sale date:	1961
Sale price:	$1,500

Verified by:	Public records and Mr. Pease
Type of conveyance:	Warranty deed

Inspection date: September 1967.

Comment: Property is now totally encumbered with scenic easement restrictions. However, at sale date property did not have any scenic easements.

COMPARABLE SALE 13

Location: South side of Town Road approximately ¼ mile east of State Highway 35, 3 miles north of Lynxville, Wis.
Area: 150 ft × 160 ft = 24,000 sq ft = 0.55 acres.
Description of the improvements: Vacant at time of purchase.
Access: Access is good from gravel-paved Town Road.
Topography: Approximately 6 ft below the road grade and gradually slopes for approximately 80 ft. As this point, a severe slope for the balance of the property. Because of the terrain it was necessary to construct a driveway parallel to Town Road for automobile access into the property.
Present use: Residential homesite.
Zoning: Open.

Sale data: Vol. 230, p. 193.

Grantor:	William A. Pease
Grantee:	Al L. Woodworth
Sale date:	7/20/64
Sale price:	$600
Verified by:	Public records and Mr. Pease
Type of conveyance:	Warranty deed

Inspection date: September 1967.

COMPARABLE SALE 14

Location: On the east side of Town Road approximately ¼ mile north of U.S. Highway 18, and approximately 3½ miles southeast of Prairie du Chien, Wis.
Area: 2 acres.
Description of the improvements: Vacant at the time of purchase, but a house was moved onto the site subsequent to the sale.
Access: Access to the subject property was good from gravel-paved Town Road.
Topography: At grade with Town Road and is level to rolling.
Present use: Residential homesite.
Zoning: Open.

Sale data: Vol. 230, p. 395.

Grantor:	Alfred L. Johll
Grantee:	Jerry N. Quinn
Sale date:	6/28/65
Sale price:	$1,000
Sale price/acre:	$500
Revenue stamps:	$1.10
Verified by:	Mrs. Quinn and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.

COMPARABLE SALE 15

Location: On north side of Town Road east of State Highway 35 and ¾ mile north of Prairie du Chien, Wis.
Area: 410 ft × 150 ft = approx. 1.412 acres.
Description of the improvements: Vacant land, now partially subdivided into homesites.
Access: Good from blacktop-paved Town Road.
Topography: Four to 6 ft above grade of Town Road and slightly rolling.
Present use: Residential homesites.
Zoning: Residential.
Sale data: Vol. 230, p. 253.

Grantor:	F. Ahrens
Grantee:	L. Schneyer
Sale date:	11/2/64
Sale price:	$5,400
Sale price/acre:	$3,824
Revenue stamps:	$6.05
Verified by:	Mr. Ahrens, Mr. Schneyer and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.
Comments: Subject property is located in a general residential area and the surrounding properties are improved with medium-priced homes of good construction.

COMPARABLE SALE 16

Location: On north side of Town Road east of State Highway 35 and ¾ mile north of Prairie du Chien, Wis.
Area: 80 ft × 150 ft = 12,000 sq ft = 0.28 acres.
Description of the improvements: Vacant at time of purchase.
Access: Access is good from blacktop-paved Town Road.
Topography: Level and at road grade; land rises toward rear portion of site.
Present use: Residential.
Zoning: Residential.
Sale data: Vol. 240, p. 81.

Grantor:	L. Schneyer
Grantee:	E. Franklin
Sale date:	8/24/66
Sale price:	$2,000
Revenue stamps:	$2.20
Verified by:	Mr. Schneyer, Mrs. Franklin, public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.
Comment: The subject property was subdivided from lands described in comparable sale 15 and sold as a residential homesite.

COMPARABLE SALE 17

Location: On east side of Town Road, ¼ mile north of U.S. Highway 18, and approximately 3½ miles southeast of city limits of Prairie du Chien, Wis.
Area: 2.94 acres.
Description of the improvements: Vacant land; house and garage erected subsequent to sale.

Access: Good access from gravel-paved Town Road.
Topography: At grade with Town Road and is level to rolling.
Present use: Residential.
Zoning: Open.
Sale data: Vol. 230, p. 173.

Grantor:	Alfred L. Johll
Grantee:	Joseph F. Ludvik
Sale date:	6/27/64
Sale price:	$1,250
Sale price/acre:	$425
Revenue stamps:	$1.65
Verified by:	Mr. Ludvik and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967

COMPARABLE SALE 18

Location: On south side of State Highway 60 approximately 4 miles east of U.S. Highway 18, and approximately 9 miles southeast of Prairie du Chien, Wis.
Area: 75.9 ft × 594 ft = 45,084 sq ft (approx. 1 acre).
Description of the improvements: Open vacant land for the most part, except slightly wooded toward the rear portion of the site.
Access: Access is good from blacktop-paved State Highway 60.
Topography: Level and approximately at grade with State Highway 60, sloping gradually for approximately 100 ft, then drops abruptly and levels off to the lower lands.
Present use: Rural residential homesite.
Zoning: Open.
Sale data: Vol. 240, p. 112.

Grantor:	Winnifred E. Steinbach
Grantee:	Donald F. McCarthy and wife
Sale date:	10/24/66
Sale price:	$300
Revenue stamps:	$0.55
Verified by:	Mrs. Steinbach and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.

COMPARABLE SALE 19

Location: On north side of U.S. Highway 18 approximately 3½ miles southeast of Prairie du Chien, Wis.
Area: 208 ft × 208 ft = 43,284 sq ft (approx. 1 acre).
Description of the improvements: Vacant land.
Access: Access is good from blacktop-paved U.S. Highway 18.
Topography: Approximately 3 ft above grade of U.S. Highway 18 and sloping toward the rear of the site.
Present use: Was residential homesite and part of the property has been acquired for road widening of U.S. Highway 18.
Zoning: Open.
Sale data: Vol. 230, p. 194.

Grantor:	Alfred L. Johll
Grantee:	James V. Jameson
Sale date:	7/31/64
Sale price:	$1,000
Revenue stamps:	$1.10
Verified by:	Mrs. Johll and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.
Comment: Subject property has view of golf course across U.S. Highway 18.

COMPARABLE SALE 20

Location: ¼ mile southeast of junction of State Highway 35 and County Road F on southern outskirts of Lynxville, Wis.
Area: Approx. 31,350 sq ft = 0.72 acres.
Description of the improvements: Older frame home on the property in fair to poor condition with a gravel driveway.
Access: Access is good from blacktop-paved County Road F.
Topography: Approximately 10 ft below grade of County Road F. Site is considered to be low, but appears to be dry.
Present use: Residential.
Zoning: Open.
Sale data: Vol. 230, p. 204.

Grantor:	Fred R. Russell
Grantee:	James L. Kurth
Sale date:	8/26/64
Sale price:	$4,500
Verified by:	Miss Russell and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.
Comments: The grantor is still living on the property and is paying no rent due to maintenance agreement with the grantee.

COMPARABLE SALE 21

Location: On north side of U. S. Highway 18 south of Prairie du Chien, Wis.
Area: 534 ft × 246 ft = 131,364 sq ft = 3.01 acres.
Description of the improvements: A frame ranch-type home containing 1,400 sq ft of living area and built about 1960; six rooms with three bedrooms; also an 8x10-ft storage shed.
Access: Access is good from blacktop U.S. Highway 18.
Topography: Property is level and at grade with U.S. Highway 18, with the home on a slight knoll. The balance of the land is rolling.
Present use: Residential.
Zoning: Open.
Sale data: Vol. 230, p. 88.

Grantor:	J. V. Jameson
Grantee:	Dorothy Teynor
Sale date:	1/27/64
Sale price:	$16,300
Revenue stamps:	$18.15
Verified by:	Mrs. Teynor and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.

COMPARABLE SALE 22

Location: On south side of Town Road and west of State Highway 35 and U.S. Highway 18 at southern corporate limits of Prairie du Chien, Wis.
Area: 0.57 acres.
Description of the improvements: 1½-story dwelling containing living room, dining room, kitchen, two bedrooms, one bath, and a full basement. Property has well and septic system.
Access: Access is good from gravel-paved Town Road.
Topography: Level and at grade with Town Road.
Present use: Residential.
Zoning: Residential.
Sale data: Vol. 218, p. 164.

Grantor:	Marie A. Dremmel
Grantee:	Fay R. Curtis
Sale date:	7/3/61
Sale price:	$11,800
Revenue stamps:	$13.20
Verified by:	Mrs. Curtis and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.

COMPARABLE SALE 23

Location: On north side of State Highway 27 at eastern city limits of Prairie du Chien, Wis.
Area: Approx. 8 acres.
Description of the improvements: Vacant land, and two buildings in poor condition.
Access: Access is good from blacktop-paved State Highway 27.
Topography: Level and at grade with State Highway 27.
Present use: 7 acres in cropland and a 1-acre homesite.
Zoning: Residential.
Sale data: Vol. 230, p. 141.

Grantor:	Donald Schultz
Grantee:	Bernard Pedretti
Sale date:	5/5/64
Sale price:	$12,000
Sale price/acre:	$1,500
Verified by:	Mr. Pedretti and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.
Comments: The buildings located on the property were in very poor condition; the grantee stated that he purchased the property for future subdivision.

COMPARABLE SALE 24

Location: On south side of U.S. Highway 18 approximately 3½ miles southeast of Prairie du Chien, Wis.
Area: 134 acres.
Description of the improvements: A two-story farm house, a barn, and a small shed. Sixty acres in tillable soil.
Access: Access is good from blacktop-paved U.S. Highway 18.
Topography: Level and at grade with U.S. Highway 18, rising to 3 to 4 ft at the front, and a gradual slope toward the rear of the property.
Present use: Farming and pasture lands (in August 1966 the property was surveyed for possible residential subdivision use).
Zoning: Open.
Sale data: Vol. 230, p. 289.

Grantor:	Martin Nolan
Grantee:	Walter C. Schlaygat
Sale date:	12/31/64
Sale price:	$14,500
Sale price/acre:	$108
Revenue stamps:	$16.50
Verified by:	Mr. Schlaygat and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.
Comment: Property adjoins a golf course.

COMPARABLE SALE 25

Location: On Town Road just south of State Highway 27, approximately 2 miles southeast of Prairie du Chien, Wis.
Area: 45 acres.
Description of the improvements: A frame farmhouse with a barn and garage in fair condition; corn crib is in good condition.
Access: Access is good from gravel-paved Town Road, which is located south of blacktop-paved State Highway 27.
Topography: Generally rolling lands.
Present use: 16 acres in cropland; a small portion is used for sanitary landfill, and the balance for pasture.
Zoning: Open.
Sale data: Vol. 211, p. 562.

Grantor:	Grace B. Konichek
Grantee:	Aloysius Obenauf
Sale date:	5/31/63
Sale price:	$9,500
Sale price/acre:	$211
Revenue stamps:	$10.45
Verified by:	Richard Nagel (manager of property for grantee) and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.

COMPARABLE SALE 26

Location: On both sides of Town Road approximately ¾ mile southerly from State Highway 27, and approximately 2½ miles from Prairie du Chien city limits.
Area: 160 acres.
Description of the improvements: A large house, barn, silo, granary and two corn cribs in good condition; 90 acres in cropland, 30 acres in pasture, 40 acres in woods.
Access: Access is good from gravel-paved Town Road.
Topography: At grade with Town Road and is generally rolling. Property is located on a high ridge.
Present use: Farming.
Zoning: Open.
Sale data: Vol. 230, p. 351.

Grantor:	Harold Enke
Grantee:	Oliver White
Sale date:	5/12/65
Sale price:	$28,000

Sale price/acre:	$175
Revenue stamps:	$30.80
Verified by:	Mr. White and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967.

COMPARABLE SALE 27

Location: On south side of State Highway 27 approximately ¾ mile east of city limits of Prairie du Chien, Wis.
Area: 103 acres.
Description of the improvements: House, barn, tobacco shed, and several small sheds. Buildings were in poor condition at time of purchase. 12 acres were in cropland, balance of property unusable.
Access: Access is good from blacktop-paved State Highway 27.
Topography: Front acreage is level and at grade with State Highway 27; balance of property is rugged and mostly wooded.
Present use: Primarily residential, and minor farming.
Zoning: Open.

Sale data: Vol. 230, p. 330.

Grantor:	John V. Check
Grantee:	Henry Zach
Sale date:	4/2/65
Sale price:	$8,000
Sale price/acre:	$78
Revenue stamps:	$8.80
Verified by:	Mrs. Zach and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967
Comments: Grantee stated that he purchased the property mainly for residential use.

COMPARABLE SALE 28

Location: On both sides of State Highway 60 approximately 10 miles southeast of Prairie du Chien, Wis.
Area: 177 acres.
Description of the improvements: Old house, barn, and outbuildings; 50 acres in cropland, 87 acres in pasture and woods, and 40 acres of marshland.
Access: Access is good from blacktop-paved State Highway 60.
Topography: The 40 acres located south of Highway 60 is swampland. The balance of the property along the highway is rolling to a bluff, and the property on the ridge is rolling.
Present use: Farming.
Zoning: Open.

Sale data: Vol. 230, p. 640.

Grantor:	Edwin J. Steinbach
Grantee:	Alfred Hagerman
Sale date:	6/3/66
Sale price:	$11,000
Sale price/acre:	$62
Revenue stamps:	$12.10
Verified by:	Mrs. Steinbach and public records
Type of conveyance:	Warranty deed

Inspection date: September 1967

COMPARABLE SALE 29

Location: On both sides of Town Road and on State Highway 60 at junction with U.S. Highway 18 approximately 4 miles southeasterly of Prairie du Chien, Wis.
Area: 122 acres.
Description of the improvements: Large, old, farmhouse and a barn which had little or no value at the time of sale; 60 acres in cropland.
Access: Access is good from gravel-paved Town Road and good to blacktop-paved State Highway 60 and U.S. Highway 18.
Topography: State Highway 60 has been elevated to join U.S. Highway 18 and the Town Road has been elevated to join State Highway 60. Due to the elevation the frontage of the property is approximately 10 to 15 ft below the grade at the intersection. The balance of the property is level to rolling.
Present use: Farming.
Zoning: Open.

Sale data: Vol. 212, p. 200.

Grantor:	William Fogarty
Grantee:	Bernard Pedretti
Sale date:	3/1/66
Sale price:	$12,500
Sale price/acre:	$102
Verified by:	Mr. Pedretti and public records
Type of conveyance:	Land contract

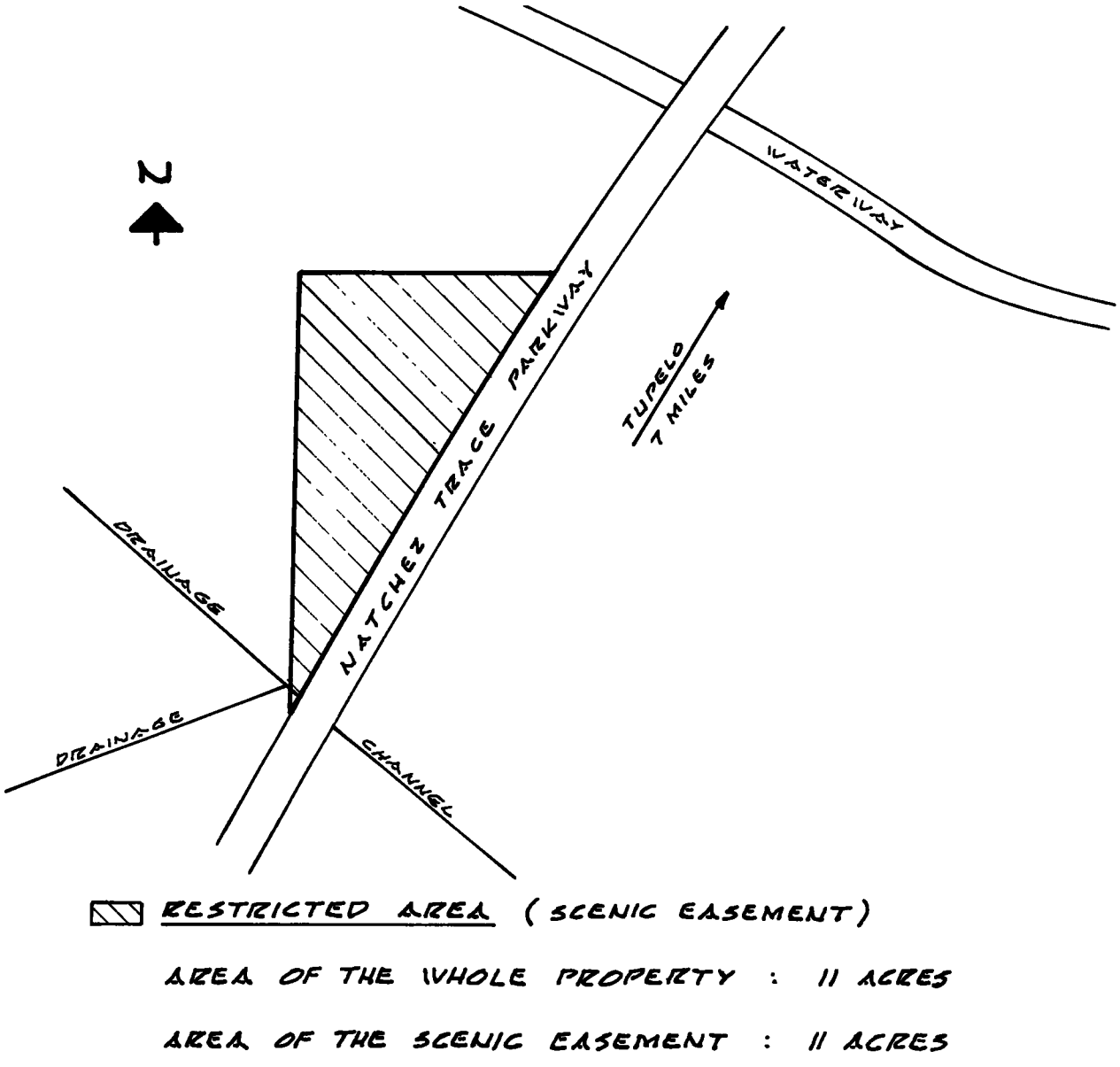
Inspection date: September 1967.

CASE STUDY 30 (Comparison Sale)

Location: In Lee County approximately 7 miles southwesterly of Tupelo, Miss., and along the Natchez Trace Parkway.
Area: Scenic easement, 11 acres; Whole property, 11 acres.
Purpose of the scenic easement: To preserve an agricultural scene.
Restrictions and permitted uses:

(a) That buildings, pole lines, and structures may be erected on such lands only for farm or residential purposes. New buildings or major alterations to existing buildings shall be subject to the prior approval of the grantee, or its assigns. No commercial buildings, power lines, or other industrial or commercial structures shall be erected on such lands, except existing commercial buildings may be altered or the property may be otherwise improved for the purpose of continuing established use after plans have been approved by the grantee, or its assigns.

(b) That no mature trees or shrubs shall be removed or destroyed on such land without the consent of the grantee or its assigns, except such seedling shrubbery or trees as may be grubbed up or cut down in accord-



ance with good farm practice and residential maintenance.

(c) That no dump of ashes, trash, sawdust or any unsightly or offensive material shall be placed upon such land.

(d) That no sign, billboard or advertisement shall be displayed or placed upon such land, except one sign not greater than 18 in. by 24 in., advertising the sale of the property or products raised upon it.

(e) That the grantee, or its assigns, shall have the right to place concrete monuments along the outside boundaries of the above scenic easement land.

General neighborhood description and trends: The neighboring properties consist of good row cropland, woods, and pasture. The subject property at this time is not considered in the path of general development and will continue as agricultural land in the foreseeable future.

Description of the whole property: Good bottom farm land and considered the best in the general area.
Topography: Approximately 2 to 3 ft below the grade of the Natchez Trace Parkway and level.
Present use: Agricultural.
Highest and best use with scenic easement: Agricultural.
Highest and best use without scenic easement: Agricultural.
Sale data: Vol. 803, p. 550.

Grantor:	Edmon Ethridge, et ux
Grantee:	James L. Taylor
Sale date:	2/19/67
Sale price:	$3,300
Sale price/acre:	$300
Revenue stamps:	$3.30
Verified by:	Mr. Taylor and public records
Type of conveyance:	Deed

Inspection date: July 1967.

Case Study 30. Looking northerly from the Natchez Trace Parkway.

Comment: The grantee has owned the adjoining property since 1940. Dams and drainage control ditches have been constructed in the general area. Mr. Taylor is employed with the Mississippi State Highway Department and is fully aware of the restrictions placed on the property by the scenic easement.

Comparison: Comparable sale 42 is a 12.66-acre tract, none of which is encumbered by a scenic easement. The property is located approximately 2 miles southwesterly from the City of Tupelo and is considered to be in the path of residential development. A new subdivision is being constructed at the Bissell-Palmetto Road, across the street from the comparable sale; the subdivision lots have been staked out and a road has been cut through. At the time of the field inspection, no sales were reported. The comparable sale lands are currently in pasture.

Comparable sale 43 is an 80-acre parcel, none of which is encumbered by scenic easement. The property consists of 40 acres in woods and 40 acres of potential row cropland, all presently in pasture land. The comparable sale is located approximately 2 miles southwesterly of the subject property and is not considered to be in the path of development in the foreseeable future.

Comparable sale 44 is a 13-acre tract, none of which is encumbered by scenic easement. This property is in pasture and has a 6-acre cotton allotment. The comparable sale is located approximately 3 miles southwesterly of the subject property and is not considered to be in the path of development in the foreseeable future.

Conclusion: Comparable sale 42, located in Lee County and now in the path of general development, sold in 1958 for $59 per acre. An appraisal of this comparable sale in March 1965 listed the value at $348 per acre. This price would have to be adjusted upward as of today's date, due to the activity in the area.

Comparable sale 43, located in Pontotoc County, is a larger tract that sold in 1965 for $2,500, or $31 per acre. Forty acres is in woods and 40 acres is considered potential row cropland. However, in order to use these 40 acres for crops, some of the farmers interviewed estimated as high as $100 per acre to break the soil and drain it properly to prepare it for agricultural use.

Comparable sale 44, located in Pontotoc County, consists of 13 acres, which sold in December 1965 for $600, or $46 per acre. This sale is also considered potential row cropland, but has gone to pasture and would require an initial cost of approximately $100 per acre to prepare for agricultural use.

It is clearly indicated that the subject property has a value in excess of comparable sales 43 and 44, even with the encumbrance of a scenic easement. This is due to the subject property being prime bottomland. Comparable sale 42, which has some subdivision potential, indicates a price of $348 per acre by a recent appraisal. The subject property has a highest and best use as agricultural, is fully encumbered by a scenic easement, and sold for $300 per acre. Therefore, the subject property has experienced no loss in value due to this encumbrance, and the value would be the same with or without scenic easement restrictions due to use and location.

CASE STUDY 31 (Comparison Sale)

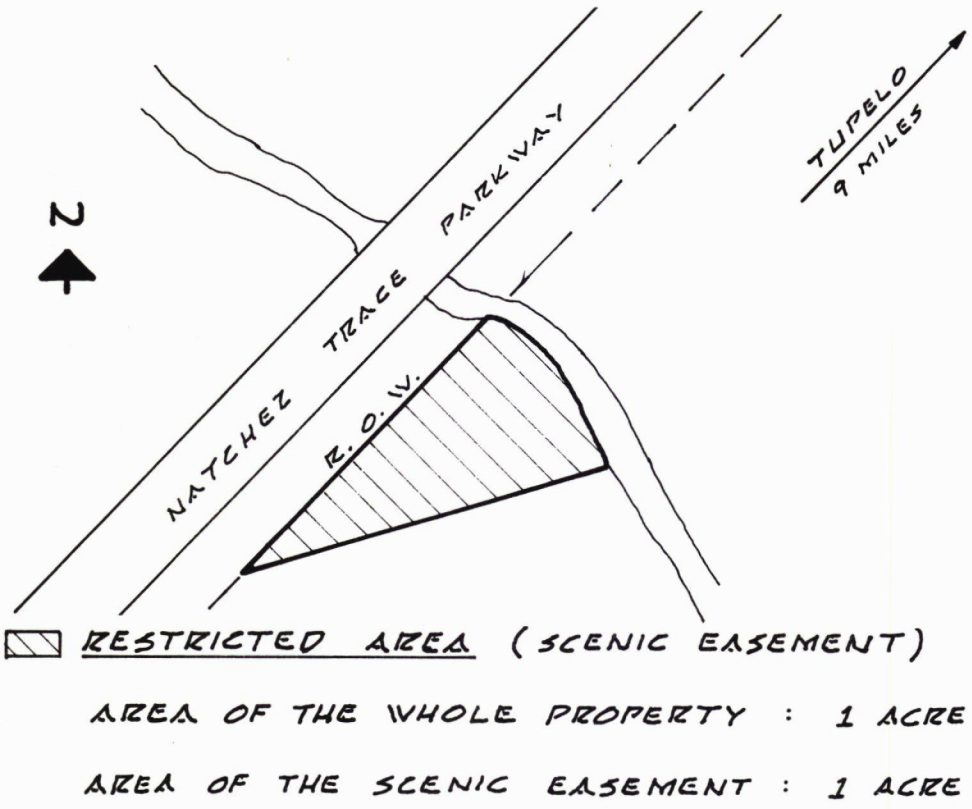
Location: In Pontotoc County approximately 8 miles southwest of Tupelo, Miss., and along the Natchez Trace Parkway.

Area: Scenic easement, 1 acre; Whole property, 1 acre.

Purpose of the scenic easement: To preserve an agricultural scene.

Restrictions and permitted uses: (Same as for Case Study 30).

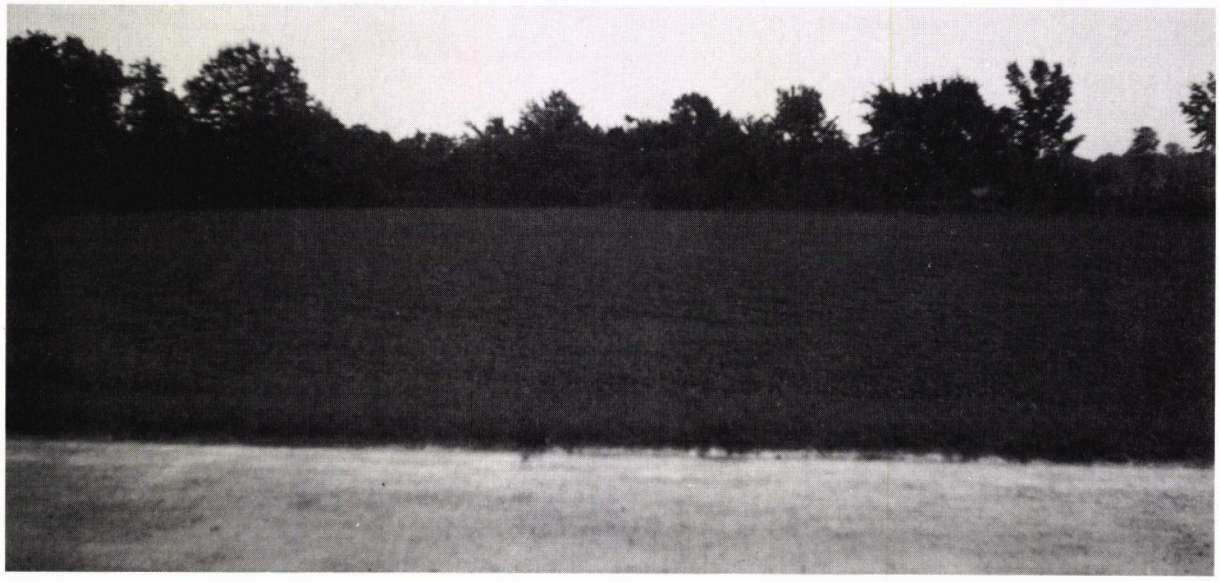
General neighborhood description and trends: The general



neighborhood is rural in scope and the subject property is agricultural in nature. The neighboring properties consist of cropland, pasture, and wooded areas. The subject property is located along the Natchez Trace Parkway, is entirely encumbered by scenic easement, is approximately 8 miles southwesterly of Tupelo, Miss., and is not considered in the path of development at the present time.

Description of the whole property: This is a 1-acre parcel that is the remainder of a larger tract which was separated due to roadway condemnation. The accessibility from the parent tract was poor after the taking. The subject property is considered good bottom farm land.

Topography: Approximately 3 ft below the grade of the Natchez Trace Parkway and generally level.



Case Study 31. Looking easterly from the Natchez Trace Parkway.

Present use: Agricultural.
Highest and best use with scenic easement: Agricultural.
Highest and best use without scenic easement: Agricultural.
Sale data: Vol. 278, p. 519.

Grantor:	Clyde Mask
Grantee:	Judy Ethridge (father, Jack Ethridge, bought property and placed it in his daughter's name.)
Sale date:	May 1965
Sale price:	$100
Sale price/acre:	$100
Revenue stamps:	None
Verified by:	Jack Ethridge and public records
Type of conveyance:	Warranty deed

Inspection date: July 1967.
Comment: Jack Ethridge was leasing adjoining property.
Comparison: For comparison purposes case study 30 and comparable sale 44 have been used. Case study 30 is an 11-acre tract encumbered by a scenic easement. It is considered good bottomland and slightly superior to the subject property. This property sold in February 1967 for $3,300, or $300 per acre.

Comparable sale 44 is a 13-acre tract, none of which is encumbered by a scenic easement. This property sold in December 1965 for $46 per acre, including a 6-acre cotton allotment. Comparable sale 44 at present is in pasture and considered fair row cropland, although the cost for preparing the soil for agricultural use would be approximately $100 per acre.
Conclusion: The subject property is a remainder of a larger tract which was separated due to roadway condemnation and poor accessibility from the parent tract after the taking. The grantee in this transaction was leasing the adjoining property and therefore could utilize the 1-acre parcel. If the subject property were part of a larger tract with good access, it would have an estimated value between $200 and $300 per acre.

Comparable sale 44 was sold for $46 per acre, but was pasture land. After investment of $100 per acre for preparing the soil for agricultural use, the comparable sale then would have a value of $150 to $200 per acre and would be inferior to the subject property.

The land described in case study 30 was good bottomland, used for agricultural purposes and would be rated slightly superior to the subject property. However, inasmuch as the subject property is an isolated parcel of land, the $100 is probably the fair market price, due to size, access, and the location from the parent tract.

Therefore, the subject property has experienced no loss in value due to the encumbrance of the scenic easement. There has been no change in the highest and best use, as it is agricultural today, was agricultural at the time of the sale, and will remain agricultural in the foreseeable future.

CASE STUDY 32 (Comparison Sale)

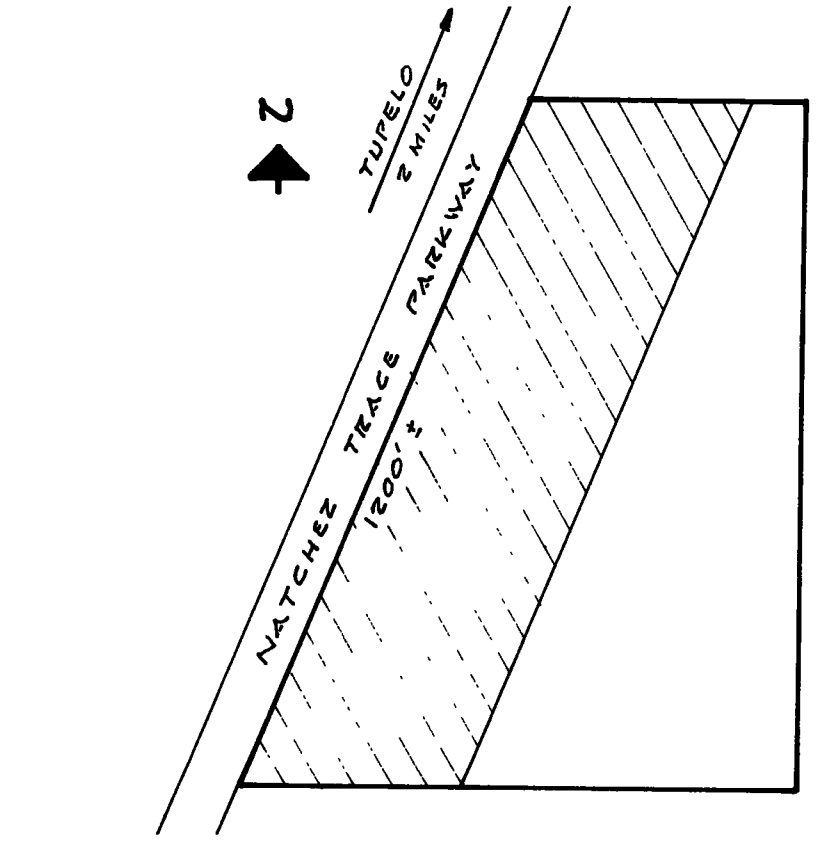
Location: In Lee County approximately 2 miles southwest of Tupelo, Miss., on the Natchez Trace Parkway.
Area: Scenic easement, approx. 13 acres; Whole property, approx. 24 acres.
Purpose of the scenic easement: To preserve an agricultural scene along the Natchez Trace Parkway.
Restrictions and permitted uses: (Same as for Case Study 30).
General neighborhood description and trends: As of the date of sale, the area is rural in nature and generally agricultural lands. The subject property, located in Lee County approximately 2 miles southwest of the City of Tupelo, is generally considered to be in the path of development.
Description of the whole property: A 24-acre tract, of which 13 acres are encumbered by scenic easement restrictions and currently are in pasture.
Topography: Approximately at grade with the Natchez Trace Parkway and generally rolling lands.
Present use: Pasture.
Highest and best use with scenic easement: Pasture for that portion encumbered by the scenic easement, and potential subdivision land with interim use as pasture for the balance of the property.
Highest and best use without scenic easement: Potential subdivision land with interim use as pasture.
Sale data: Vol. 561, p. 572.

Grantor:	I. B. Hulsee
Grantee:	Elmo B. Thomas
Sale date:	October 1960
Sale price:	$1,200
Sale price/acre:	$50
Revenue stamps:	$1.65
Verified by:	Mr. Thomas and public record
Type of conveyance:	Warranty deed

Inspection date: July 1967.
Comments: The grantee was represented by an attorney and was aware of the scenic easement restrictions on the property. The property was bought for long-range speculation.
Sale breakdown: Estimated value of the 13 acres encumbered with scenic easement restrictions and based on the sale of comparable farm acreage:

13 acres @ $30/acre	= $390
Sale price	= $1,200
Estimated value of the scenic easement area	= $390
Attributable to balance of lands without scenic easement restrictions	= $810
Indicated price of the acreage without scenic easement restrictions ($810/13 acres)	= $62/acre
Indicated loss due to scenic easement restrictions ($62 — $30)	= $32/acre
Percentage loss due to use change on a per acre basis of the scenic easement area as of the date of sale	= 52%

Comparison: Comparison sale 42, a 12.66-acre tract, none of which is encumbered by scenic easement, sold in



October 1958 for $750, or approximately $59 per acre. It is currently in pasture and was purchased at that time for its present use and for long-range speculation.

Comparable sale 43, an 80-acre tract, sold in March 1965 for $2,500, or $31 per acre. Forty acres of this comparable sale is in woods and 40 acres in potential row cropland, which at present is not being farmed. This comparable sale is located approximately 4 miles southwest of Tupelo and was not, at the time of sale, considered in the path of general development.

Comparable sale 44 is a 13-acre tract, none of which is encumbered by scenic easement, and at present is in pasture. This property was sold in December 1965 for $600, or $46 per acre. This property had a 6-acre cotton allotment on it.

Comparable sale 43, although a larger tract, sold for $31 an acre and, with the exception of location, could be considered as equal to the subject property. This comparable sale indicates that the going rate for pasture land is approximately $30 per acre. Even though this sale was consummated in 1965, a much later date than the sale of the subject property, it is considered that the values would remain approximately the same.

Comparable sale 44 is a 13-acre tract which has an indicated value of $46 per acre. This comparable sale had a 6-acre cotton allotment, which probably was responsible for the variance in the per acre price. This property is located approximately 10 miles southwesterly of Tupelo and is not considered to be in the path of development.

Conclusion: Comparable sale 42, a 12.66-acre tract that sold in March 1958 for approximately $59 per acre, is similar to the subject property, which adjoins it on the east, and is generally considered to be in the path of future development. This property was purchased for long-range speculation, as was the subject property.

Comparable sale 42 is considered equal to the subject property and to the comparable sales, and still indicated a value of $59 per acre. This indicates that a speculator was willing to pay somewhat in excess of the going rate for pasture land for anticipated future subdivision use.

The sale breakdown indicates that the subject property has a loss in value due to the scenic easement restrictions. Although comparable sale 42 was sold in October 1958 for $59 per acre and the subject property was sold two years later for an overall average of $50 per acre, a value of $30 per acre has been assigned to the pasture land of the subject

Case Study 32. Looking easterly from the Natchez Trace Parkway.

property that was encumbered by scenic easement. The balance of the property that was not encumbered by a scenic easement would have a value at the time of sale of approximately $62 per acre. This is believed feasible, based on comparable sale 42 and allowing a slight increase for time.

Therefore, due to the potential change of the highest and best use, the subject property has experienced a loss in value to that portion encumbered by scenic easement restrictions of approximately 52 percent.

CASE STUDY 33 (Comparison Sale)

Location: In Pontotoc County approximately 9 miles southwesterly from Tupelo, Miss., and along the Natchez Trace Parkway.
Area of the whole property: 166 acres.
Area of the scenic easement: 17.75 acres.
Purpose of the scenic easement: To preserve a rural scene along the Natchez Trace Parkway.
Restrictions and permitted uses: (Same as for Case Study 30).
Description of the whole property: Consists of 166 acres with approximately 86 acres in pasture and stock pond, 40 acres in timber, and 40 acres of potential cropland.
General neighborhood description and trends: Rural in nature and the properties are used for agricultural, pasture, and timber lands. The subject property at present is not considered in the path of development.
Topography: Generally rolling.
Present use: Agricultural.
Highest and best use with scenic easement: Agricultural.
Highest and best use without scenic easement: Agricultural.
Sale data: Vol. 278, p. 205.

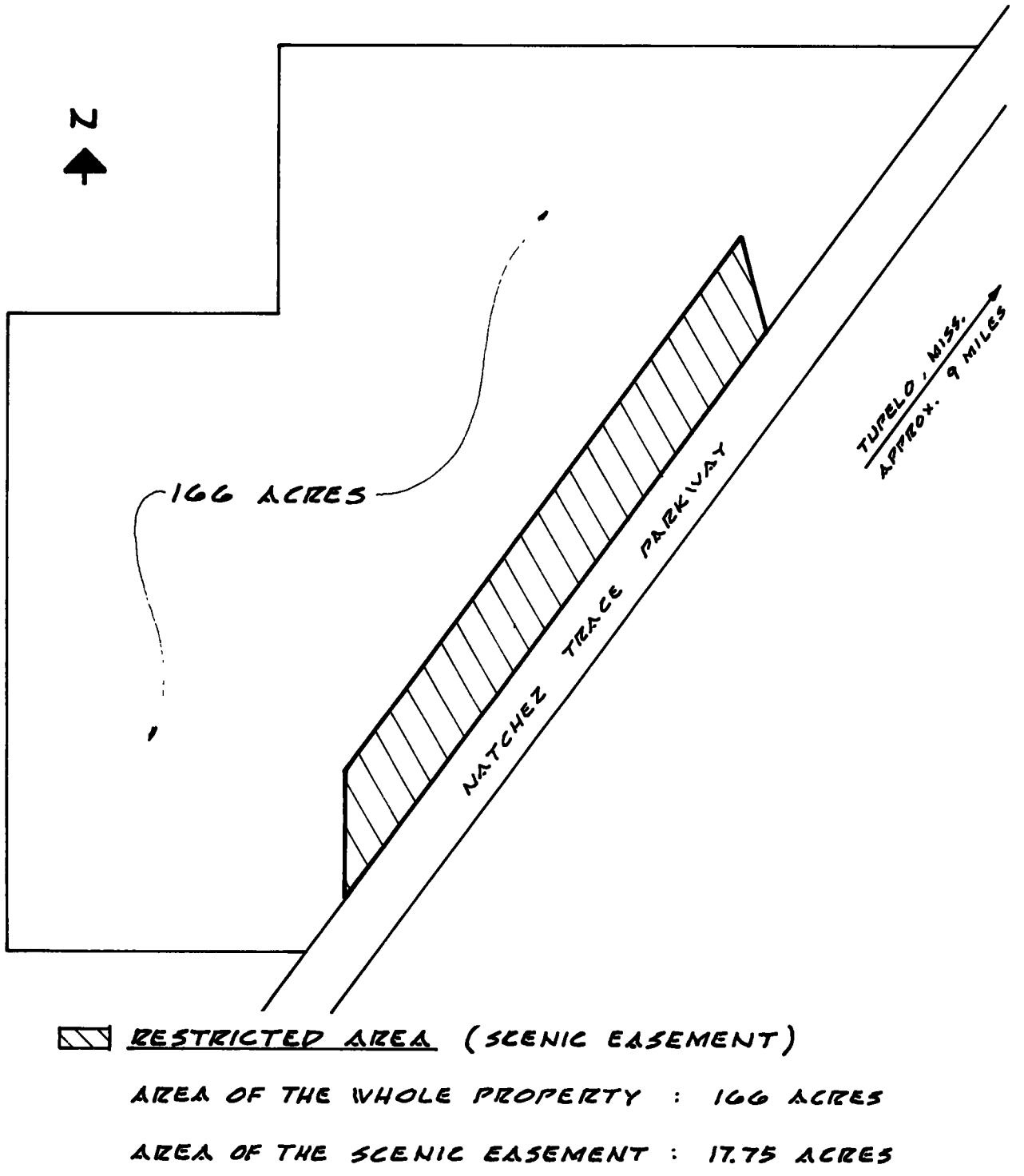
Grantor:	Thomas L. Caldwell, Special Commissioner
Grantee:	Elmo B. Thomas
Sale date:	March 1964
Sale price:	$5,001
Sale price/acre:	$30
Revenue stamps:	$5.50
Verified by:	Grantee and public records
Type of conveyance:	Commissioner's deed

Inspection date: July 1967.
Comment: The subject property was purchased from the court at auction by the Grantee in order to expand his farming operations.
Sale breakdown: The value of the 17.75 acres encumbered with scenic easement restrictions and based on sales of farm acreage are as follows:

17.75 acres @ $30	= $533
Sale price	= $5,001
Value of scenic easement area	= $533
Attributable to balance of lands	= $4,468
Indicated sale price of the acreage not encumbered by scenic easement ($4,468/148.25 acres)	= $30/acre
Indicated loss due to scenic easement restrictions per acre $30 — $30)	= $0/acre
Percentage loss due to restriction of the scenic easement on the subject property	= 0%

Comparison: Comparable sale 43, an 80-acre tract, none of which is encumbered by scenic easement, sold in March 1965 for $2,500, or $31 per acre. This property is similar to the subject property in that 40 acres are in woods and 40 acres are potential row cropland.

Comparable sale 44, a 13-acre tract, none of which is encumbered by scenic easement, sold in December 1965 for $600, or $46 per acre. This property was pasture land and contained a 6-acre cotton allotment. Because the cotton allotment is a saleable commodity in this area, the variance



in the per acre price between the two comparable properties is no doubt due to the cotton allotment.

Conclusion: The subject property sold in March 1964 for $30 per acre. Comparable sale 43 sold in March 1965 for $31 per acre. Comparable sale 44 sold in December 1965 for $46 per acre. The difference in the per acre price was attributable to the 6-acre cotton allotment of comparable sale 44.

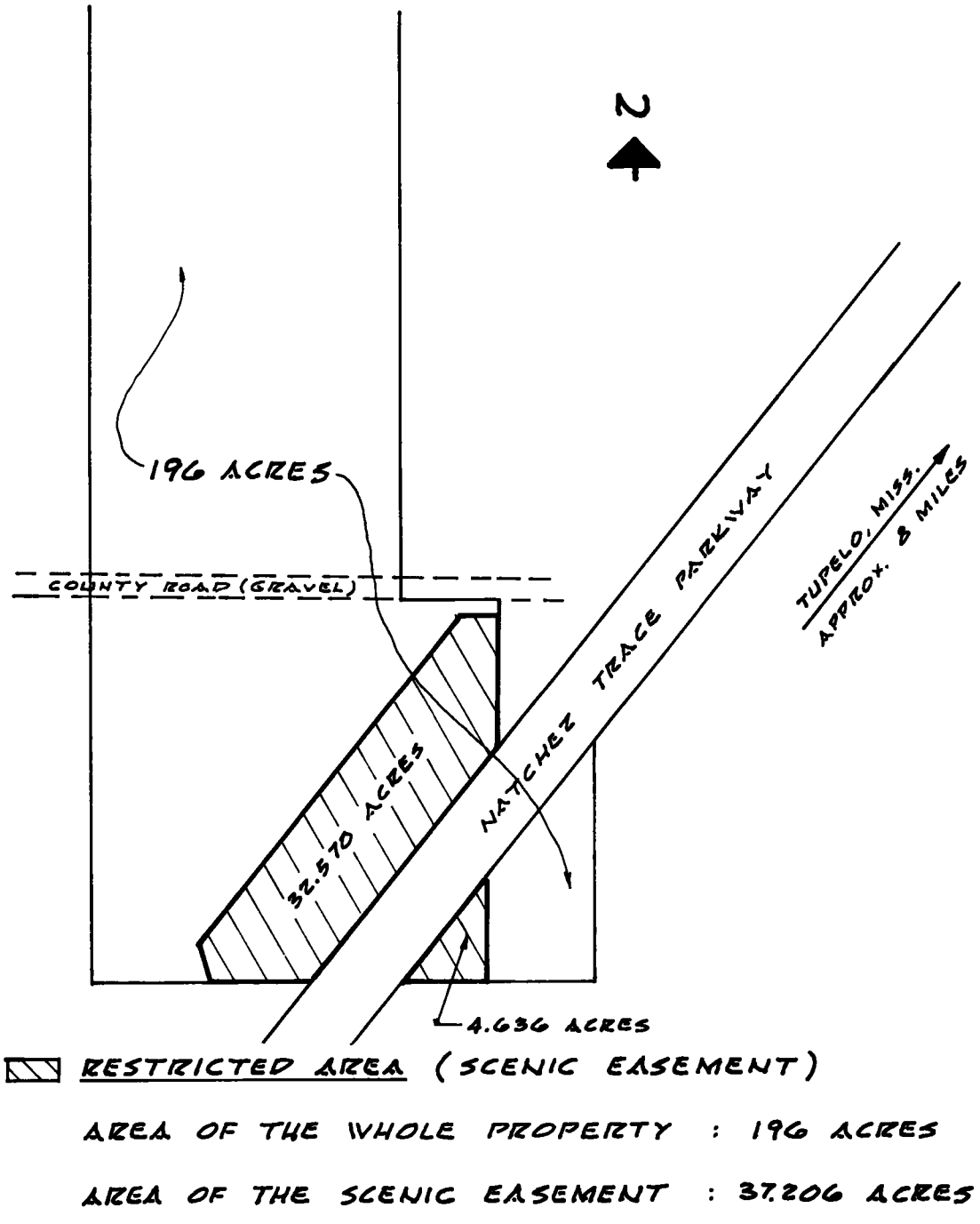
Inasmuch as the subject property and the comparable sales are similar in nature, the $30 per acre paid for the subject property is equal to the comparable sales, and therefore the subject property suffered no loss in value due to the scenic easement restrictions. The subject property is not in the path of general development, and no change in the highest and best use is anticipated in the foreseeable future.

CASE STUDY 34 (Comparison Sale)

Location: In Pontotoc County approximately 8 miles southwesterly of Tupelo, Miss., and on the Natchez Trace Parkway.

Case Study 33. Looking northwesterly from the Natchez Trace Parkway.

Case Study 34. Looking westerly from the Natchez Trace Parkway.



Area: Scenic easement, 37.206 acres; Whole property, 196 acres.
Purpose of the scenic easement: To preserve a rural farm scene along the Natchez Trace Parkway.
Restrictions and permitted uses: (Same as for Case Study 30).
General neighborhood description and trends: Rural, and the surrounding acreage is in pasture, row cropland, and timber. The subject property at present is not considered in the path of development.
Description of the whole property: The subject property consists of a home site with a 6-room house and outbuildings. The acreage consists of 53 acres in row cropland, approximately 80 acres in scrub oak timber, and 63 acres in pasture. There is a 9.9-acre cotton allotment on the property.
Topography: Generally rolling.
Present use: Farming.
Highest and best use with scenic easement: Farming.
Highest and best use without scenic easement: Farming.
Sale data: Vol. 278, p. 531.

Grantor:	W. L. Priest
Grantee:	Allen Poe
Sale date:	June 1965

Sale price:	$20,000
Sale price/acre:	$102
Revenue stamps:	None
Verified by:	Mr. Poe and public records
Type of conveyance:	Warranty deed

Inspection date: July 1967

Comment: The grantee was represented by an attorney, who explained the scenic easement restrictions. The grantor retained one-half of the oil, mineral, and gas rights.

Comparison: Comparable sale 41, located in Lee County, has an area of 43.76 acres, none of which is encumbered by scenic easement. The comparable sale has a 6-room house, a barn, and a garage located on the property. The farmland consists of approximately 20 acres in cropland, 10 acres in pasture, and 13 acres in woods. Approximately 8.7 acres had been awarded a cotton allotment.

Comparable sale 43, an 80-acre tract located in Pontotoc County, consists of 40 acres in timber and 40 acres in pasture and is considered as potential row cropland. There were no building improvements located on the comparable sale property.

Comparable sale 41 sold in November 1961 for $8,500, or $194 per acre. Comparable sale 43 sold in March 1965 for $2,500, or $31 per acre. Neither of the comparable sales was considered to be in the path of general development nor were these sales encumbered by scenic easement restrictions.

Conclusion: Although comparable sale 43 is not an operating farm, it is located in Pontotoc County approximately 1 mile southwesterly of the subject property. This comparable sale had 40 acres in woods and 40 acres of potential cropland. This sale indicates a price of $31 per acre as strictly pasture land. If the 40 acres were in cropland, the value would be approximately $125 to $150 per acre, which was indicated in interviews with the local farmers, who estimated a cost of approximately $100 per acre to prepare the soil for agricultural use. If the 40 acres were available for cropland, this would increase the value approximately $100 per acre, or $4,000. This comparable sale would then have an overall value of $6,500, or $80 per acre. This is less than the subject property; however, the subject property has a residential home and outbuildings, which would more than offset this value difference.

In comparing comparable sale 41 to the subject property, there is a variance from $194 per acre to $102 per acre for the subject property. Inasmuch as both properties were improved with a 6-room house and outbuildings, the difference probably is cause directly by the smaller parcel creating a higher unit price. In addition, comparable sale 41 had approximately 47 percent of the total acreage in cropland, compared to 27 percent for the subject property. The cotton allotment on each of the parcels was fairly comparable; because cotton allotments are a saleable commodity this would also reflect a higher unit price for the smaller parcel.

There appears to be no foreseeable change in the highest and best use, and the subject property is not located in an area that is in the path of development. Although the property is encumbered by scenic easement restrictions, there seems to be no loss in value other than nominal-type compensation.

CASE STUDY 35 (Comparison Sale)

Location: In Lee County approximately 2 miles southwesterly of Tupelo, Miss., and located on both sides of the Natchez Trace Parkway.

Area of the whole property: 31.66 acres.

Area of the scenic easement: Approximately 3 acres.

Purpose of the scenic easement: To preserve an agricultural scene along the Natchez Trace Parkway.

Restrictions and permitted uses: (Same as for Case Study 30).

Description of the whole property: The improvements on the subject property are a single-family residence and one small building used for a neighborhood-type beauty shop operation. Of the 31.66 acres, approximately 20.66 acres are in pasture. The remaining 11 acres are good bottomland and the soil is excellent. The 3 acres encumbered with a scenic easement are located on both sides of the Natchez Trace Parkway.

General neighborhood description and trends: Rural area that is agricultural and in pasture land. However, across the road from the subject property some small tracts have been sold for residential use. The property is generally considered in the path of development, and the sale was made to an agent for the party considering the property for residential development.

Topography: The subject property is approximately 2 to 3 ft below grade of the Natchez Trace Parkway and generally level to slightly rolling.

Present use: Agricultural.

Highest and best use with scenic easement: Due to the scenic easement, 3 acres have a highest and best use as farming; the balance of the land (28.66 acres) has subdivision potential with an interim use as pasture, homesite, and farming.

Highest and best use without scenic easement: The whole property has residential subdivision potential with an interim use as farming.

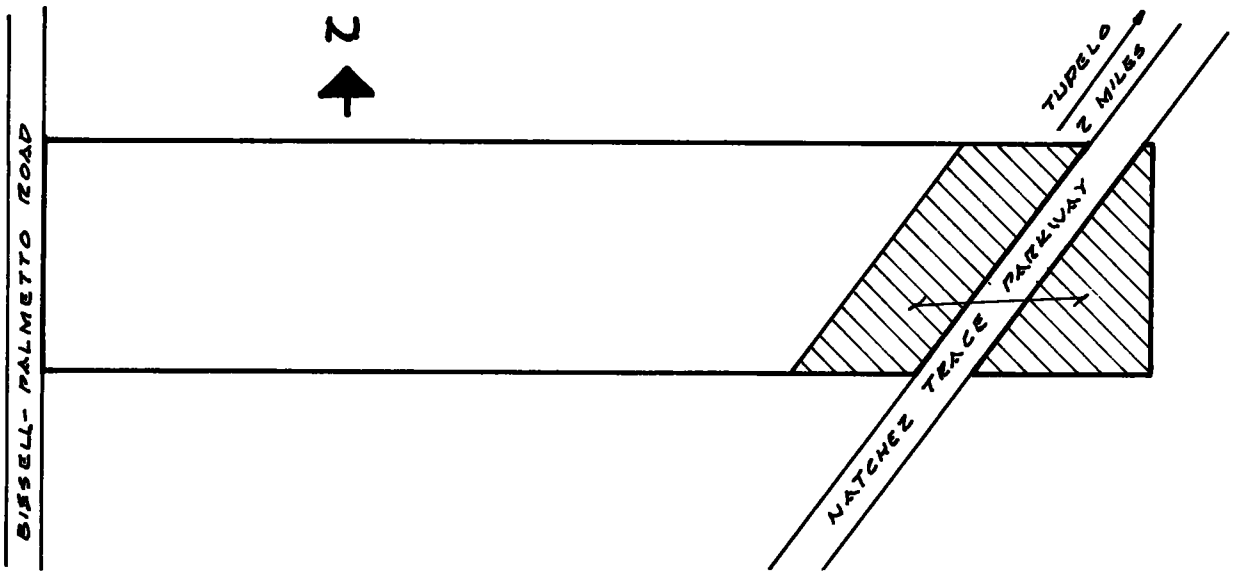
Sale data: Vol. 804, p. 427.

Grantor:	Guy Metcalfe
Grantee:	Robert E. Tedford (Agent)
Sale date:	March 1967
Sale price:	$14,000
Sale price/acre:	$442
Revenue stamps:	$15.40
Verified by:	Mr. Metcalfe and public records
Type of conveyance:	Warranty deed

Comment: Subject property was sold in conjunction with case study 36.

Sale breakdown: Value of the 3 acres encumbered with scenic easement restrictions based on sales of similar farm acreage:

3 acres @ $300	= $900
Sale price	= $14,000
Attributable to balance of lands with subdivision potential	= $13,100



Indicated sale price of the acreage with subdivision potential: ($13,000/28.66 acres)	= $457/acre
Indicated loss per acre due to the scenic easement restrictions: ($457 − $300)	= $157/acre
Percentage loss due to use change on a per acre basis of the scenic easement area	= 34%

Comparison: Comparable sale 42, a 12.66-acre parcel, none of which is encumbered by scenic easement, was sold in October 1958 for $750, or $59 per acre. An interview with the grantee indicated that he purchased the property as pastureland and also for long-range speculation. The property across the road is a new subdivision and is approximately the same distance from Tupelo as the subject property. An appraisal made on comparable sale 42 in March 1965 valued it at $4,400, or $348 per acre. This clearly indicates an increase in value due to a potential use change.

Case study 36, a 32-acre tract, 7 acres of which are encumbered by scenic easement, sold in September 1963 for $6,000, or $188 per acre. The 11 acres of bottomland of the comparable sale at $300 per acre (indicated by case study 30) equals $3,300. The balance of $2,700 indicates that $129 per acre was paid for the remaining 21 acres. Because $129 per acre exceeds the current price of pastureland in the general area not considered in the path of development, this clearly indicates that in 1963 the property was increasing in value due to the proximity of the City of Tupelo.

Case study 36 was then resold in April 1967 for $13,500. This definitely indicates a change in the highest and best use of the property and the following valuations were attributed to this sale:

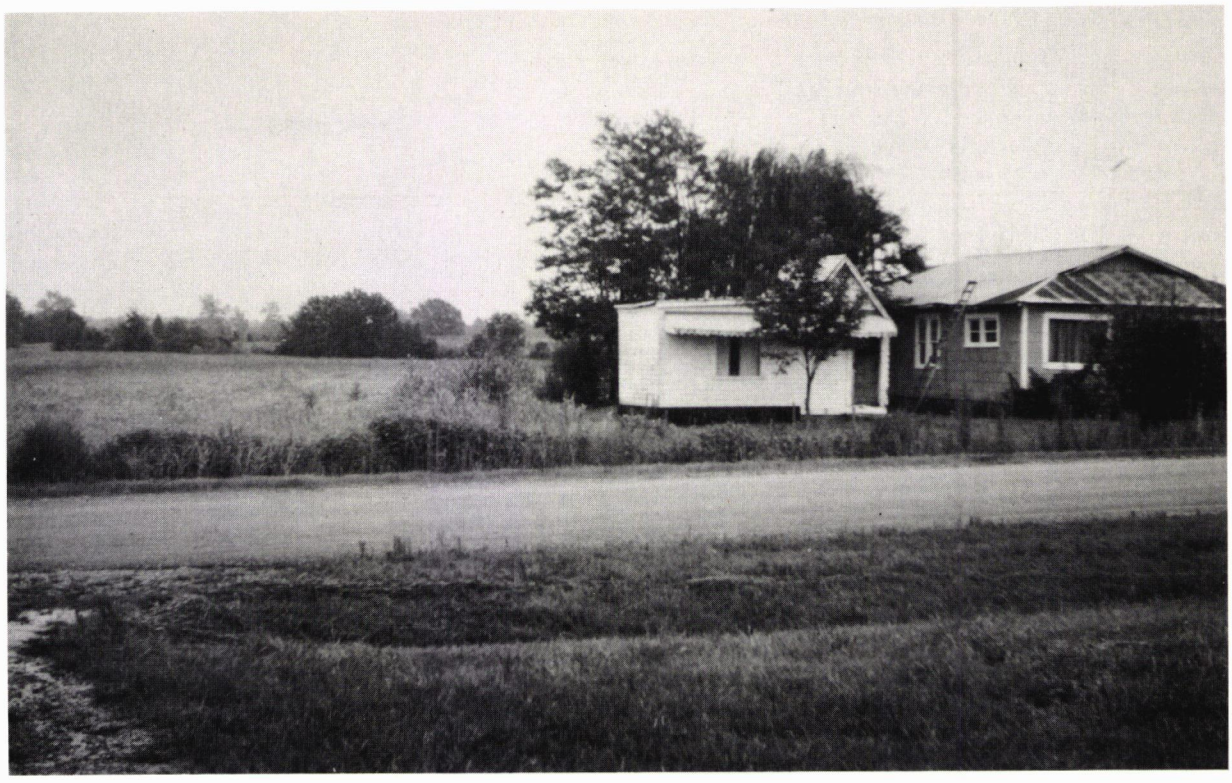
Seven acres encumbered by scenic easement at $300 per acre equals $2,100. The balance of $11,400, attributable to the 25 remaining acres, indicates a price of $456 per acre.

Although case study 36 did not have any improvements on the property, as did the subject property, the unit selling price was the same. This indicates that the buyer did not consider the improvements in his evaluation of the property.

In comparable sale 42, $59 per acre was paid in October 1958. Case study 36 is a sale of the property in September 1963, indicating a price of $129 per acre for the property unencumbered by scenic easement. In March 1965 an appraisal was made on comparable sale 42 indicating a price of $348 per acre. The property in case study 36 sold in April 1967 for $456 per acre.

Conclusion: Inasmuch as the subject property, comparable sale 42, and case study 36 are located in the same general area and are all considered to be in the path of general development, the sale and appraisal of the property clearly indicates a change in value by time due to the proximity of the City of Tupelo, Miss.

The sale breakdown of this case study indicates a value of the scenic easement portion of the property based on the known factor of the encumbered property of 11 acres as shown in case study 30. The loss in value of $156 per acre for that portion of the property encumbered with scenic easement restrictions is due to a change in use, and indicates approximately 34 percent of the fee value of the restricted acreage.



Case Study 35. Looking easterly across the Bissell-Palmetto Road.

Case Study 35. Looking westerly from the Natchez Trace Parkway.

CASE STUDY 36 (Comparison Sale)

Location: In Lee County approximately 2 miles southwest of Tupelo, Miss., and along the Natchez Trace Parkway.
Area of the whole property: 32 acres.
Area of the scenic easement: 7 acres.
Purpose of the scenic easement: To preserve an agricultural view from the Natchez Trace Parkway.
Restrictions and permitted uses: (Same as for Case Study 30).
Description of the whole property: Of the total of 32 acres, 21 acres are in pasture and 11 acres in bottomland. No building improvements were located on the property.
General neighborhood description and trends: A rural area that is agricultural and in pasture land. However, across the road from the subject property some small tracts have been sold for residential use. The property is generally considered in the path of development, and the sale was made to an agent for the party considering the property for residential development.
Topography: Approximately 2 to 3 ft below grade of the Natchez Trace Parkway and slightly rolling.
Present use: Agricultural.
Highest and best use with scenic easement: The 7 acres encumbered with the scenic easement have agriculture as highest and best use; the remaining 25 acres have a potential use as residential subdivision, with an interim use as agricultural.
Highest and best use without scenic easement: The whole property (32 acres) has a highest and best use as residential subdivision potential, with an interim use as agricultural.

Sale data: Vol. 804, p. 594.

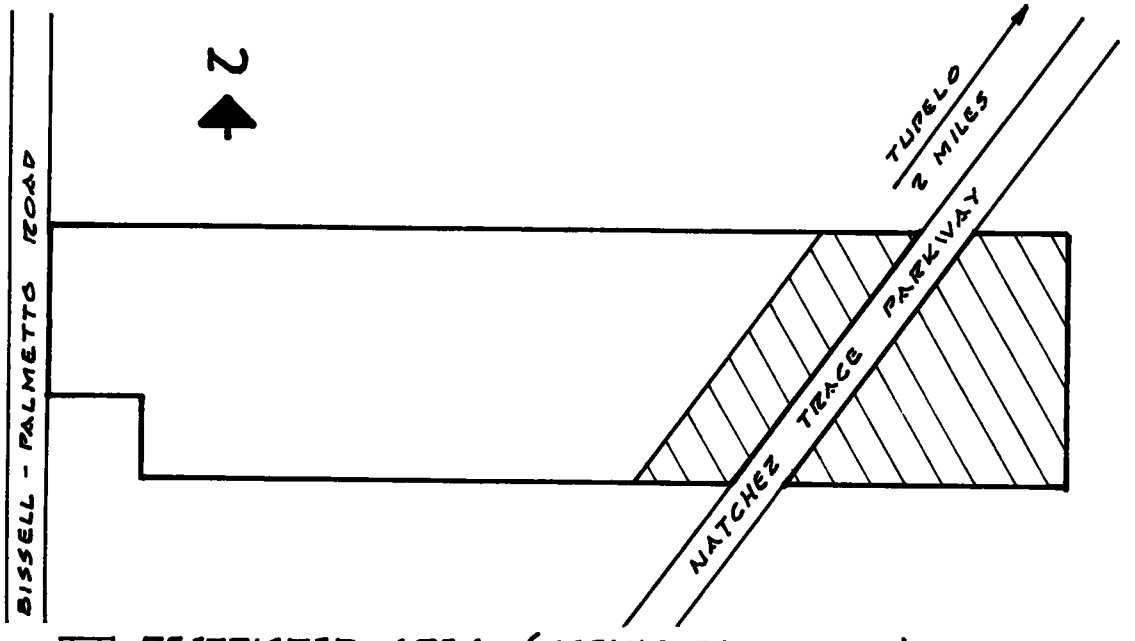
Grantor:	Douglas (Pete) Harris
Grantee:	Robert E. Tedford (agent)
Sale date:	April 1967
Sale price:	$13,500
Sale price/acre:	$422
Revenue stamps:	$14.85
Verified by:	Mr. Guy Metcalfe and public records
Type of conveyance:	Warranty deed

Comment: This property was sold in conjunction with case study 35.
Inspection date: July 1967.

Prior sale: Vol. 655, p. 260.

Grantor:	Guy M. Metcalfe, et ux
Grantee:	Douglas (Pete) Harris
Sale date:	September 1963
Sale price:	$6,000
Sale price acre:	$188
Revenue stamps:	$6.60
Verified by:	Mr. Metcalfe and public records
Type of conveyance:	Warranty deed

Comment: Grantor indicated that the property was sold because of health reasons, as the acreage was becoming too difficult for him to work.
Sale breakdown: The value of the 7 acres encumbered with the scenic easement restrictions and based on the sales of similar farm acreage indicate the following:



Case Study 36. Looking westerly from the Natchez Trace Parkway.

7 acres @ $300 per acre	= $ 2,100
Sale price	= $13,500
Value of the scenic easement area	= $ 2,100
Attributable to the balance of the lands with subdivision potential	= $11,400
Indicated sale price of the acreage with subdivision potential: ($11,400/25 acres)	= $456/acre
Indicated loss due to the scenic easement per acre ($456 — $300)	= $156/acre
Percentage loss due to use change on a per acre basis of the scenic easement area	= 34%

Comparison: Comparable sale 42, a 12.66-acre parcel in pasture and located approximately the same distance from Tupelo as the subject property, sold in October 1958 for $750, or $59 per acre. Because this represents a price slightly higher than that paid for normal pasture land in the general area, the Grantee when interviewed indicated that the property was purchased for pasture land and long-range speculation. A local appraiser in March 1965 indicated a value of $345 per acre. This property was not encumbered by scenic easements.

Case study 35 is a 31.66-acre parcel of which 20.66 acres are in pasture, and 11 acres in good bottom cropland. This property had 3 acres encumbered by scenic easement on both sides of the Natchez Trace Parkway, and adjoined the subject property on the north.

Conclusion: Because the subject property adjoins comparable case study 35 and comparable sale 42 and is located in the same general area, any change in the area affects all the properties approximately equally. In October 1958 comparable sale 42 sold for $59 per acre. In September 1963 the subject property was sold for approximately $129 per acre for that portion not encumbered by a scenic easement. In March 1965 comparable sale 42 was appraised at $348 per acre. In March 1967 case study 35 sold for $457 per acre for that portion not encumbered by scenic easement. Comparable sale 42 is located across the Bissell-Palmetto Road from a new residential subdivision. The subject property and case study 35 are located across the street from small individual parcels of land that have been sold off from the parent tract for residential purposes.

In the September 1963 sale of the subject property the indicated price per acre was arrived at by evaluating the 11 acres of bottomland at $300 per acre (which is borne out by the factor as shown in case study 30). Therefore, 11 acres at $300 equals $3,300. The balance of $2,700 is attributable to the remaining 21 acres of the property, indicating a price of $129 per acre for the pasture lands.

Case study 35 had a 3.6-acre cotton allotment in addition to the two houses, one a frame residence and the other small building used as a beauty shop. The equal price paid for the two properties (as shown in the sales breakdown) clearly indicates that the buyer purchased the property for potential residential subdivision. These sales indicate that the two frame building improvements and the cotton allotment of case study 35 were not considered as a factor in the sales negotiation.

Therefore, the loss shown in the sales breakdown of this case study attributable to that portion of the property encumbered with scenic easement restrictions was due directly to a potential change in the highest and best use of the subject property, and 34 percent represents the ratio of loss due to the scenic easement restrictions.

APPENDIX G

CASE STUDIES: EXCHANGE AND COMPARISON SALES

CASE STUDY 37 (Exchange)

Location: In Attala County on the outskirts of the City of Kosciusko, Miss., at the southeast corner of Bypass Highway 35 and East South Street. The property is located on both sides of the Natchez Trace Parkway.

Area of the whole property: Several hundred acres owned by Mr. Hight, of which approximately 100 acres were encumbered by a scenic easement.

Area involved in the scenic easement exchange: Because of the location, this property was divided into three parcels: Parcel A, 28.641 acres; parcel B, 6.706 acres; parcel C, 22.514 acres; total, 57.861 acres.

Purpose of the exchange: To deed in fee to the U. S. Government parcel A in exchange for the release of the scenic easement restrictions on parcels B and C.

Purpose of the scenic easement: To preserve a rural scene along both sides of the Natchez Trace Parkway.

Restrictions and permitted uses: (Same as for Case Study 30).

Description of the whole property: Approximately 200 to 300 acres; generally low and primarily used for pasture, some scattered timber, and the area is subject to occasional flooding. However, the basis of this case study is limited to parcels A, B, and C, which have a total area of 57.861 acres.

Description of property involved in the exchange: Parcel A consists of 28.641 acres and is located adjacent to the Natchez Trace Parkway. It is wooded and above the grade of the road. Parcel B consists of 6.706 acres, is sparsely wooded, and is at grade with East South Street. Parcel C consists of 22.514 acres, is wooded and partially open, and is below the grade of the road.

General neighborhood description and trends: The subject property is located on the outskirts of the City of Kosciusko, Miss., in a neighborhood that is developing with new residential, commercial, and industrial properties at the present time.

Access and topography of the exchanged property: Access to parcel A is good from gravel-paved East South Street. The topography is generally good and above the grade of East South Street, with a slight slope in a southeasterly direction. Access to parcel B is good from blacktop-paved Bypass Highway 35 and to gravel-paved East South Street. The topography is high, above the grade of Bypass Highway 35, slopes northerly, and is level and at grade with East South Street. Access to parcel C is good from gravel-paved East South Street. The topography is generally low, with a slight slope in a southeasterly direction.

Use prior to the exchange: All of the parcels in question are encumbered by scenic easement restrictions, which negate the cutting of the timber portion of the property. Therefore, the property was used primarily for grazing purposes.

Zoning: Neither the City of Kosciusko, Miss., nor Attala County have zoning laws. If a change in use is anticipated, one can submit an application either to the City of Kosciusko, or if the property is located outside the city limits, to Attala County, and permission would be granted for the use change provided it served the best interest of the area.

Highest and best use with scenic easement: Limited pasture.

Highest and best use without scenic easement: Commercial or light industrial for parcels A and B, and pasture and/or limited light industrial use for parcel C.

Basis of exchange: On the basis of an appraisal made prior to the date of the exchange, parcel A (28.641 acres) was deeded in fee to the U. S. Government in exchange for the release of the scenic easement restrictions on parcels B and C (29.220 acres). These exchanges were effected on the basis of dollar-for-dollar value; that is, the combined value of the scenic easements in exchange for a like value of "fee" property.

Value without the scenic easement restrictions: Subsequently in this case study it is shown that parcels B and C were sold after the release of the scenic easement restrictions.

Scenic easement restriction date: July 24, 1939.

Exchange data: Vol. 208, p. 172.

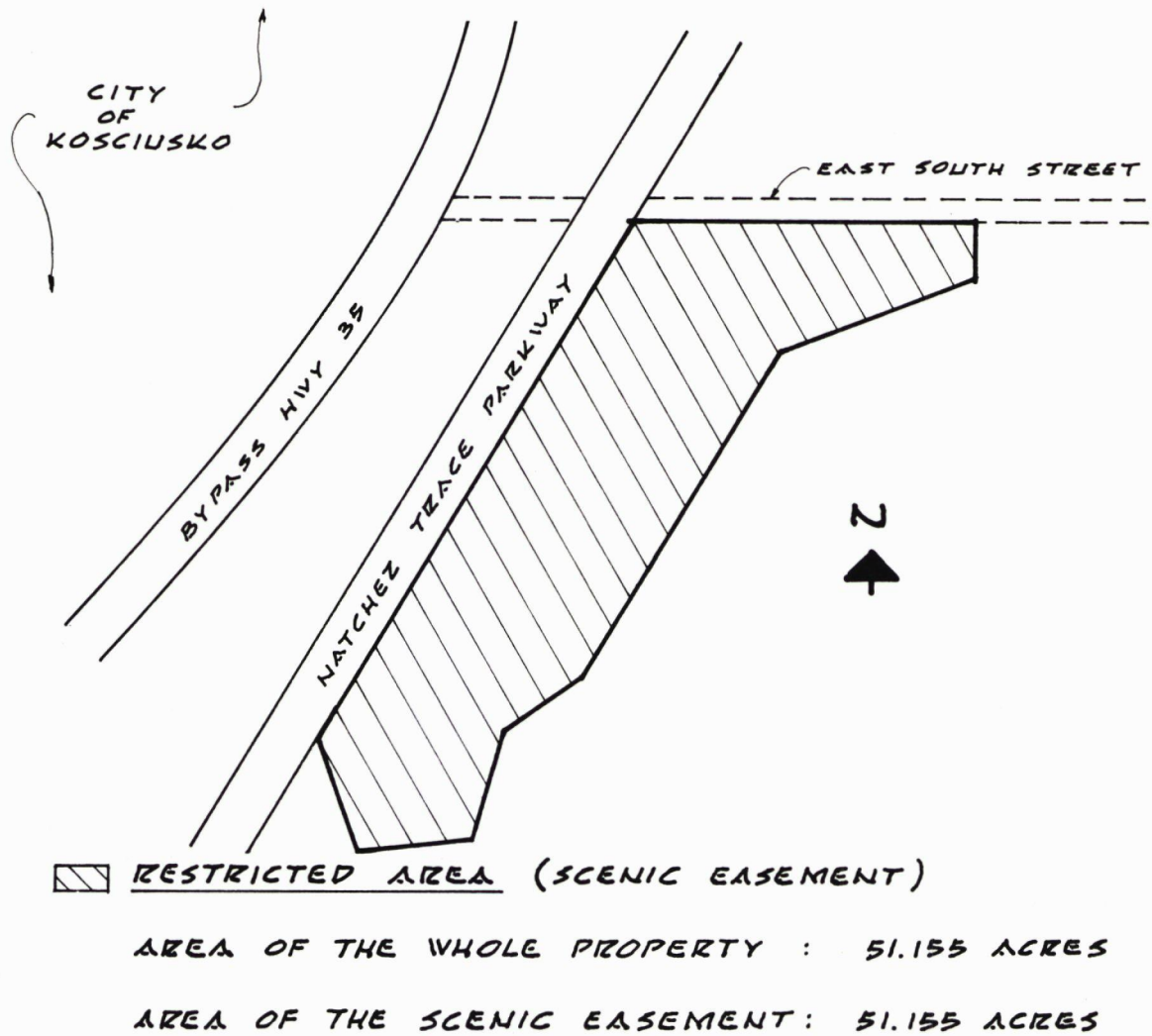
Grantor:	Herbert Hight
Grantee:	United States of America
Exchange date:	12/30/61
Verified by:	Mr. Hight, National Park Service Records, and public records
Type of conveyance:	Exchange deed

Inspection date: July 1967.

Sale history of parcel A

Sale A-1: Vol. 121, p. 386.

Grantor:	Thomas W. Rosamond, et al.
Grantee:	Herbert Hight
Sale area:	51.115 acres, including parcels A and C
Scenic easement area at sale date:	51.115 acres
Sale date:	February 1946
Sale price:	$6,250
Sale price/acre:	$122
Revenue stamps:	None
Verified by:	Mr. Hight and public records
Type of conveyance:	Deed



Parcel A, sale A-1.

Case Study 37. Looking southeasterly from the Natchez Trace Parkway at parcels A and C.

Conclusion: The grantee purchased the property in the immediate postwar period for the purpose of extending his holdings. He indicated that at the time of purchase the scenic easement had had no effect on the property value. No comparable sales were researched due to the age of this sale. This item is mentioned only to indicate that at the time of purchase there was no anticipated change in the highest and best use, that the property was purchased with full knowledge of the scenic easement restrictions, and that the buyer indicated that the easement had no effect on the sale.

Sale history of parcel B

Sale B-1: Vol. 212, p. 88.

Grantor:	Herbert Hight
Grantee:	Superior Coach Company
Sale area:	6.706 acres
Scenic easement area at sale date:	None (released)
Sale date:	May 1962
Sale price:	$16,787.50
Sale price/acre	$2,500
Revenue Stamps:	None affixed
Verified by:	Mr. Hight, William R. Ford (attorney for Mr. Hight), and public records
Type of conveyance:	Deed

Comparison: Case study 39, a 49.7-acre tract, of which approximately 4 acres were encumbered by a scenic easement, had access to Bypass Highway 35 via a dirt and gravel road. The property was slightly low and required fill. This property sold in June 1964 for $50,000, or $1,006 per acre.

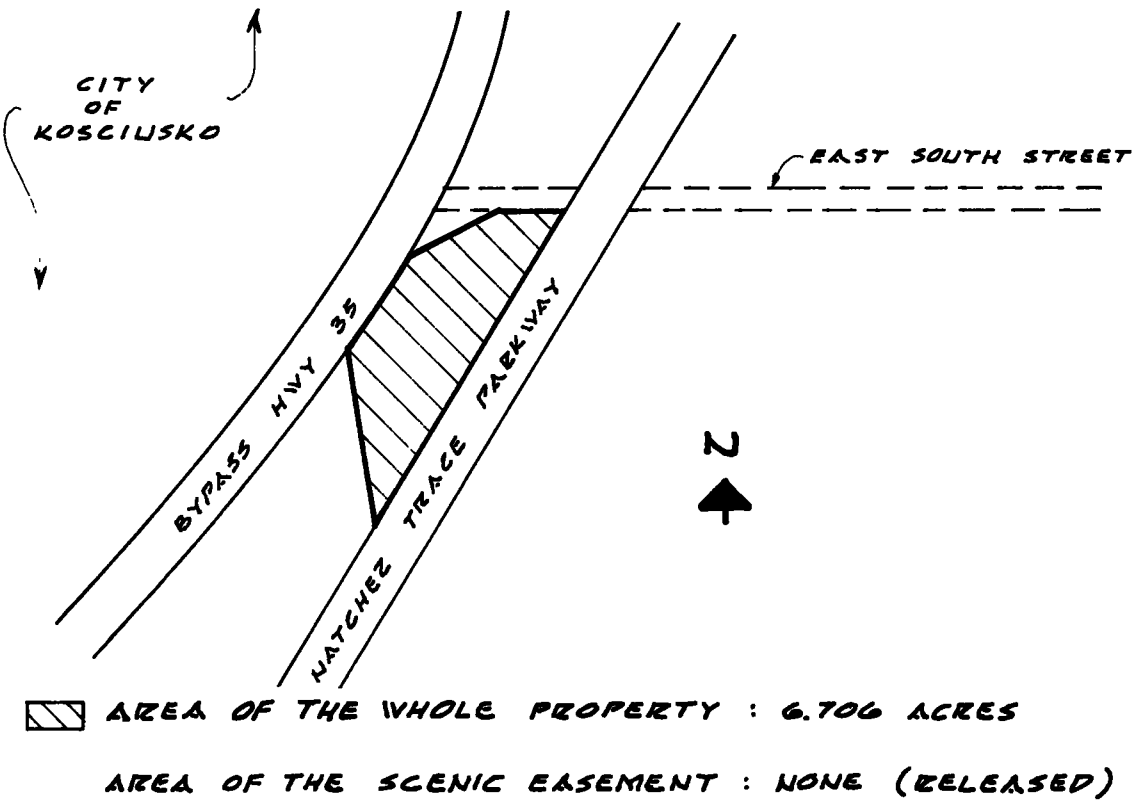
Comparable sale 45, a 6.4-acre tract, none of which was encumbered by a scenic easement, was high ground, had good frontage on Bypass Highway 35, and was considered superior to the subject property. This property sold in March 1957 for $6,500, or $1,015 per acre.

Comparable sale 46, a 1.09-acre tract, none of which was encumbered by a scenic easement, was good high ground, but it was a landlocked parcel and had no access except across the lands of others. This property sold in March 1958 for $500, or $459 per acre.

Conclusion: Case study 39 had no frontage on the blacktop highway, required fill, and approximately 4 acres was encumbered by scenic easement restrictions. This property sold in June 1964 for $1,006 per acre and was considered inferior to the subject property.

Comparable sale 45 was a parcel similar in size to the subject property and sold in March 1956 for approximately $1,015 per acre. This property was purchased "as is"; subsequent to this sale it was rezoned for light industrial use. Due to the rezoning, the location, and the topography, this property was generally considered superior to the subject property.

Comparable sale 46 sold in March 1958 for $459 per acre. This is high ground and adjacent to comparable sale



Parcel B, sales B-1, B-2, and B-3.

Case Study 37. Looking southeasterly from the Natchez Trace Parkway at portion of 270 acres including parcels A and C.

45. However, this parcel was landlocked and the only access to the comparable sale was across the lands of others; its only use would be to an adjoining owner. The sale in March 1958 was to an adjoining owner (the same grantee as in comparable sale 45), who purchased it to expand his operations. Although the adjoining owner may have had a specific need for it, the fact that the parcel was landlocked was certainly reflected in the price paid.

An appraisal of the subject property at the time of the exchange with the U. S. Government in December 1961 showed a value with the scenic easement of $250 per acre. The sale of the subject property in May 1962, after the scenic easement was released, indicated a price of $2,500 per acre. This can be attributed directly to a change in the highest and best use, and the release of the scenic easement restrictions on the property.

Sale B-2: Vol. 226, p.15.

Grantor:	Superior Coach Corp.
Grantee:	Southern Inns, Inc.
Sale area	6.706 acres

Case Study 37. Looking northeasterly from Bypass Highway 35 at parcel B.

Scenic easement area at sale date:	None (released)
Sale date:	July 1964
Sale price:	$17,000
Sale price/acre:	$2,532
Revenue stamps:	$18.70
Verified by:	Public records
Type of conveyance:	Warranty deed

Conclusions: It was indicated in sale B-1 that the property had a value of $250 per acre before the release of the easement restrictions. After the release of the scenic easement restrictions, the property was sold in May 1962 for $2,500 per acre. In July 1964 the property without the scenic easements sold for $2,532 per acre. This increase can be attributed directly to a change in the highest and best use and the release of the scenic easement restrictions on the property.

Sale B-3: Vol. 241, p. 144.

Grantor:	Southern Inns, Inc.
Grantee:	Superior Coach Corp.
Sale area:	6.706 acres
Scenic easement area at sale date:	None (released)
Sale date:	June 1966
Sale price:	$20,000
Sale price/acre:	$2,978
Revenue stamps:	$22
Verified by:	Public records
Type of conveyance:	Warranty deed

Conclusions: In sale B-1 (May 1962) it was shown that the subject property had a value of $250 per acre before the scenic easement restrictions were released and $2,500 per acre after release of the easement. The property sold in June 1966 for $20,000, or $2,978 per acre.

Within six months after the scenic easement restrictions were lifted in December 1961, the property was sold for $2,500 per acre. This was due to the change of highest and best use and the demand for this type of property at that time. Subsequent sales in July 1964 and the current sale in June 1966 show additional increases, indicating that the City of Kosciusko was expanding southerly toward the subject property and the demand was becoming greater.

Sale history of parcel C

Sale C-1: Vol. 214, p. 447.

Grantor:	Herbert Hight
Grantee:	Mississippi Industrial Land and Timber Corp.
Sale area:	270 acres (including all of parcel C)
Scenic easement area at sale date:	None of parcel C (there was still approximately 40 acres in scenic easement not part of case study 37)
Sale date:	March 1963
Sale price:	$9,500
Sale price/acre:	$35
Revenue stamps:	$10.45
Verified by:	Mr. Hight and public records
Type of conveyance:	Warranty deed

Comments: The subject property was sold less the mineral rights, and Mr. Hight took the sale price of $9,500 in company stock.

General neighborhood description and trends: Northwesterly of the subject property is a new residential area; northeasterly and southwesterly of the subject property along Bypass Highway 35 are located some industrial tracts. The neighborhood can best be described as increasing in value at the present time. However, due to the subject property being located on the easterly side of the Natchez Trace Parkway, which is a limited-access highway and tends to act as a natural barrier, it is doubtful at this time whether the expansion of the city of Kosciusko will extend beyond the Parkway.

Access and topography: Access to the subject property is good from gravel-paved East South Street. The topography is generally high ground at the northwestern portion, but sloping easterly the property becomes marshland.

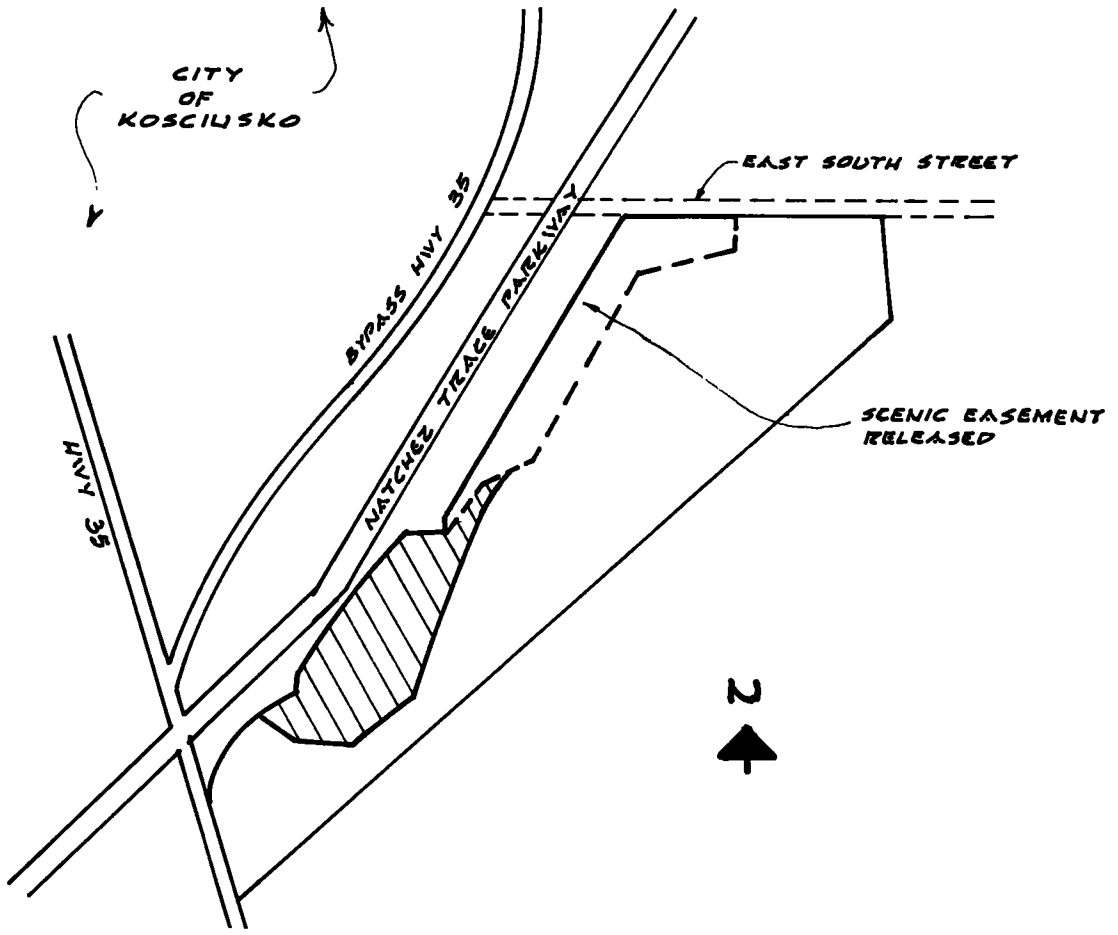
Description of the whole property: Generally pasture land, with some scattered timber which is not considered marketable at the present time. There is a lagoon located on the subject property, and the property has a tendency to flood.

Comparison: Comparable sale 47 is a 98.9-acre tract, of which approximately 45 acres are encumbered with a scenic easement. This is low land, subject to flooding, and is very similar to the subject property with the exception that access to the comparable sale is by a private road across the lands of others. This road is passable only in dry weather. The property was sold in February 1956 for $2,500; or approximately $25 per acre.

Conclusion: Comparable sale 47 is similar to the subject property in that it is partially wooded and usable for pasture. Both parcels are subject to flooding; however, the subject property has better access. The difference between the subject sale price of $35 per acre and the comparable sale price of $25 per acre could be attributed to the lack of access on the comparable sale property. The subject property included approximately 22.5 acres (parcel C) on which the scenic easement restrictions had been released. The release of the scenic easement restrictions probably did not affect the value in this sale due to the size and type of property.

Sale C-2: Vol. 224, p. 137.

Grantor:	Mississippi Industrial Land and Timber Corp.
Grantee:	City of Kosciusko
Sale area:	25.56 acres (approx. 12.56 acres was part of parcel C)
Scenic easement area at sale date:	None (released)
Sale date:	April 1964
Sale price:	$3,000
Sale price/acre:	$117
Revenue stamps:	$3.30
Verified by:	Mr. Hight and public records
Type of Conveyance:	Quit claim deed



Parcel C, sale C-1.

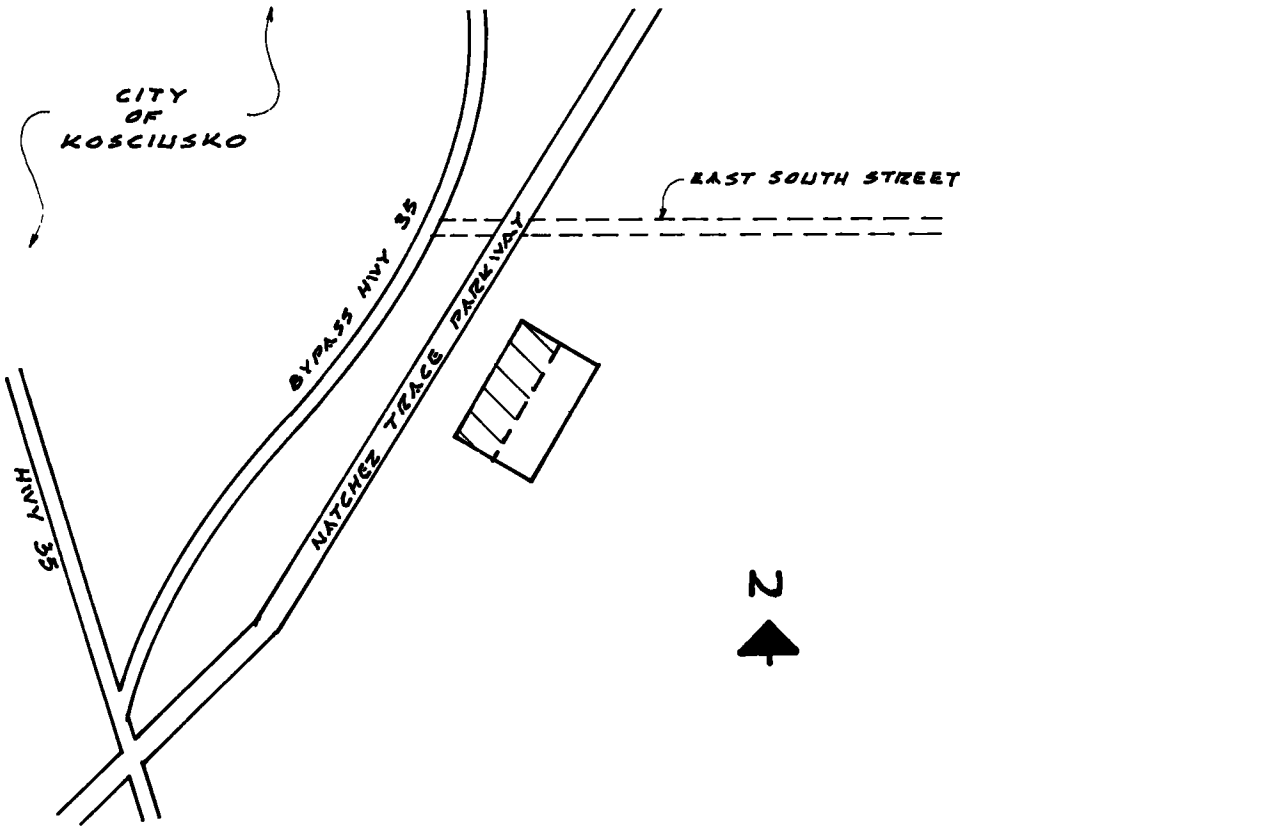
Comments: The subject property had no road frontage and an easement was granted for ingress and egress. The property was to be used for a sewage treatment area.

Description of the whole property: The northwesterly portion of the subject property, on which the scenic easement has been released, is generally high ground sloping southeasterly toward a lagoon and marshy-type property. This low area is subject to flooding.

Access and topography: The subject property has no road frontage and access to the property is by an easement across the lands of others. The topography of the subject property is low at the southeasterly portion and slightly rolling to the northwesterly portion.

General neighborhood description and trends: Northerly from the subject property is a new residential area and northeasterly and southwesterly from the subject property along Bypass Highway 35 are located some industrial tracts. The neighborhood can best be described as increasing in value at the present time. However, due to the subject property being located on the easterly side of the Natchez Trace Parkway, which is a limited-access highway, and tends to act as a natural barrier, it is doubtful at this time whether the expansion of the City of Kosciusko will extend beyond the Parkway.

Comparison: Case study 37, parcel A, sale A-1, consists of approximately 51 acres, all of which at the time of sale were encumbered by scenic easements. The comparable sale was pasture and timber and has a gravel road frontage.



Parcel C, sale C-2.

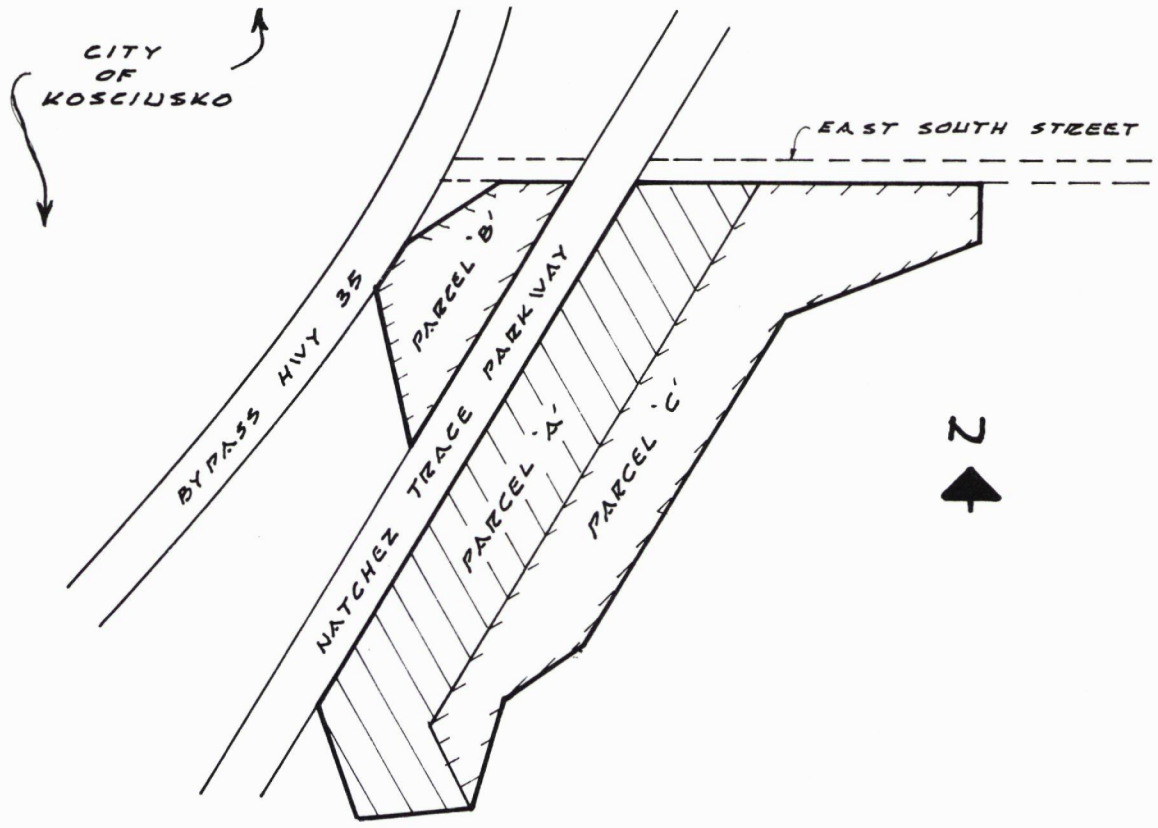
This property was sold in February 1946 for $6,250, or $122 per acre. Comparable sale 47 is a larger tract (98.9 acres) with access across the land of others, as with the subject property. This property was sold in February 1956 for $2,500, or $25 per acre.

Sale breakdown:

Sale price	= $3,000
Low swampland: 13 acres @ $25/acre	= $ 325
Attributable to 12.56 acres on which the scenic easement restrictions have been released	= $2,675
Indicated value per acre: $2,675/12.56 acres	= $213/acre
Value of 12.56 acres prior to release of scenic easement restrictions	= $122/acre
Increase in value due to release of scenic easement restrictions	= $ 91/acre
Percent of increase	= 75%

Conclusion: The subject property sold in April 1964 for $3,000, or $117 per acre. However, case study 37, parcel A, sale A-1, sold in February 1946 for $122 per acre. To more accurately measure the value of the property, the low swampland had to be separated from the balance of the property. The exact figures were not available, but according to a conversation with the grantor, the swampland was estimated to be approximately 13 acres. The balance of 12.56 acres would then be attributable to that portion on which the scenic easement restrictions had been released.

Although comparable sale 47 involved a larger tract, the comparison with the low portion of the subject property is considered equal. The indicated price of $25 per acre for comparable sale 47 would apply equally to the portion encumbered by scenic easement as well as the portion not encumbered by scenic easement. The balance of the property can then be valued on the basis of its own merit, as shown in the sale breakdown. The portion of the subject property encumbered by the scenic easement was valued at $122 per acre. After the release of the scenic easement the property, by actual sale, brought $213 per acre, an increase of $91 per acre due to the release of the scenic easement restrictions, and a change in the use of the property.



AREA OF THE EXCHANGE PROPERTY :

PARCEL A	=	28.641
PARCEL B	=	6.706
PARCEL C	=	22.514
TOTAL	=	57.861 ACRES

NOTE: U.S. GOVERNMENT ACQUIRED PARCEL 'A' IN FEE, IN EXCHANGE FOR THE RELEASE OF THE SCENIC EASEMENT ON PARCEL 'B' & PARCEL 'C'.

Case Study 37. Location and area of exchange properties.

Case Study 37. Looking easterly from parcel A at lagoon in parcel C.

CASE STUDY 38 (Exchange)

Location: In Attala County at the outskirts of the City of Kosciusko, Miss., at the northeast junction of Bypass Highway 35 and East South Street. The subject property is located on both sides of the Natchez Trace Parkway.
Area of the whole property: Approximately 39 acres.
Area involved in the scenic easement exchange: Parcel A, 17.134 acres; parcel B, 4.349 acres; total, 21.483 acres.
Purpose of the exchange: To deed in fee to the U. S. Government parcel A in exchange for the release of the scenic easement restrictions on Parcel B.
Purpose of the scenic easement: To preserve a rural scene along both sides of the Natchez Trace Parkway.
Restrictions and permitted uses: (Same as for Case Study 37).
Description of the whole property: The whole property consists of approximately 39 acres, of which approximately 21.5 acres are encumbered by a scenic easement. The property is generally low and that portion east of the Natchez Trace Parkway is subject to flooding. For the most part the property is pasture land; however, there are a few trees, but these are not considered to be merchantable timber.
Description of the property involved in the exchange: Parcel A generally follows the description of the whole property. Parcel B, on the westerly side of the Natchez Trace Parkway, is at the northeast corner of Bypass Highway 35 and East South Street, is generally below grade, but is not swampy such as the property located east of the Natchez Trace Parkway.
General neighborhood description and trends: This area on the outskirts of the City of Kosciusko, Miss., is developing with new residential, commercial, and industrial properties at the present time. A short distance from the subject property and located along blacktop Bypass Highway 35 is a tract of land purchased in 1957 whose use has been changed to light industrial. In view of the increased activity in the general area and the expansion of the residential section, property values were increasing at the time of the exchange.
Access and topography of the exchange property: Access to parcel A was good from gravel-paved East South Street; the topography was generally low and subject to periodic flooding. Access to parcel B was good from blacktop-paved Bypass Highway 35, and also from gravel-paved East South Street. Topography was generally low, slightly below street grade, and sloping northward.
Use prior to the exchange: Parcel A is reported to have been used periodically for agricultural purposes, but at the time of the exchange was used for grazing.

Because of its location, parcel B is isolated from the main tract and had no particular use, as cattle would have to cross the Natchez Trace Parkway in order to utilize this small parcel.
Zoning: Neither the City of Kosciusko nor Attala County have any zoning laws. If a change in use were anticipated, one could submit an application either to the City of Kosciusko, or, if the property was outside the city limits, to Attala County, and permission would be granted for the use change, provided it served the best interest of the area.

Highest and best use without scenic easement: Parcel A, pasture; parcel B, commercial or light industrial.
Basis of exchange: On Feb. 13, 1964, an appraisal was made and submitted to the U. S. Government and to Mr. Potts's attorney. In this appraisal report comparable sales were used and the valuations were as follows: Parcel A value with scenic easement was estimated on the basis of $90 per acre. The value without the scenic easement was estimated on the basis of $100 per acre. Parcel B value with scenic easement was estimated to be $250 per acre, and without the scenic easement approximately $600 per acre. On the basis of these estimates of value the appraiser's conclusions are as follows:

		PRESENT VALUE TO:		VALUE IT WILL HAVE TO:	
PARCEL	ACREAGE	POTTS	USA	POTTS	USA
A	17.134	$1,542	$ 171	—	$1,713
B	4.349	$1,087	$1,522	$2,609	—
		$2,629	$1,693	$2,609	$1,713

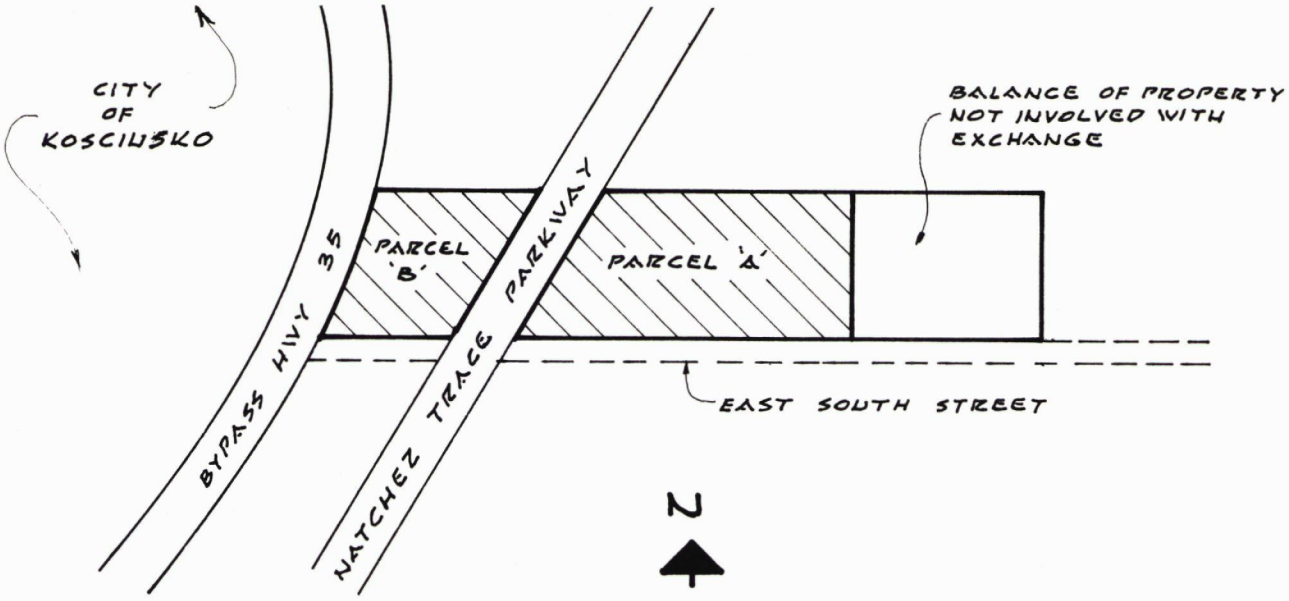
In the final analysis and on the basis of the appraisals used, the United States Government realizes a benefit of about $20 by the exchange.
Value without scenic easement restrictions: Using as a basis the conclusions drawn by the appraiser in the exchange, the following is applicable:

Parcel A
Estimate of value without scenic easement restrictions = $1,713.40
Present value to owner with scenic easement restrictions = $1,542.06
Loss of value due to scenic easement restrictions = $ 171.34
Percentage loss due to scenic easement restrictions = 10%

Parcel B
Value without scenic easement restrictions = $2,609.40
Value to owner with scenic easement restrictions = $1,087.25
Loss in value due to scenic easement restrictions = $1,522.15
Percentage loss due to scenic restrictions = 58%

Scenic easement restriction date: June 15, 1939
Exchange data: Vol. 224, pp. 94 to 98.

Grantor:	Frances S. and Hugh S. Potts
Grantee:	United States of America
Exchange date:	3/4/64
Verified by:	Mr. Potts, William R. Ford (atty.), and public records
Type of conveyance:	Exchange deed



RESTRICTED AREA (SCENIC EASEMENT)

AREA OF THE EXCHANGE PROPERTY:

PARCEL 'A'	=	17.134
PARCEL 'B'	=	4.349
TOTAL	=	21.483 ACRES

NOTE: U.S. GOVERNMENT ACQUIRED PARCEL 'A' IN FEE, IN EXCHANGE FOR THE RELEASE OF THE SCENIC EASEMENT ON PARCEL 'B'.

Case Study 38. Looking easterly at parcel A from the Natchez Trace Parkway.

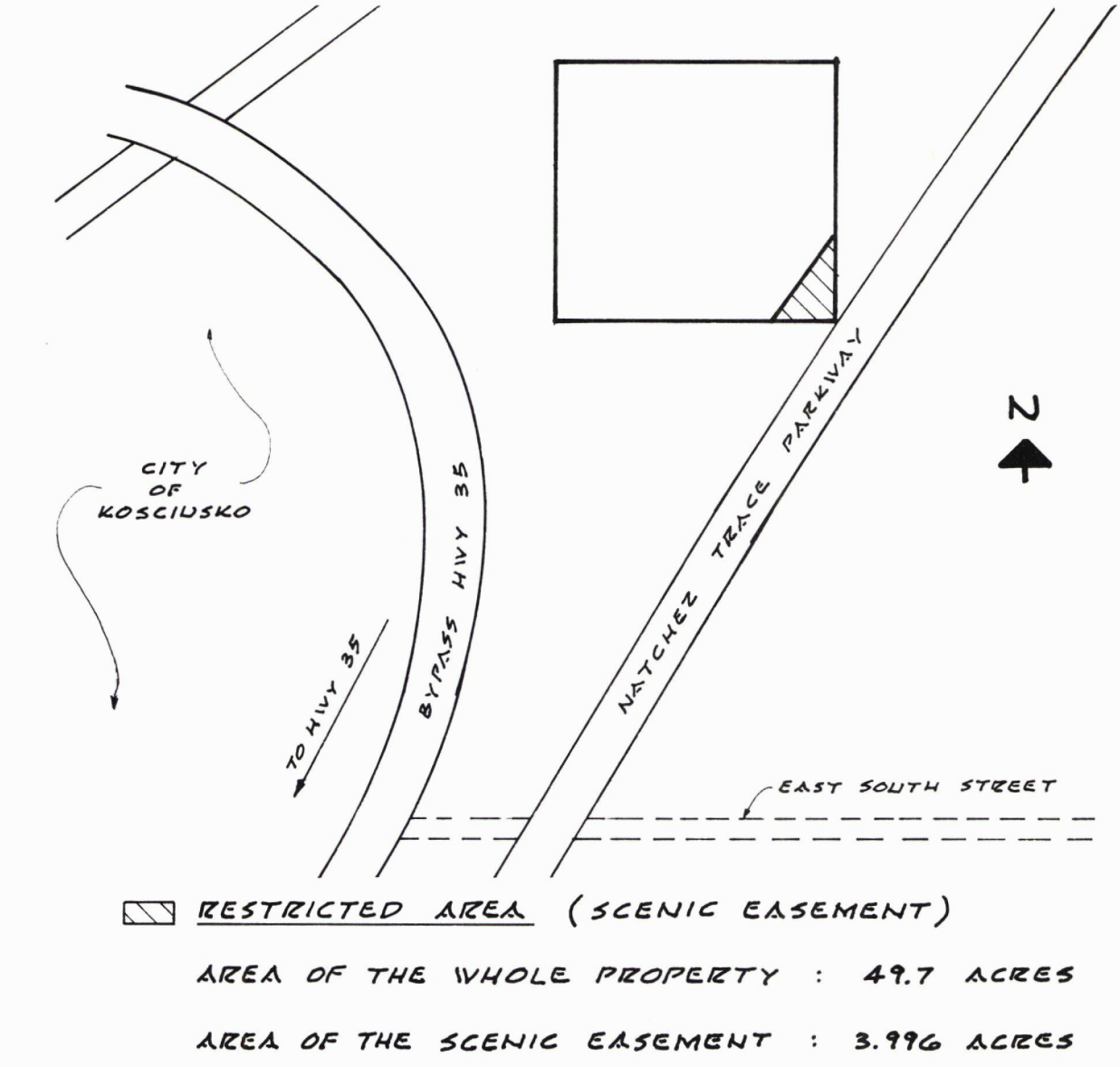
Case Study 38. Looking westerly at parcel B from the Natchez Trace Parkway.

Inspection date: July 1967.
Comments: A conversation with Mr. Potts in the presence of his attorney, Mr. Ford, revealed that Mr. Potts was satisfied with the exchange and hoped that the potential value of parcel B will more than offset the loss of the larger acreage of parcel A. At the time of the field inspection Mr. Potts already has received some benefits from the exchange in that the highway department moved its asphalt plant onto the property in March 1967. This was allowed with only a small rental being paid to Mr. Potts in exchange for fill that was needed to improve the property. The highway department estimated that the asphalt plant probably would be moved out in November 1967, and the property will then be approximately at grade, making it more usable.
Conclusion: Due to the acceptance of the exchange, all parties acknowledge a loss due to the scenic easement restrictions.

CASE STUDY 39 (Comparison)

Location: In Attala County southeasterly from the City of Kosciusko, Miss., approximately ½ mile northerly of East South Street, and between Bypass Highway 35 and the Natchez Trace Parkway.
Area of the whole property: 49.7 acres.
Area of the scenic easement: 3.996 acres.
Purpose of the scenic easement: To preserve a rural scene along the Natchez Trace Parkway.
Restrictions and permitted uses: (Same as for Case Study 30).
Description of the whole property: Approximately a square-shaped tract containing 49.7 acres. As of the date of sale the property was vacant, but as of the date of the field inspection in July 1967 it had been improved with an industrial building.
General neighborhood description and trends: On the west side of Bypass Highway 35 there is a new residential area with new brick ranch homes that are in the medium-price range. There is a school located in the general area. Southwesterly from the subject property is a tract of land that has been sold with the anticipation of building a motel; however, at the time of the field inspection no construction had been started. Due to the expansion of the City of Kosciusko and the apparent need for industrial properties, the value of the subject property can best be described as increasing as of the date of sale.
Access: The subject property is located on a gravel-paved road, but has no direct access to blacktop-paved Bypass Highway 35 except over the gravel road.
Topography: At the time of the sale the property was slightly below grade and required some fill. The property was open and the lands were in a natural state.
Present use: At the time of the sale the zoning on the subject property was open; however, subsequent to the sale the property was rezoned to light industrial, and at the time of the inspection in July 1967 an industrial plant had been constructed and was in operation.
Highest and best use with scenic easement: Light industrial except for that portion on which there was a scenic easement.
Highest and best use without scenic easement: Light industrial.
Sale data: Vol. 224, p. 306.

Grantor:	Timothy C. Wasson (47.7 acres) Billie E. Wasson (2 acres)
Grantee:	Star-Herald Publishing Co.
Sale date:	5/11/64 (47.7 acres) 6/4/64 (2.0 acres)



Case Study 39. Looking northeasterly from Bypass Highway 35.

Sale price:	$50,000
Sale price/acre:	$1,006
Revenue stamps:	None
Verified by:	Public records
Type of conveyance:	Warranty deeds

Inspection date: July 1967.

Comparison: In case study 37, Parcel A, Sale A-1, a 51.115-acre tract was sold in February 1946 for $6,250, or $122 per acre. This property was good pasture land, was high ground, and was purchased at that time to extend the buyer's farm holdings. The entire tract of land was encumbered with scenic easement at the time of sale. The area of this comparable sale encompassed both parcels A and C as outlined in the exchange of case study 37.

In case study 37, Parcel C, sale C-2, a portion of parcel C was sold, after the scenic easement had been released, along with other acreage that was low and swampy. To arrive at a value of that portion of parcel C after the release of the scenic easement, the low swampland had to be separated from the other property. After deducting the value of the low swampland, the indicated price of the remaining property (12.56 acres) was $213 per acre, which is no longer encumbered by scenic easement. This sale occurred in April 1964, at approximately the same time as the sale of the subject property.

Although there is an 18-year time difference between the two sales cited, there is an indicated value of $213 per acre for that area not encumbered by scenic easement as compared to $122 per acre in 1946 for property fully encumbered by scenic easement. Therefore, good pasture land at the present time probably would sell for $125 to $150 per acre for property fully encumbered by a scenic easement.

Conclusion: In case study 37, sale history of parcel B, it is indicated that commercial and industrial properties have sold for $459 per acre without access, to a range of $1,015 per acre in March 1957 to $2,532 per acre in July 1964 for good industrial property with highway road frontage.

Because the subject property was larger and considered inferior to the comparable sales, the $1,006 per acre paid for the subject property is considered to be the fair market value at the date of the sale.

Sale breakdown:

Selling price	= $50,000
Estimated value of scenic easement: (3.996 acres @ $150)	= $ 600
Value attributable to land not encumbered by scenic easement: (49.7 − 3.996 = 45.704 acres)	= $49,400
Selling price per acre: ($49,400/45.704)	= $ 1,081/acre
Estimated value of land encumbered by scenic easement:	= $ 150/acre
Loss per acre attributable to scenic easement restrictions	= $ 931/acre
Percent of loss due to change in highest and best use	= 86%

CASE STUDY 40 (Comparison)

Location: Shands Subdivision, located in Lee County in the northern portion of the City of Tupelo, Miss., at the southeast corner of the Natchez Trace Parkway and Highway 78.

Source of information: Public records and Mr. Partlow.

General neighborhood description and trends: Residential, recently developed, and the homes are in the medium price range. Due to the surrounding area and the comparative success of the subdivision, the trend appears to be toward increasing value at the present time.

Description of the whole property and comparable properties: The subject property is located in the northern portion of the City of Tupelo, south of Natchez Trace Parkway between Highway 78 and the Frisco Railroad Lines track. At the western portion of the subdivision a triangular section was encumbered by a scenic easement. A comparable property, Yates Acres, is located easterly of the Natchez Trace Parkway and on the west side of the City of Tupelo. Both properties are considered fairly equal, with Yates Acres being slightly newer. Both subdivisions have reasonable access to the Natchez Trace Parkway, and equal accessibility to the downtown section of the City of Tupelo. Yates Acres was not and is not encumbered with a scenic easement.

Highest and best use with scenic easement: Residential.

Highest and best use without scenic easement: Residential.

Explanation and justification: Yates Acres is a slightly newer subdivision and conversations with a Mr. Herman Partlow, Secretary of the Southwest Development Corp., developers of Yates Acres, indicated that the subdivision was opened in 1963. Originally the lots sold for approximately $1,600 each. At the time of the field inspection they had sold approximately 103 lots and were in the process of opening up their wooded section. Mr. Partlow indicated that the average price per lot was approximately $2,500 on that portion sold. Yates Acres has blacktop-paved streets with curb and gutter, sewer, water, and underground utilities. The Shands Subdivision appears to have slightly smaller lots and does not have curb and gutter. For this reason, the subdivision property at Yates Acres is slightly superior to the Shands Subdivision.

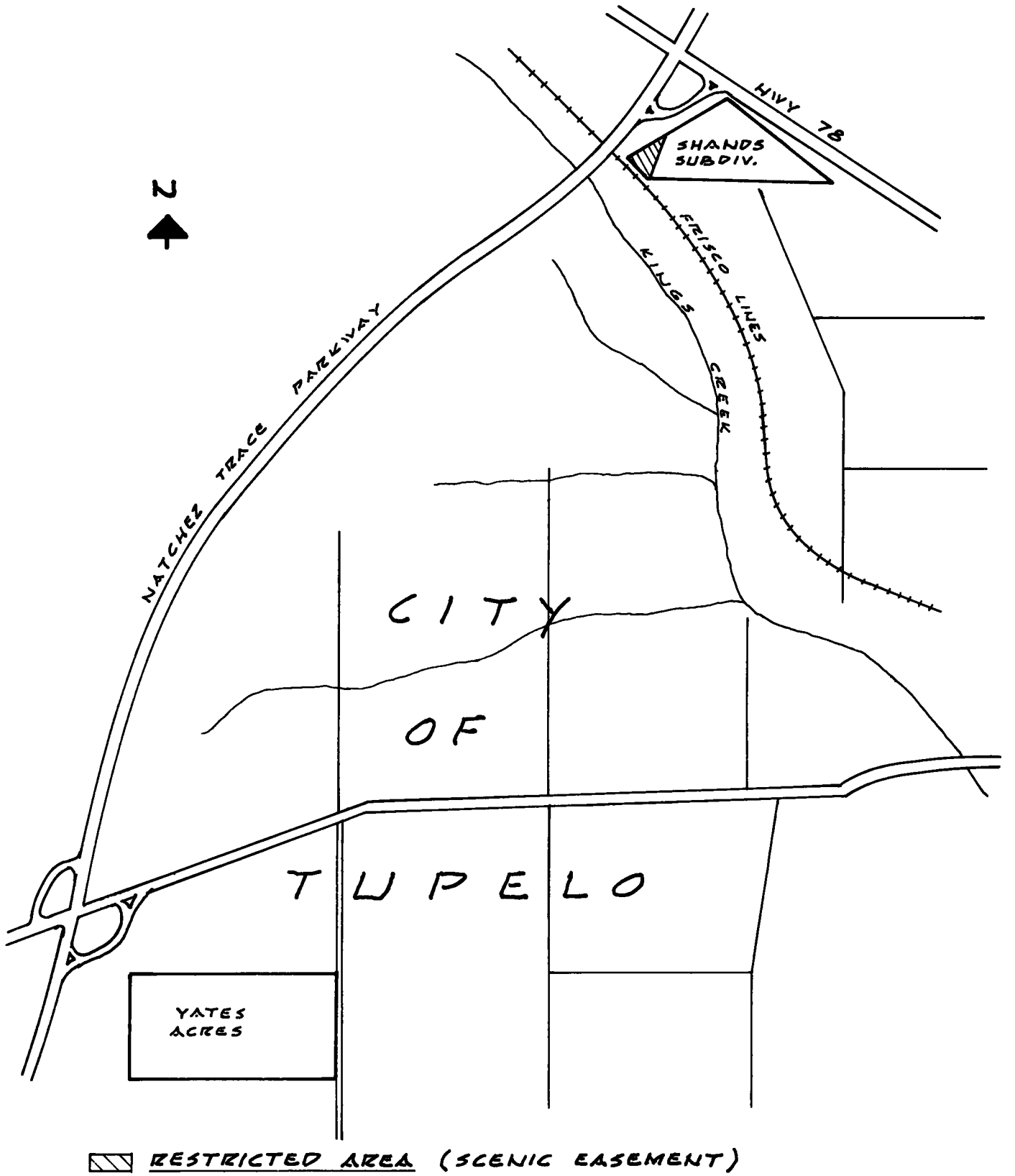
In comparing the Shands Subdivision with Yates Acres, it is felt that approximately $2,000 per lot would be a fair price. A field inspection was made of the Shands Subdivision and the plats were checked. It appears that approximately 13 lots were lost by the encumbrance of the scenic easement.

Conclusions: In the field inspection of the Shands Subdivision and that portion encumbered by a scenic easement, it was impossible to determine exactly what the scenic easement was supposed to accomplish. The Frisco Lines runs alongside one portion of it and the portion covered by scenic easement appeared to be in a natural state. This was not a wooded section; it was merely an open prairie.

It is possible that when the original scenic easement was taken it preserved a rural scene. However, with the development of the surrounding properties, now strictly residential, it appears that the easement no longer accomplishes

Case Study 40. Looking northeasterly along Shands Avenue from the Natchez Trace Parkway right-of-way.

Case Study 40. Looking northeasterly along Shands Avenue in Shands Subdivision.


N
HWY 78
SHANDS SUBDIV.
FRISCO LINES
KINGS CREEK
NATCHEZ TRACE PARKWAY
CITY
OF
TUPELO
YATES ACRES
RESTRICTED AREA (SCENIC EASEMENT)

its original purpose. Scenic easements of this type should be re-negotiated with the owner, and possibly the fee should be released from the encumbrance of the scenic easement restrictions for some consideration.

Therefore, 13 lots were lost at an average of approximately $2,000 per lot, or $26,000 lost to the fee holder due directly to the encumbrance of the scenic easement.

COMPARABLE SALE 41

Location: In Lee County approximately 5 to 7 miles northeasterly of the City of Tupelo, Miss., in the northwest corner of the northwest quarter of Sec. 3, T 9 S, R 5 E.
Area: 43.76 acres.
Description of the property: A small farm with improvements consisting of a 6-room house in good condition, a barn, and a garage. The property consists of a homesite, with approximately 20 acres in cropland, 10 acres in pasture, and the balance in woods. The property had an 8.7-acre cotton allotment, and a 7-acre corn base.
Access and topography: Access is good from a gravel-paved road and the topography was generally rolling.
Use as of sale date: Farming.

Sale data: Vol. 593, p. 91.

Grantor:	B. L. Hunter, et ux
Grantee:	William Eugene Hughes
Sale date:	11/22/61
Sale price:	$8,500
Sale price/acre:	$194
Revenue stamps:	$9.35
Verified by:	Mr. Hughes and public records
Type of conveyance:	Deed

Inspection date: July 1967.

COMPARABLE SALE 42

Location: Approximately 2 miles southwesterly of the City of Tupelo, Miss., between the Bissell-Palmetto Road and the Natchez Trace Parkway.
Area: 12.66 acres.
Description of the property: Pasture land with a few scattered trees. An old barn was located on the premises as of the date of sale.
Access and topography: Access is good from gravel-paved Bissell-Palmetto Road; the topography is generally rolling.
Use as of sale date: Pasture.

Sale data: Vol. 508, p. 69.

Grantor:	Guy M. Metcalfe
Grantee:	Elmo B. Thomas
Sale date:	October 1958
Sale price:	$750
Sale price/acre:	$59
Revenue stamps:	None
Verified by:	Mr. Thomas, Mr. Metcalfe, and public records
Type of conveyance:	Deed

Inspection date: July 1967.
Comments: The subject property was purchased for long-range speculation and at the time of the July 1967 inspection a new residential subdivision was located across the road. An appraisal in March 1965 valued this property at $4,500, or $348 per acre.

COMPARABLE SALE 43

Location: In Lee County approximately 9 miles southwesterly of the City of Tupelo, Miss.
Area: 80 acres.
Description of the property: 40 acres in woods and 40 acres in potential row cropland. At present the property is not being farmed.
Access and topography: Access was good from a gravel-paved road. Although the property could be seen from the Natchez Trace Parkway, none of it was encumbered with a scenic easement. The property was slightly below grade and level.
Use as of sale date: Pasture.

Sale data: Vol. 281, p. 579.

Grantor:	Tucker Wood
Grantee:	Elmo B. Thomas
Sale date:	March 1965
Sale price:	$2,500
Sale price/acre:	$31
Revenue stamps:	$2.20 *
Verified by:	Mr. Thomas and public records
Type of conveyance:	Warranty deed

Inspection date: July 1967.
Comment: The property was bought primarily to expand an existing farming operation.

COMPARABLE SALE 44

Location: In Lee County approximately 10 miles southwesterly of the City of Tupelo, Miss.
Area: 13 acres.
Description of the property: The property is open pasture, and contained a 6-acre cotton allotment.
Access and topography: Access was good from a gravel-paved road. The property was generally level.
Use as of sale date: Pasture.

Sale data: Vol. 283, p. 415.

Grantor:	Tucker Wood
Grantee:	Elmo B. Thomas
Sale date:	December 1965
Sale price:	$600
Sale price/acre:	$46
Revenue stamps:	None
Verified by:	Mr. Thomas and public records
Type of conveyance:	Warranty deed

Inspection date: July 1967.
Comment: The property is considered as possible cropland although it is presently used for pasture and had not been farmed for some time. It would cost approximately $100 per acre to break the soil and drain the property to prepare it for agricultural use.

* Indicates a price of $2,000. Grantee stated there was a $500 obligation due him from the grantor, which made the difference.

COMPARABLE SALE 45

Location: Along Bypass Highway 35 southerly from the City of Kosciusko, Miss.
Area: 6.4 acres.
Description of the property: A vacant tract of land located on the outskirts of the City of Kociusko, Miss. The property had formerly been used for pasture but was now considered in the path of development.
Access and topography: Access is good from blacktop-paved Bypass Highway 35. Generally high, slightly above road grade, and comparatively level.
Use as of sale date: Vacant and weed covered.

Sale data: Vol. 176, p. 336.

Grantor:	W. C. Leonard
Grantee:	Luvel Dairy Products, Inc.
Sale date:	March 1957
Sale price:	$6,500
Sale price/acre:	$1,015
Revenue stamps:	None
Verified by:	Public records
Type of conveyance:	Deed

COMPARABLE SALE 46

Location: Southerly from and on the outskirts of the City of Kosciusko, Miss.
Area: 1.09 acres.
Description of the property: Vacant land reported used for pasture. At the time of the sale the property was vacant and in a natural state.
Access and topography: This was a landlocked parcel; the only access was across the lands of others. Topography was generally high and it adjoined comparable sale 45.
Use as of sale date: Vacant.

Sale data: Vol. 186, p. 267.

Grantor:	Avery A. McKinney, et ux
Grantee:	Luvel Dairy Products, Inc.
Sale date:	March 1958
Sale price:	$500
Sale price/acre:	$459
Revenue stamps:	None
Verified by:	Public records
Type of conveyance:	Deed

Comment: As a landlocked parcel, its only utility was to an adjoining landowner.

COMPARABLE SALE 47

Location: Southerly from and on the outskirts of the City of Kosciusko, Miss., and approximately ½ mile southwesterly from the junction of Bypass Highway 35 and East South Street.
Area: 98.9 acres.
Description of the property: A 98.9-acre tract, of which approximately 44.988 acres was encumbered with a scenic easement. The lands are generally low marshlands and subject to periodic flooding.
Access and topography: Access was poor over approximately 1,500 ft of private road across the lands of others. At the time of sale this road was passable to farm vehicles in dry weather only. Topography was slightly irregular, and generally lower than the surrounding acreage.
Use as of sale date: Unlimited pasture.

Sale data: Vol. 170, p. 347.

Grantor:	Ralph R. Gober, et ux
Grantee:	Avery A. McKinney
Sale date:	February 1956
Sale price:	$2,500
Sale price/acre:	$25
Revenue stamps:	None
Verified by:	Public records
Type of conveyance:	Deed

Comment: The 1,500 ft of private road necessary for access to the comparable sale was built and maintained by the owner.

COMPARABLE SALE 48

Location: At the western outskirts of the City of Tupelo, Miss., and easterly from the Natchez Trace Parkway.
Area: 183 lots, average lot size 90 × 140 ft (none encumbered by a scenic easement).
Description of the property: The subject property is located within the city limits of Tupelo, Miss., and is generally considered good subdivision land. The property has sewer and water, blacktop-paved streets, underground utilities, but no public sidewalks. One portion contained wooded lots. However, at the time of the inspection and the conversation with Mr. Partlow, they were just preparing to open this portion of the subdivision for sale.

Use as of sale date: Residential lots.

Sale data:

Grantor:	Southwest Development Corp.
Grantee:	Various lot buyers
Sale date:	The comparable subdivision was first opened in 1963 and sales were made periodically up to the present.
Sale price:	From $1,600 to $3,000 (for that portion that was open for sale)
Sale price/lot:	$2,500 (average)
Verified by:	Mr. Partlow, secretary of the Southwest Development Corp., and public records

Inspection date: July 1967.
Comment: Access to the Natchez Trace Parkway was by a short circuitous drive to an access point. At the northwest corner of the subject property it adjoins the Natchez Trace Parkway right-of-way.

APPENDIX H

BIBLIOGRAPHY

BOOKS AND MONOGRAPHS

1. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *Condemnation Appraisal Practice.* Prepared by a Special Technical Committee of the Education Committee. Chicago, Ill. (1961) 586 pp. (including index of cases and subject index).

   An excellent standard text covering basic principles, Federal condemnation practice, taking of land for highways, valuation of rights-of-way, valuation of special purpose property, reservoir sites and flowage rights, valuation of leasehold interests, appraisal testimony, and condemnation appraising generally. Each topic is dealt with by an expert.

2. AMERICAN LAW INSTITUTE, *Restatement of Property.* St. Paul, Minn. (1944).

   Parts I and III, Div. V, deal, respectively, with easements and "promises respecting the use of land" (i.e., covenants running with land and equitable servitudes). Particularly useful in connection with easements are §§ 450-456, 487-496, and 509. In connection with covenants and equitable servitudes, §§ 530-539, 541-548, and 564-567 are especially useful.

3. *American Law of Property.* A. J. Casner, ed. Vol. 2, pp. 225-314, "Easements" (by Oliver S. Rundell). Vol. 2, pp. 335-453, "Covenants Running With the Land at Law, Equitable Servitudes" (by Russell R. Reno). Little Brown (1952).

   A standard treatise on the law of real property. The chapters on covenants and equitable servitudes are outstanding. The chapter on easements is not as useful as the chapters in the treatises by Powell (*34*) and Tiffany (*41*).

4. BRENNEMAN, RUSSELL L., *Private Approaches to the Preservation of Open Land.* The Conservation and Research Foundation (1967) 133 pp.

   An excellent monograph treating the various methods available to private organizations to preserve open land for scenic and conservation purposes. The author deals with: (1) transfers outright and in trust; (2) easements and leaseholds; (3) conditions and limitations; (4) restrictive covenants; and (5) tax aspects of open land preservation. There is a summary and conclusion, and useful appendices containing a note on government programs and private action; documents in use by public agencies; trust agreements for private conservation trusts; and legal instruments such as conservation easements and leases used by private agencies.

5. CLARK, CHARLES E., *Real Covenants and Other Interests Which "Run with Land."* 2nd ed. Callaghan and Co., Chicago (1947) 310 pp.

   A very useful text dealing with the law relating to interests which "run with land." Included are discussions of licenses, easements and profits, real covenants, party-wall agreements, equitable restrictions, and rents, and legislative restriction of "running interests." An appendix contains the author's "exceptions to the restatement of the law of real covenants" by the American Law Institute. Particularly valuable are Chapters III, IV, and VI.

6. CHINEN, JON J., *Just Compensation in Eminent Domain Proceedings.* Hawaii (1962) 109 pp. (including index).

   An interesting monograph based on study of eminent domain cases in the U.S. Supreme Court and the courts of the various States, including all the eminent domain cases in the Supreme Court of Hawaii.

7. DELAFONS, JOHN, *Land Use Controls in the United States.* Joint Center for Urban Studies of M.I.T. and Harvard Univ. (1962) 100 pp. (plus appendices).

   Concludes that outright purchase is the most satisfactory technique where land is to be developed primarily for recreational use, but that conservation or development easements may be useful in preserving agricultural and other open land that should remain in private ownership, protected from incongruous development. Lists the disadvantages of conservation or development easements, as follows: (1) The public will not have access to the land; (2) A uniform type of deed may be difficult to devise; (3) An easement scheme may get bogged down in legal difficulties; and (4) An easement may not secure open-space land permanently against development pressures.

8. DUNHAM, ALLISON, *Preservation of Open Areas: A Study of the Non-Governmental Role.* Welfare Council of Metropolitan Chicago (1966) 101 pp.

   An excellent discussion of the opportunities and problems in preservation of open-space areas by nongovernmental action. The author deals with the various types of private rights available to preserve open space, such as rights of entry for breach of condition, possibilities of reverter, executory interests, restrictive covenants, and easements; methods of avoiding condemnation of privately controlled open space for conflicting public uses; forms of association for private acquisition and preservation of open space, such as nonprofit corporations, foundations and associations, and trusts; and tax problems that may arise in connection with nongovernmental open-space programs. Appendices deal with steps toward establishment of a park or forest preserve district and the history of the Chicago lake front.

9. GALE, C. J., and WHATLEY, T. D., *Law of Easements.* Halsted and Voorhies, New York (1840) 352 pp.

   The first English treatise on the law of easements. It deals with the essential qualities of easements, methods of acquisition, incidents of easements, methods of extinguishment, and remedies for interference. Chapter 1, on the essential qualities of easements, contains a brief discussion of negative easements.

10. GRUEN, VICTOR, ASSOCIATES, "A Review of Transportation Aspects of Land-use Control." *NCHRP Report 31,* Highway Research Board, Washington, D.C. (1966).

11. HEANEY, DONALD, *Valuation of Property for Highways Under Eminent Domain.* Automotive Safety Foundation, Washington, D.C. (1960) 108 pp.

An excellent treatment of the topic. It looks first to Wisconsin's law of eminent domain and then observes it in actual operation at the appraisal, negotiation, award, and court review stages of the compensation process. Although speaking largely in terms of the law and practice within a single State, what is reported suggests the need for greater coordination between judicial and legislative statements of valuation rules and appraisal practices throughout the nation. The monograph as published is a condensation of the author's S.J.D. thesis on file in the law library of the University of Wisconsin.

12. *The Highway and the Landscape.* W. Brewster Snow, ed. Rutgers Univ. Press (1959).

13. HIGHWAY RESEARCH BOARD, "Condemnation of Property for Highway Purposes: A Legal Analysis. Part I." *Spec. Rep. 32,* Washington, D.C. (1958) 56 pp. (including appendices).

An extremely valuable report dealing with delegation of the power of eminent domain, property which may be taken, the legal interests which may be taken, and designation of the procedure to condemn property for highway purposes. These four aspects of condemnation law are treated under four different headings according to the agency which exercises the condemnation power: State highway departments; counties; cities, towns, and villages; and special authorities. The appendices, with a summary of law by States and tables of statutes and cases, are especially useful.

14. HIGHWAY RESEARCH BOARD, "Condemnation of Property for Highway Purposes: A Legal Analysis. Part II." *Spec. Rep. 33,* Washington, D.C. (1958) 55 pp. (with appendices).

This report covers three aspects of the condemnation of property for highway purposes: (1) the granting of a court preference for condemnation suits; (2) the right to take possession and/or title to property prior to final determination of compensation; and (3) the right to remain in possession or take possession for the first time during pendency of appellate proceedings.

15. HIGHWAY RESEARCH BOARD, "Condemnation of Property for Highway Purposes: A Legal Analysis, Part III." *Spec. Rep. 59,* Washington, D.C., 1960. 91 pp. (with appendices).

This report covers various aspects of the condemnation of property for highway purposes, including the board of viewers, jury trial, miscellaneous tribunals for determining compensation, time at which value is determined, constitutional provisions concerning the taking and damaging of property, set-off of benefits, interest and court costs, determination of necessity, right of entry, property already devoted to a public use, dismissal or abandonment of proceedings, and scope of appeal.

16. HIGHWAY RESEARCH BOARD, "Acquisition of Land for Future Highway Use: A Legal Analysis." *Spec. Rep. 27,* Washington, D.C. (1957) 80 pp. (including appendices).

This report analyzes existing statutes and court decisions involving acquisition of land for future use and isolates the important principles which should be considered in drafting legislation authorizing the acquisition of land for future use.

17. HIGHWAY RESEARCH BOARD, "Legislative Purpose in Highway Law: An Analysis." *Spec. Rep. 39,* Washington, D.C. (1958) 120 pp. (including appendices).

This study deals with express legislative declarations of purpose concerning activities in the highway field. It includes (1) the assembly and analysis of statutory provisions which involve a legislative policy or purpose relative to highway activities; (2) the assembly and analysis of judicial decisions in which such provisions have played a part; and (3) the ascertainment and analysis of the substantive elements that should be considered in connection with such legislation. The appendices contain a summary of statutes and selected cases, by State, statutory citations, and case citations.

18. HIGHWAY RESEARCH BOARD, "State Constitutional Provisions Concerning Highways: A Legal Analysis." *Spec. Rep. 50,* Washington, D.C. (1959) 84 pp. (including appendices).

This report covers the full range of pertinent subject matter found in the several State constitutions. It gathers the State constitutional provisions which affect both the existing highway statutes and future legislation concerning highways.

19. HIGHWAY RESEARCH BOARD, "The Art and Science of Roadside Development." *Spec. Rep. 88* (1966) 92 pp.

A good general discussion of the topic, including treatment of the historical background; aesthetics and roadside development in highway design and location; right-of-way, scenic areas, and adjacent land use; conservation of natural resources in highway design and construction; erosion control; landscape plantings; roadside rest areas; scenic turnouts and overlooks; safety in roadside development; maintenance; and the future of roadside development. There is some discussion of scenic easements in Chapter 3, dealing with right-of-way, scenic areas, and adjacent land uses. Chapter 4, dealing with conservation of natural resources in highway design and construction, is also relevant.

20. HIGHWAY RESEARCH BOARD, "Relocation of Public Utilities, 1956-1966: An Analysis of Legal Aspects." *Spec. Rep. 91* (1966) 96 pp. (including appendices).

A report designed to add to the study of State laws relating to relocation of public utilities due to highway improvements published in 1955 (*HRB Spec. Rep. 21*) the results of a decade of experience in legislation on this subject by the States and the Federal government. Also deals with administrative experience gained from the law in action, and includes the following matters: State statutes providing for reimbursement of utility relocation costs, judicial review of reimbursement statutes, determination of eligibility for relocation payments, and other facets of the utility relocation problem. The material on judicial review of reimbursement statutes challenged as violating anti-diversion amendments in the State constitutions is especially relevant for the light it casts on the analogous question whether expenditure of State highway funds to acquire scenic easements will be held to violate such State constitutional provisions. Appendices contain a summary of legal authority pertaining to payment of relocation costs, a table of cases, and citations to reimbursement laws.

21. HUBBARD, ALICE HARVEY, *This Land of Ours.* Macmillan (1960) 272 pp.

A popular treatment of and plea for preservation of open space from a conservationist's viewpoint.

22. JONES, LEONARD A., *The Law of Easements.* Baker, Voorhis & Co., New York (1898) 767 pp.

A useful standard treatise on the law of easements, though now somewhat out-of-date. The definitions in Chapter 1 are still quite valuable.

23. KRASNOWIECKI, JAN Z., "Legal Aspects of Planned Unit Residential Development." *Tech. Bull. No. 52,* Urban Land Institute, Washington, D.C. (1965) 96 pp.

A thorough discussion of the legal problems involved in the modern planned unit residential development, which makes use of the techniques of density zoning and cluster development with a view to preserving large amounts of open space within each new subdivision development. The continuous maintenance of the common open space within the subdivision by a homeowner's association operating under a recorded agreement through which each homeowner is automatically a member of the association and each lot is subject to assessment for a pro rata share of the maintenance expenses is treated.

24. LEVIN, DAVID R., *Public Control of Highway Access and Roadside Development.* U.S. Gov't. Print. Office, Washington, D.C. (1947).

This report deals with acquisition of development rights or easements by public bodies to prevent development of land needed for future highway right-of-way and assure a lesser ultimate acquisition cost for such right-of-way. Among the rights acquired under the heading of development rights are the following: (1) to erect buildings or other structures; (2) to construct any private drive or road; (3) to remove or destroy any shrubbery or trees; (4) to place any trash or unsightly or offensive materials on the land; and (5) to display any signs, billboards, or advertisements on the land. (These development rights, in substance, constitute the scenic easement rights acquired by the National Park Service along the Blue Ridge and Natchez Trace National Parkways.) Concludes that development easements are most successful in undeveloped areas. Even there, speculator-owners violently oppose the acquisition of development easements at reasonable prices.

25. MATUSZESKI, WILLIAM, "Less-Than-Fee Acquisition for Open Space: Its Effect on Land Value." Unpub. paper, Inst. of Legal Research, Univ. of Pennsylvania (1966) 42 pp.

An extremely valuable study of experience with less-than-fee acquisition in four programs: (1) National Park Service program; (2) Mill Creek Valley conservation program in suburban Philadelphia; (3) Great River Road program in Wisconsin; and (4) Concord (Mass.) Land Conservation Trust program. After briefly recounting the experience with scenic easements and other less-than-fee interests in these programs, discusses the factors to be taken into account in establishing a program of less-than-fee acquisition; the continuing operation of a less-than-fee program; and the effect of less-than-fee devices on land values in each of the four programs previously mentioned. The data on which the discussion of effect on value is based were quite limited, and the conclusions are only tentative.

26. MATUSZESKI, WILLIAM, "Less-Than-Fee Legal Devices for Open Space Preservation in Metropolitan Areas: Feasibility and Implementation." Unpub. paper submitted to Prof. C. Haar in Seminar on Urban Land Use Planning, Harvard Univ. Law School (1966) 73 pp.

This paper is largely based on the same research as the preceding paper (*25*). The author, however, has greatly expanded the discussion of establishment of a program of less-than-fee acquisition. He deals with the following topics under that heading: (1) the choice of legal device (of which the easement is only one); (2) the public role; (3) valuation of less-than-fee restrictions on property; (4) property tax incentives; (5) Federal income tax benefits; (6) the need to assure a clear understanding of the restrictions by the servient landowner; (7) enforcement of the agreement; (8) advantages of perpetuity; and (9) the role of less-than-fee devices in metropolitan planning. An extremely valuable research paper.

27. MEGARRY, R. E., and WADE, H. W. R., *The Law of Real Property.* 3rd ed. Stevens & Sons, London (1966).

Probably the best current standard treatise on the English law of real property. Particularly useful are pp. 802-878, dealing with easements, and pp. 745-774, dealing with covenants and equitable servitudes.

28. NAIRN, IAN, *The American Landscape.* Random House (1965).

29. NETHERTON, ROSS D., and MARKHAM, MARION, *Roadside Development and Beautification—Legal Authority and Methods, Part I.* Highway Research Board (1965) 93 pp. (including appendices).

An extremely valuable discussion of (1) concepts of function and amenity for modern highway systems; (2) the use of eminent domain for preservation of natural beauty; and (3) legal authority for landscaping within and outside the highway right-of-way.

30. NETHERTON, ROSS D., and MARKHAM, MARION, *Roadside Development and Beautification—Legal Authority and Methods, Part II.* Highway Research Board (1966) 159 pp. (including appendices).

An extremely valuable discussion of the following topics: (1) private property, public interest, and the police power; (2) regulatory standards, aesthetic and otherwise; (3) regulation of roadside advertising; and (4) the use of zoning and subdivision controls to preserve the natural beauty of the highways. The appendices include State legislation relating to outdoor advertising; State legislation relating to junkyards; a highway service district ordinance; and the Highway Beautification Act of 1965.

31. NETHERTON, ROSS D., *Control of Highway Access.* Univ. of Wisconsin Press (1963) 518 pp.

32. NICHOLS, *The Law of Eminent Domain.* Rev. 3rd ed. by Sackman. Vol. 1, pp. 449-451, 540-592 (1964); Vol. 2, pp. 614-692 (1963); Vol. 3, pp. 262-281 (1965) Matthew Bender & Co., Albany, N.Y.

The current edition of the best standard treatise on the law of eminent domain.

33. PLIMPTON, OAKES A., *Conservation Easements: Legal Analysis of "Conservation Easements" as a Method of Privately Conserving and Preserving Land.* Prepared for The Nature Conservancy (1966) 34 pp.

An excellent legal analysis of the problems that may arise in connection with efforts by private groups to use conservation easements as a method for conserving open land. Topics discussed include appurtenant easements; appurtenant equitable servitudes (restrictive covenants); easements and equitable servitudes in gross; profits *a prendre;* novel easements (problems of drafting); statutory modification of the common law; and tax effects of conservation ease-

ments. Concludes that if an area contains unique natural features a conservation agency should try to acquire the fee simple, but that conservation easements may prove useful in preserving large areas of certain types where fee-simple ownership is not practical. Caution in the use of easements in gross is counseled because of the uncertainty as to transferability and the extent of enforcibility. Model forms of conservation easements appurtenant and in gross are included.

34. POWELL, RICHARD B., *The Law of Real Property*. Vol. 3, pp. 379-526.59 (recomp. ed. 1967); Vol. 5, pp. 139-229 (1962) Matthew Bender & Co., New York.

An excellent standard treatise on the law of real property. The material in Vol. 3, pp. 379-562.59 deals with easements; the material in Vol. 5, pp. 139-229, deals with promises as to the use of land (i.e., covenants running with the land at law and equitable servitudes).

35. SCHMUTZ, WILLIAM F., JR., *Condemnation Appraisal Handbook*. Rev. and enlarged by Edwin M. Rams. Prentice-Hall (1963).

In connection with the appraisal of easements, lists the following factors to be taken into consideration: (1) the highest, best, and most profitable use to which the land can be put; (2) the extent to which the use authorized by the easement will infringe on other valuable uses of the land subject to, and contiguous land not subject to, the easement; (3) the location of the easement with respect to the boundaries of the land; and (4) the location of existing improvements and their nature and adequacy with respect to the location of the easement.

36. SIEGEL, SHIRLEY A., *The Law of Open Space*. Regional Plan Association, New York (1960) 72 pp.

A comprehensive treatment of the legal aspects of acquiring or otherwise preserving open space in the tri-State New York metropolitan region. Included are: (1) public use and purpose; (2) legal aspects of parks and recreational land use; (3) legal matters in respect to other essential open space; (4) tax considerations. Although the discussion is focused on the tri-State area, it is of much more general interest and value. Fully documented.

37. STRONG, ANN LOUISE, *Preservation of Open Space*. Monograph submitted to Urban Renewal Administration. Unpub. 498 pp.

A comprehensive monograph covering many aspects of open space preservation, principally from the legal viewpoint, but also covers much general material. Chapter III deals with (1) the legal framework of local action; (2) regulations to hold land open; (3) acquisition of open space; (4) the role of conservation commissions; (5) the economics of open space from the local community's point of view; and (6) real property taxation and its relation to open space preservation. Chapter IV deals with State action to preserve urban open space.

38. STRONG, ANN LOUISE, *Preserving Urban Open Space*. Urban Renewal Administration, Housing and Home Finance Agency, Washington, D.C. (1963) 36 pp.

Discusses the need for open space and methods by which local, State, Federal, and private organizations may acquire open space. Various approaches, including tax policies, are considered.

39. STRONG, ANN LOUISE, *Controls and Incentives for Open Space*. Unpub. monograph. 73 pp.

40. STRONG, ANN LOUISE, *The Role of the States in Preserving Urban Open Space* (1962).

41. TIFFANY, HERBERT T., *The Law of Real Property*. Vol. 3, pp. 200-400, 441-470, 471-523. 3rd ed. Callaghan and Co., Chicago, Ill. (1939).

An excellent standard treatise on the law of real property. The material in Vol. 3 at pp. 200-400 deals with easements; at pp. 441-470, with covenants running with the land "at law"; at pp. 471-523, with equitable servitudes.

42. TUNNARD, CHRISTOPHER, and PUSHKAREV, BORIS, *Man-Made America: Chaos or Control?* Yale Univ. Press (1963) 479 pp.

Considers design and planning for roads, urban developments, open space, and historical landmarks. Extensively illustrated.

43. U.S. DEPARTMENT OF COMMERCE, *A Proposed Program for Scenic Roads and Parkways*. U.S. Gov't. Print. Office, Washington, D C. (1966) 254 pp.

An extremely valuable and comprehensive treatment of the needs for a scenic roads and parkways program, the forms such a program might take, existing scenic roads, and the costs of both the recommended minimum and extended programs. In connection with existing scenic roads, Chapters 7 and 8 are particularly valuable. The report is beautifully illustrated.

44. U.S. DEPARTMENT OF THE INTERIOR, *National Parkways Handbook*. National Park Service (1964).

45. URBAN LAND INSTITUTE, and NATIONAL ASSOCIATION OF HOME BUILDERS, "New Approaches to Residential Development: A Study of Concepts and Innovations." *Tech. Bull. 40*, Urban Land Institute, Washington, D.C. (1961) 151 pp.

Presents illustrations and land use analyses of planned unit developments, cluster subdivisions, town, group and patio houses, and other special innovations in the planning of residential areas. Many of these innovations are designed to provide common open spaces for community use within the subdivision. One legal device for securing the use of this open space to all residents of the subdivision is the easement.

46. URBAN LAND INSTITUTE, and NATIONAL ASSOCIATION OF HOME BUILDERS, "Innovations and Traditions in Community Development." *Tech Bull. 47*, Urban Land Institute, Washington, D.C. (1963) 111 pp.

Presents comparative studies of residential land use for new community development, emphasizing new concepts designed to provide open space within the development for common use.

47. WASHBURN, EMORY, *American Law of Easements and Servitudes*. 4th ed. Little Brown (1885) 764 pp.

The classic American treatise on the law of easements and servitudes. Chapter I, dealing with the nature, character, and mode of acquiring easements, is still useful, as are Chapter IV, sections VI and VII, dealing with easements of light and air and miscellaneous easements and servitudes.

48. WHYTE, WILLIAM H., JR., "Securing Open Space for Urban America: Conservation Easements." *Tech. Bull.*

36, Urban Land Institute, Washington, D.C. (1959) 67 pp. (including appendices).

The pioneering work on conservation easements, this is still immensely useful. Contents include: (1) the precedents; (2) the public purpose; (3) the limits of zoning; (4) just compensation for taking; (5) gifts; (6) tax questions; (7) costs to the public; (8) the easement deed; (9) financing; (10) the agencies; and (11) legislation. The appendices include legislation and proposed legislation for conservation easement acquisition, scenic easement deeds, and highway reservation agreements.

49. WHYTE, WILLIAM H., JR., "Open Space Action. Report to the Outdoor Recreation Resources Review Commission." *Study Rep. 15,* Outdoor Recreation Resources Review Commission, Washington, D.C. (1962) 107 pp. (including appendices).

An extremely valuable monograph dealing with a variety of methods for preserving open space, including the tax approach, cluster development, and less-than-fee land acquisition. The survey of these approaches is followed by a chapter of general findings and a chapter of recommendations. The appendices are particularly useful, containing: (1) Federal open-space legislation; (2) State open-space legislation; (3) voting statistics on State open-space references; (4) deed forms and procedures; (5) tables on easement costs; and (6) plans incorporating new open-space approaches.

50. WILLIAMS, NORMAN, JR., "Land Acquisition for Outdoor Recreation—Analysis of Selected Legal Problems." *Study Rep. 16,* Outdoor Recreation Resources Review Commission, Washington, D.C. (1962) 55 pp.

An extremely useful monograph covering: (1) the constitutional power of State and Federal governments to acquire land, by purchase or condemnation, for recreation and for related open-space purposes; (2) the constitutional power of the Federal government to condemn land for recreation and for related open-space purposes; (3) legal problems involved in acquiring less-than-fee interests in land for recreation and for related open-space purposes. The materials on the last topic are especially valuable. They include a discussion of affirmative and negative easements, constitutional and statutory authority to acquire less-than-fee interests in land for recreation or related open-space purposes, a summary of technical problems in easement law, and guidelines for enabling legislation.

51. WYKERT, PAUL V., *Environmental Easements: A Way of Preserving Visual Integrity.* Unpub. paper Dept. of Conservation, School of Natural Resources, Univ. of Michigan (1965) 77 pp. (including a bibliography).

A very useful monograph on "environmental" easements—i.e., scenic and conservation easements—prepared not only to fulfill a course work requirement but also to provide a reference document for use by National Park Service personnel contemplating the use of environmental easements to preserve visual integrity. After defining the terms used, the author deals with land-use controls generally and then with environmental easements in some detail: legal aspects, examples of use, the limitations and possibilities of environmental easements, taxation problems (both income and property taxes are considered), administration and control, and economic justifications. The conclusions and recommendations, including the checklist at pp. 64-68, are especially valuable. A good bibliography is included.

ARTICLES, REPORTS, PAPERS, PROCEEDINGS

52. "Assessment of Farmland Under the California Land Conservation Act and the "Breathing Space" Amendment." *Cal. Law Rev.,* Vol. 55, pp. 273-292 (1967).

A useful student comment dealing with the basic operation of the California Land Conservation Act of 1965, the State's real property assessment standards and practices covering the land to which the act applies, and an evaluation of the act in light of current assessment practices, with special emphasis on the changes brought about by the 1966 "breathing space" amendment to the California Constitution.

53. BEUSCHER, JACOB H., "Conservation Easements and the Law." *Proc. of Conservation Easements and Open Space Conference,* pp. 19-32. Wisconsin Dept. of Resource Development and State Recreation Comm. (1961).

An excellent discussion of the objectives of an open-space program, the basic powers of the State (including the police power, tax power, and eminent domain power), and the problem of integrating these governmental powers in order to control land use and preserve open space. Discusses the Wisconsin conservation and scenic easement acquisition program under the 1961 ORAP legislation and the various methods by which conservation and scenic easements can be acquired—e.g., by lease, purchase and resale subject to conditions or restrictive covenants, and purchase of conservation or scenic easements.

54. BEUSCHER, JACOB H., "Scenic Easements and the Law." *Proc. of Conference on Scenic Easements in Action,* pp. 49-59. Univ. of Wisconsin (1967).

An excellent treatment of the legal aspects of scenic easements, including: (1) the great variety in content of scenic easements; (2) carefully worded scenic easement enabling legislation and deeds are essential dual foundations for a successful scenic conservation program; (3) since scenic easements are usually granted in perpetuity, flexibility in administration is important; and (4) the scenic easement is only one of a whole kit of legal tools available to preserve natural amenities. In connection with point 4, emphasizes the need for integrating any program of scenic easement acquisition with police power controls and tax policies to provide incentives to private landowners to grant scenic easements.

55. *Beauty for America: Proc. of White House Conference on Natural Beauty, May 24-25, 1965.* U.S. Gov't. Print. Office, Washington, D.C. (1965).

56. BEUSCHER, JACOB H., "The Highway Corridor as a Legal Concept." *Hwy. Res. Record No. 166* (1967) pp. 9-13.

57. BRODSKY, HAROLD, "Highways and Outdoor Recreation." *Hwy. Res. Record No. 161* (1967) pp. 22-29.

Deals with: (1) reassessing highways as a recreational resource; (2) highway accessibility and the crisis in outdoor recreation; (3) improving highways as a recreation resource; (4) types of outdoor recreation areas and highway accessibility; and (5) the economics of outdoor recreation.

58. BROESCHE, T. C., "Land-Use Regulations for the Protection of Public Parks and Recreational Areas." *Tex. Law Rev.,* Vol. 45, pp. 96-131 (1966).

An excellent article dealing with the regulation of private land use for the protection of public parks and recreational areas. The only "tool of regulation" considered is the police power, however. There is no dis-

cussion of scenic easements or other less-than-fee interests as devices for land-use control.

59. BUSCHER, JOSEPH D., "Landscaping and Scenic Enhancement." *Hwy. Res. Circ. No. 23* (Apr. 1966) pp. 10-14.

Discusses some of the problems anticipated in connection with State implementation of the Highway Beautification Act of 1965.

60. CALIFORNIA DEPARTMENT OF PUBLIC WORKS, *State Scenic Highway System: Progress and Recommendations.* (Jan. 1967) 12 pp. (plus appendix).

A report prepared pursuant to Cal. Senate Concurrent Resolution No. 56, 1965 Reg. Sess. It deals with activities of the Interdepartmental Committee on Scenic Highways, the Advisory Committee on a Master Plan for Scenic Highways, and the Department of Public Works. It also contains recommendations of the Advisory Committee and an appendix listing scenic corridor study locations, including a map of the latter as of November 1966.

61. CALIFORNIA DIVISION OF HIGHWAYS, *Report on Acquisition of Scenic Areas Adjacent to State Highways.* Report to California Legislature (Dec. 1966) 24 pp. (plus exhibits).

An excellent report, prepared pursuant to Cal. Stat. 1966, 1st Ex. Sess., Ch. 125, § 3. It deals with the background of the California scenic areas program, Federal participation and controls, State progress, criteria for selection of scenic areas, criteria for the property interest to be acquired, coordination with other scenic programs in California, the 1966-67 scenic areas program, and the problem of maintaining scenic areas. Also contains, as an attachment, Bureau of Public Roads PPM No. 21-4.6, dated Jan. 24, 1966.

62. CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, *California Parkways: A Plan for a State Parkway System.* Preliminary report (Dec. 1966) 70 pp. (plus tables and appendices).

A very useful report, setting out the California Parkway Act and discussing the relation of the parkway program to other programs and agencies in California, the basic concepts underlying the parkway program, standards and criteria for establishing parkways, administration and financing of the program, and a number of potential parkway locations.

63. CALIFORNIA DEPARTMENT OF PUBLIC WORKS, *The Scenic Route: A Guide for the Designation of an Official Scenic Highway.* (1965) 54 pp. (including appendix).

Discusses the background of the scenic highways program, the enabling legislation, responsibilities of various State agencies, procedures and criteria for corridor delineation, standards for corridor protection, and effectuation of the scenic highways program. Under the last heading, one of the subheadings is "Public Lands and Easements." The *Guide* is beautifully illustrated and contains an appendix of the laws relating to scenic highways.

64. CAMPBELL, E. W., "Transportation System Corridors." *Hwy. Res. Record No. 166* (1967) pp. 26-35.

65. CHERNER, MORRIE, "Property Values as Affected by Highway Landscape Development." *Hwy. Res. Record No. 53.* (1964) pp. 4-7.

66. CLARENBACH, FRED A., "The Use of Resources and Property Rights." In *A Place to Live: The Yearbook of Agriculture, 1963,* pp. 439-448. U.S. Gov't. Print. Office, Washington, D.C. (1963).

Lists some important unanswered questions posed by the Wisconsin Director of Conservation and others: (1) When is it best to buy conservation easements instead of a fee-simple title? (2) When should an option to buy in fee simple be taken at the same time an easement is acquired? (3) When should a public agency buy land in fee simple and then return to the former owner specified rights which the agency does not wish to keep? Would this policy preserve for the public some important rights which at the time of acquisition are not recognized as potentially valuable? (4) When and to what extent should condemnation be used for acquisition of conservation easements and other less-than-fee interests?

67. CLAWSON, MARION. "Positive Approach to Open Space Preservation." *Jour. Am. Inst. of Planners,* Vol. 28, pp. 124-129 (1962).

Stresses the need for more careful definition of the kinds of open space needed in urban and suburban areas, more accurate determinations of the amount of open space needed, greater use of open-space areas already established, and development of effective public interest groups directly concerned with maintaining open-space areas. The author urges a joining together of groups with an interest in preservation of open space in order to oppose more effectively the special interests which threaten to eliminate open space.

68. COLSON, R. B., "New York's Trout Stream Easement Program." *Proc. of Conservation Easements and Open Space Conference,* pp. 43-46. Wisconsin Department of Resource Development and State Recreation Committee (1961).

A brief report on the methods used in acquisition of fishing rights on top-quality trout streams in New York, beginning in 1935. There is some discussion of costs, as well as a description of negotiation practices and stream improvement activities.

69. CRON, FREDERICK W., "Scenic Easement—The Vital Ingredient of the Great River Road." Paper presented at second annual Albert P. Greensfelder Memorial Breakfast Meeting of Mississippi River Parkway Planning Commission, St. Louis, Mo. (Feb. 9, 1960).

70. CROUCH, WILLIAM H., "Appraisal of Easements and Rights in Land." *Proc. of Conservation Easements and Open Space Conference,* pp. 53-60. Wisconsin Department of Resource Development and State Recreation Committee (1961).

An excellent brief discussion of problems arising in the appraisal of easements, with particular reference to scenic and conservation easements.

71. DANZIGER, BURTON, "Control of Urban Sprawl or Securing Open Space: Regulation by Condemnation or by Ordinance?" *Cal. Law Rev.,* Vol. 50, pp. 483-499 (1962).

A comment on the legal aspects of Whyte's monograph, "Securing Open Space for Urban America: Conservation Easements" (*48*). The author (a law student) evaluates the legality and utility of conservation easements as compared to an expanded use of the police power.

72. DAVIDSON, PAUL, "An Exploratory Study to Identify and Measure the Benefits Derived from the Scenic Enhancement of Federal Highways." *Hwy. Res. Record No. 182* (1967) pp. 18-21.

Description of a study being financed by a grant from the New Jersey Highway Department. The report is preliminary. The author's analysis suggests that benefits derived from scenic enhancement of highways appear to fall into four categories: (a) visual pleasures which make a trip more enjoyable; (b) a possible change in the accident rate; (c) a possible alteration in the average time of trips; and (d) a possible difference in vehicle operating costs and highway maintenance costs.

73. DAVIS, ARTHUR A., "The Uses and Values of Open Space." In *A Place to Live: The Yearbook of Agriculture, 1963*, pp. 330-336. U.S. Gov't Print. Office, Washington, D.C. (1963).

Deals with population growth, the trend toward urbanization, and the horizontal expansion of cities, which have been using land at a rapid rate, especially at the urban fringes. Haphazard development leaves in being large amounts of open space that may answer some of the needs for open-space uses. These open spaces are not valueless wastelands but have positive values for meeting a variety of community needs. Local, national, and international examples of open-space preservation are cited.

74. DAVIS, ARTHUR A., "The 1961 Federal Open-Space Program." *Proc. of Conservation Easements and Open Space Conference*, pp. 97-101. Wisconsin Department of Resource Development and State Recreation Committee (1961).

A brief discussion of the preliminary planning for implementation of the new open-space program authorized by Title VII of the Housing Act of 1961. The focus of such planning was on open space in urban areas.

75. DAVIS, JEANNE M. "Getting and Keeping Open Space." In *A Place to Live: The Yearbook of Agriculture, 1963*, pp. 337-345. U. S. Gov't Print. Office, Washington, D.C. (1963).

Points out that open space has three dimensions, and that the basic requirements are: a natural landscape, free of traffic, and large enough to be significant in the surrounding landscape. Examples of well-planned communities that preserve open space are cited.

76. DECKMAN, WILLIAM L., "Fee vs Easement, Updated." *Proc. of National Seminar, 1962*, pp. 43-46. Am. Right-of-Way Assn.

Lists six items requiring informed judgment in order to decide between fee simple and easement acquisition: (1) economic factors involved—holding cost and problems of inflation; (2) operational factors involved—freedom of use vs limited use or mere restrictions on private use; (3) encroachment and use problems that may be expected; (4) other possible uses of the land, and possible incomes from such use; (5) negotiation factors to contend with; (6) public relations problems, both before and after acquisition.

77. DERBES, MAX J., JR., "The Appraisal of Easements." *Right-of-Way*, Vol. 11, pp. 23-29 (Dec. 1964).

Emphasizes that easement appraisal is essentially the estimation of the reduction in market value of land caused by taking from the owner a limited part of the total benefits of ownership.

78. DISQUE, EARL A., "The Great River Road—A Model for America's Scenic Routes." *Hwy. Res. Record No. 161* (1967) pp. 34-49.

An extremely valuable account of the history, current status, and planned future development of the Great River Road along the Mississippi River. Probably the best overview of the Great River Road project, with emphasis on its value as a model or prototype for scenic highways elsewhere.

79. ESPESETH, ROBERT D., "Scenic and Conservation Easements in Wisconsin." *Trends in Parks and Recreation*, Vol. 2, pp. 21-23 (Apr. 1965).

80. EVELETH, PETER A., "New Techniques to Preserve Areas of Scenic Attraction in Established Rural-Residential Communities—The Lake George Approach." *Syracuse Law Rev.*, Vol. 18, pp. 37-48 (1966).

A useful and rather detailed description of the "unique" Lake George approach to scenic area preservation through the encouragement of property owners to execute restrictive covenants and easements in favor of the Lake George Park Commission restricting their property to noncommercial uses. Emphasis is on the legal problems involved in this "do-it-yourself zoning" program, and the need for further research on these problems.

81. FEDLRICK, JOSEPH C., "The Highway-Landscape Nexus." *Hwy. Res. Record No. 161* (1967) pp. 17-21.

A brief discussion of the factors which resulted in the designation of a section of Route 17 in southern New York as America's prizewinning highway for 1964 in the *Parade Magazine* scenic highway competition.

82. FIELDS, JUNE, *Methods of Preserving Open Space*. San Mateo (Calif.) County Planning Commission (1959) 8 pp. (mimeo).

A terse summary of the methods a county or city can use to preserve open space, including acquisition of fee simple or development rights, tax concessions, and zoning.

83. FORER, LOIS G., "Preservation of America's Park Lands: The Inadequacy of Present Law." *N. Y. Univ. Law Rev.*, Vol. 41, pp. 1093-1123 (1966).

An interesting discussion of the problem of preventing diversion of park lands and scenic and historic sites to other uses.

84. FRANKLAND, BAMFORD, "Valuation of Scenic Easements." *Hwy. Res. Circ. No. 23* (1966) pp. 30-32.

Despite its title, this paper deals mainly with the possible alternatives to scenic easement acquisition, particularly county zoning for scenic preservation. The conclusion is that, if scenic easement acquisition becomes desirable, the appraisal objective will be to ascertain the full fair market value of whatever interest is acquired in the land. Not very useful.

85. FRANKLAND, BAMFORD, "California's Scenic Highway Program." *Hwy. Res. Record No. 161* (1967) pp. 50-53.

A brief discussion of the history and current status of the California scenic highway program, with emphasis on the agencies involved in planning to date and the agencies which will be responsible for implementing the plans. There is no discussion of scenic easements. The conclusion is that high-speed highways and beautiful highways are perfectly compatible and that the motorist should enjoy a pleasurable ex-

perience as he goes from one place to another, whether it is at 80 or at 20 mph.

86. FRANKLAND, BAMFORD, "Coexistence in the Highway Corridor: A Test of Intergovernmental Cooperation." *Hwy. Res. Record No. 166* (1967) pp. 22-25.

A brief discussion of the problem of securing intergovernmental cooperation in establishing new freeway routes in California, where the State highway agency has the task of coordinating the diverse local points of view but no power to coerce.

87. GODDARD, MAURICE K., "Land Acquisition by Public Agencies." In *A Place to Live: The Yearbook of Agriculture, 1963*, pp. 449-453. U.S. Gov't Print. Office, Washington, D.C. (1963).

88. GODSCHALK, DAVID R., "Achieving Environmental Quality and the Highway Beautification Act of 1965." *Hwy. Res. Record No. 182* (1967) pp. 22-24.

A brief but perceptive discussion of possible means for achieving the objectives of the Highway Beautification Act of 1965. Suggests that signboards and junkyards are probably only minor elements in complete highway environmental systems, despite their convenience as symbols of ugliness; that both beauty and safety are involved in a satisfactory system of information about environmental order; that under conditions of stress the most attractive scenery is merely extraneous information; that by viewing the highway environment as a total system we can utilize studies by psychologists of perception and behavior as influenced by stress; and that total highway route planning at the Federal or State level will enable the use of systems techniques for information and beautification programs. Concludes that we should concentrate on improving the design of new highways and remedial work on the existing Interstate System, with improvement programs at major intersections of the primary system rather than along the entire existing length.

89. GOLDSCHMIDT, CARL, "Windshield Vistas—Who Cares?" *Jour. of Am. Inst. of Planners*, Vol. 24, No. 3, pp. 158-165 (1958).

90. "Government Control of Land: Protecting the I-Know-It-When-I-See-It Interest." *Northwestern Univ. Law Rev*, Vol. 62, pp. 428-461 (1967).

A perceptive student comment on governmental techniques for controlling land, inspired by the recent decision in Hickey v. Illinois Central R.R., 35 Ill. 2d 427, 220 N.E. 2d 415 (1966), holding that the railroad owns the fee title to both an extensive strip of land paralleling Lake Michigan on Chicago's South Side and a plot of land adjacent to the city's downtown area. The author discusses the governmental interest in land-use control, use of eminent domain, use of zoning, acquisition of development rights, compensable regulation, and what the author calls "cooperative land-use control" (which means, in substance, zoning the area to be regulated restrictively, and vesting power in a commission to grant exemptions from the stringent zoning restrictions if a particular development plan submitted meets with the commission's approval). This seems to be essentially a variant of the relatively familiar special exception or special use permit technique in zoning.

91. GUNNING, HAROLD C., "Valuation of Restrictive Easements." *Appraisal Jour.*, Vol. 31, pp. 29-33 (Jan. 1963).

Emphasizes that in determining the before-and-after values of land on which a restrictive easement is imposed the degree of reduction of estimated market value will depend on the limiting effects of the easement on the highest and best use of the land.

92. HAAR, CHARLES M., and HERING, BARBARA, "The Determination of Benefits in Land Acquisition." *Cal. Law Rev.*, Vol. 51 (1963).

An extremely valuable article dealing with the determination and deductibility of benefits in computing condemnation awards in takings of land for highway purposes. Possible application of the rules with respect to benefits in cases of scenic easement acquisition is obvious, though not mentioned.

93. HAGMAN, DONALD G., "Open Space Planning and Property Taxation—Some Suggestions." *Wis. Law Rev.*, pp. 628-59 (1964).

An excellent discussion of the possible uses of tax policy to aid in preservation of open space. Essentially, raises and seeks to answer the question whether property taxation methods can be modified so as to encourage rather than discourage the preservation of land in an undeveloped state. Proposes use of modified property taxation methods as an alternative to acquisition of conservation easements, use of the police power alone, or some system of compensable regulation.

94. HAIST, DOUGLAS F., "The Wisconsin Highway Commission Scenic Easement Program." *Proc. of Conservation Easements and Open Space Conference*, pp. 68-69. Wisconsin Department of Resource Development and State Recreation Committee (1961).

Chiefly valuable for the map of proposed scenic easements to be acquired for the Great River Road and other priority areas set forth in the 1961 Wisconsin ORAP legislation.

95. HERRING, FRANCES W. (ed.), *Regional Parks and Open Space: Selected Conference Papers.* Bur. of Public Administration, Univ. of California, Berkeley (1961).

96. JONES, RICHARD O., "Implementation of the Highway Beautification Act of 1965 at the State Level." Presented at AASHO Annual Meeting, Legal Affairs Committee (Dec. 1, 1966).

97. JORDAHL, HAROLD C., JR., "Conservation and Scenic Easements: An Experience Resume." *Land Economics*, Vol. 39, pp. 343-65 (1963).

An invaluable resume of the Wisconsin experience with both scenic and conservation easements through mid-1963. The tables setting forth the spatial extent of easement acquisitions and the cost thereof are especially useful. The discussion of easement acquisition for protecting scenic beauty along highways (pp. 354-356) is excellent. Appendix A contains scenic and conservation easement forms.

98. JORDAHL, HAROLD C., JR., "The Scenic Easement Device: Uses and Abuses." *Proc. of Conference on Scenic Easements in Action*, pp. 5-22. Univ. of Wisconsin (1967).

This paper is somewhat broader in focus than its title suggests. It discusses conservation programs currently utilized in connection with national parks ("the Cape Cod formula") and fish and wildlife areas, as well as scenic preservation for areas adjacent to highways, and land-use controls based on the police power as well as scenic preservation programs based on use of easements. Emphasis is placed on the need for general social recognition that certain natural values are worth preserving; the need for a solid

legislative base and a well-developed and acceptable comprehensive plan which identifies those areas which should be preserved and the method for preserving them; coordination of efforts between agencies and levels of government; careful drafting of scenic easement documents; and use of the same agency for acquisition, maintenance and enforcement. Exploration of the possibility of obtaining gifts of scenic easements is recommended.

99. KORTH, LEO A., "Report on Highway Beautification." Presented to AASHO Annual Meeting, Right-of-Way Committee, (Nov. 28-Dec. 2, 1966).

A report on a questionnaire survey of the 50 States dealing with billboard legislation and control, junkyard legislation and control, scenic easement legislation and progress, and wayside rest areas. The responses indicated that, as of September 1966, many States were still in need of legislation to meet the requirements of the Highway Beautification Act of 1965 for effective control of outdoor advertising and junkyards, and to enable the State highway agencies to implement the provisions for landscaping and scenic enhancement.

100. KRASNOWIECKI, JAN Z., and PAUL, JAMES C. N., "The Preservation of Open Space in Metropolitan Areas." *Univ. of Penn. Law Rev.*, Vol. 110, pp. 179-239 (1961).

Proposes a legal technique for preserving open spaces under which development restrictions are imposed on land which is to be kept undeveloped and the owners of such property will be compensated for the difference between the postrestriction sales price and the prerestriction value of the land; but compensation is to be paid at the time of sale of the land subject to the restrictions rather than at the time the restrictions are imposed. The compensable regulation plan is proposed as an alternative to use of the police power alone, or purchase of development easements alone, or use of tax incentives alone, for the purpose of preserving open space.

101. KRASNOWIECKI, JAN Z., and STRONG, ANN LOUISE, "Compensable Regulations for Open Space—A Means of Controlling Urban Growth." *Jour. Am. Inst. of Planners*, Vol. 29, No. 2, pp. 87-101 (May 1963).

A condensed version, of the article by Krasnowiecki and Paul (*100*).

102. KRAUSZ, N. G. P., and PINK, FREDERICK G., "Agricultural Assessing Practices." *County Officer*, pp. 151-158 (Apr. 1963).

A review of some of the means being used to encourage the retention of land in farm use until needed for development. Techniques discussed include preferential assessment (Maryland, California, Florida, Oregon, New Jersey, and Illinois), deferred tax liabilities (proposed in Indiana, Massachusetts, and Hawaii), acquisition of development rights, and modified assessment practices.

103. LEITNER, HOWARD, "Easement: Tool or Trap for the Land-Use Planner?" *Intramural Law Rev.* (N.Y.U. School of Law), Vol. 21, pp. 42-59 (1965).

This student note is critical of proposals to secure open space and control future development of land by acquiring development rights or conservation easements on the ground that development rights do not conceptually embody the physical criteria necessary to an easement. The author's argument that a court would find it quite difficult to determine what is taken when an easement in a landowner's development rights is condemned is not very persuasive and, in any case, the author seems to distinguish highway or park scenic easements and to approve of the latter because they have built-in geographical limitations based on the boundaries and size of the highway or park.

104. LEVERICH, ROBERT C., "The Preservation of Scenic Beauty: A Total Program." *Proc. of Conference on Scenic Easements in Action*, pp. 35-48. Univ. of Wisconsin (1967).

Offers three guidelines to preservation of scenic beauty: (1) consider and isolate the qualities which create the beauty, or which can be developed or altered to create beauty, and draft the terms and conditions of the scenic easement so as to preserve and promote this beauty; (2) include in the scenic easement those rights which may be necessary to enable future restoration of desirable qualities in the landscape or elimination or screening of undesirable qualities which may be present now or develop in the future; and (3) apply these terms and conditions to the total scene, or to that part of the scenic area which will effectively control the entire view. Also emphasizes the need for communication of the objectives of a scenic easement program to highway personnel and the public generally; the need for keeping scenic values in mind in connection with all highway agency activity; the need to eliminate legal jargon in drafting scenic easement deeds; and the use of committees for site selection.

105. LEVIN, DAVID R., "Highway Zoning and Roadside Protection in Wisconsin." *Wis. Law Rev.*, pp. 197-228 (1951).

A discussion of the pioneering efforts of Wisconsin to control land uses adjacent to highways through the power of eminent domain and the police power, including (under the latter) subdivision control and zoning, setbacks, and building lines. There is a brief discussion of aesthetic considerations, which leads to the conclusion that it would be unwise to attempt to justify roadside protection exclusively on aesthetic arguments.

106. LEVIN, DAVID R., "Scenic Roads and Parkways." *Hwy. Res. Record No. 161* (1967) pp. 30-33.

A short paper detailing the need for and the economic and social underpinning for a program to establish a national system of scenic roads and parkways. Emphasizes the benefits to accrue from such a program and the need for adopting the corridor concept as a basic element in any program of scenic roads and parkways. Essentially a very brief summary of matters developed at more length in the U.S. Dept. of Commerce "Proposed Program for Scenic Roads and Parkways" (*43*).

107. LEVIN, DAVID R., "Scenic Corridors." *Hwy. Res. Record No. 166* (1967) pp. 14-21.

108. LEVIN, DAVID R., "Highway Development Rights." *Proc. HRB*, Vol. 25 (1945) pp. 1-7.

109. LEVINE, LAWRENCE, "Land Conservation in Metropolitan Areas." *Jour. Am. Inst. of Planners*, Vol. 30, p. 204 (1964).

An excellent article proposing that conservation, particularly of wetlands, be emphasized and given high priority as a metropolitan open-space requirement. Argues that lands vital to conservation needs have a strong relationship to an area's health and welfare and afford opportunities for achieving multiple open-space objectives. The great stumbling block

to achieving open-space objectives is continuing reliance upon local government initiative and action. The natural basis for conservation would require a degree of inter-municipal coordination which is difficult to realize and maintain at the local level. The author suggests that the responsibility for implementing the open-space program be borne by a larger unit of government, preferably the State. A discussion of the use of conservation easements or acquisition of development rights is included.

110. LEWIS, PHILIP H., JR., "Protection of Scenic Values." *Hwy. Res. Cir. No. 23* (1966) pp. 2-5.

A brief description of the scenic resource inventories conducted in Wisconsin in an effort to understand the fabric of the land, with its patterns arranged in their natural corridors, and then to fit the highway system into this fabric in such a way as to create variety, surprise, and visual experiences which would otherwise be lacking. The resource inventories were based on four major resources: waters, wetlands, flood plains, and sandy soils adjacent to waters, along with the slopes of varying degrees enclosing the surfaces and linear bands in which these resources are located. Inventories were made on a county-by-county basis. The information obtained is available to the highway designer, the urban designer, and the land-use planner.

111. LEWIS, PHILIP H., JR., "Environmental Values in Regional Highway Design." *Hwy. Res. Record No. 161* (1967) pp. 1-16.

A more detailed exposition of the considerations relevant to the preservation of environmental values in regional highway design. Included is the discussion of the Wisconsin resource inventories contained in *Hwy. Res. Circ. No. 23 (110)*. Also discusses resource nodes, scientific patterns, landscape patterns, and ethnic patterns as elements to be considered in designing environmental corridors for highways. A demonstration (using illustrations) of the development of scenic routes is also included.

112. LEWIS, PHILIP H., JR., "The Environmental Corridor." *Proc. of Conference on Scenic Easements in Action,"* pp. 23-34. Univ. of Wisconsin (1967).

Essentially an expanded version of the discussion of scenic values in highway design contained in *Hwy. Res. Circ. No. 23,* with an introductory section dealing with some of the demographic and landscape characteristics of the midwest.

113. LEWIS, PHILIP H., "The Highway Corridor as a Concept of Design and Planning." *Hwy. Res. Rec. No. 166* (1967) pp. 1-8.

114. LINDAS, LEONARD, "Western Experience with Scenic View and Protection Easements." *Hwy. Res. Circ. No. 23,* pp. 14-16 (Apr. 1966).

Concludes that, as of early 1966, the western States have had practically no experience with scenic easements. All the then-applicable legislation is cited in footnotes; but more recent legislative developments have made some of this material obsolete.

115. LIRETTE, PAUL E., "Ownership in Fee vs Easements." *Proc. Southeastern Assn. of State Highway Officials* (1953) pp. 156-161.

116. LORENS, E. R., "The Highway Beautification Act of 1965: Valuation of Scenic Area Easements." Unpub. paper (1966) 6 pp. plus appendices.

A useful report on valuation of scenic easements in connection with the Highway Beautification Act of 1965, by a right-of-way engineer for the Minnesota Department of Highways. The appendices include a proposed draft of a scenic easement form for use in Minnesota and sample scenic easement appraisals.

117. MANDELKER, DANIEL R., "What Open Space? Where? How?—Planning 1963," pp. 21-27. Am. Soc. of Planning Off. (1963).

After brief reference to the English "green belts," the author launches into an interesting discussion of American open-space programs. He deals with various methods of implementing such programs, such as acquisition of open-space easements, the guaranteed value scheme (also known as the compensable regulation scheme), and new approaches to open-space planning, including a device based on the official map principle developed by the author for the reservation of highway right-of-way in advance of acquisition. He concludes by suggesting that American schemes for open space preservation will profit from consideration of the underlying assumptions of the English green belt program.

118. MANDELKER, DANIEL, "Delegation of Power and Function in Zoning Administration." *Wash. Univ. Law Quart.,* pp. 60-99 (1963).

An excellent treatment of delegation of power, administrative structure, and administrative discretion in zoning, including the power to grant variances and special exceptions, and discretionary administration of the newer devices such as "sinking zones," "floating exceptions," and "floating zones."

119. MANDELKER, DANIEL R., "Notes from the English: Compensation in Town and Country Planning." *Cal. Law Rev.,* Vol. 49, pp. 699-744 (1961).

An extremely valuable discussion of the English scheme of compensable regulation of land use under the Town and Country Planning Acts of 1947 and 1954. The author's proposals for adapting the English scheme for use in the United States are especially useful. With some modification, they could be applied in setting up a scheme of compensable regulation for scenic protection along American highways.

120. MATHENY, JOHN B., "Acquisition of Scenic Easements." *Hwy. Res. Record No. 166* (1967) pp. 36-43.

A good discussion of the existing statutory basis, as of mid-July 1965, for preservation of scenic areas adjacent to highways in California, in anticipation of enactment of the Highway Beautification Act of 1965. Also discusses some of the guidelines and standards developed in California for the scenic highway system, and some of the factors involved in a long-range program of scenic easement acquisition. In addition, there is a brief consideration of legislation in other States which, either expressly or by reasonable construction of the statutory language, authorizes acquisition of scenic easements. The author concludes with some excellent suggestions for drafting scenic easement enabling legislation. An appendix of bibliographic references is included.

121. MORRISON, DARRELL G., "Protecting a Presidential View of the Potomac." *Landscape Arch.,* Vol. 55, pp. 176-78 (Apr. 1965).

122. MOSER, L., "Methods Used to Protect or Reserve and Acquire Rights-of-Way for Future Use in Maryland." *Hwy. Res. Bull. No. 77* (1953) pp. 51-59.

123. MULLEN, B. J., "Scenic Easements: Techniques of Conveyancing." Report to American Bar Association National Institute, "Junkyards, Geraniums and Jurisprudence: Aesthetics and the Law." Chicago, Ill., June 3, 1967 (unpub.) 7 pp. plus exhibits.

Contains an excellent brief summary of the achievements of the Wisconsin scenic easement program; a discussion of the evolution of scenic easement deed forms in Wisconsin; a current Wisconsin scenic easement deed form, along with the current lists of specific rights conveyed and specific rights relinquished, used as a basis for filling in the blank spaces in the deed form. There is also a brief summary of the decision in *Kamrowski v. State,* sustaining the use of eminent domain to acquire scenic easements in Wisconsin; and a discussion of the need for scenic easement variance legislation, together with a copy of a proposed bill to give the State highway agency the authority to grant variances.

124. MULLEN, B. J., "Scenic Easements: Wisconsin Progress." Report to 1966 Conference of AASHO (Nov. 30, 1966) 14 pp.

An excellent brief summary of the Wisconsin scenic easement program to date, including historical background, objectives, the scenic easement appraisal process, and some comments about the future of the Wisconsin program. Also included is a discussion of the decision in *Kamrowski v. State,* upholding the use of eminent domain to acquire scenic easements in Wisconsin; and a listing of the specific rights conveyed and the specific rights relinquished currently used in drafting Wisconsin scenic easement deed forms.

125. MULLEN, B. J., "Appraisal, Communication, Negotiation, Administration." *Proc. of Conference on Scenic Easements,* pp. B-1 to B-13. Univ. of Wisconsin (1967).

A summary of the workshop discussions on appraisal, communication, negotiation, and administration in a scenic easement program. Appended to the report is a listing of the specific rights conveyed and the specific rights relinquished currently used in drafting Wisconsin scenic easement deeds.

126. NELSON, GAYLORD A., "Governor's Address." *Proc. of Conservation Easements and Open Space Conference,* pp. 81-85. Univ. of Wisconsin (1961).

A brief summary of the objectives and the major features of the 1961 ORAP legislation in Wisconsin

127. NEUMANN, CARL A., "Legislative Problems in Wisconsin's Scenic Easement Program 1967 Highway Law Comment 14-24." *Hwy. Res. Circ. No. 66* (July 1967).

A good brief discussion of the proposed scenic beauty bill now pending in the Wisconsin legislature, including the reasons for the drafting of the bill, its objectives, and a critique of the language used in the bill.

128. NEW YORK STATE DEPARTMENT OF PUBLIC WORKS, *Scenic Roads and Parkways.* Vol. I (1965).

129. NORTON, THOMAS J., "Decision-Making Techniques for Identifying Aesthetically Superior Highway Environments." *Hwy. Res. Record No. 182* (1967) pp 5-8.

A general discussion of decision-making techniques for identifying aesthetically superior highway environments, with special emphasis on the criteria developed in Washington on the basis of the 1961 Washington Highway Advertising Control Act and the new survey technique developed for use in Washington in response to the Highway Beautification Act of 1965.

130. PETERSON, GEORGE L., "Complete Value Analysis: Highway Beautification and Environmental Quality." *Hwy. Res Record No. 182* (1967) pp. 9-17.

A mathematical treatment of the topic. The author states that his purpose is not to develop a model, but rather to provide a way of stating as simply as possible a rather complicated concept.

131. OLSON, JAMES A., "Progress and Problems in Wisconsin's Scenic and Conservation Easement Program." *Wis. Law Rev.,* pp. 352-73 (1965).

An excellent student note dealing with various aspects of the Wisconsin scenic and conservation easement program. Statistics on the extent and cost of scenic and conservation easement acquisition are included. There is a very good discussion of a number of tax problems that may arise in connection with the Wisconsin program, such as Federal income tax treatment of easement payments to landowners and the effect of scenic and conservation easements on property taxes paid by landowners.

132. "Preservation of Indiana's Scenic Areas: A Method." *Ind. Law Jour.,* Vol. 40, pp. 402-19 (1965).

A good student note dealing briefly with various methods for preserving scenic areas, such as tax relief plans, purchase of development rights, and compensable regulation. Concludes that the most hopeful possibility is public acquisition of scenic rights in land through voluntary restrictive agreements, following the Lake George or "do-it-yourself zoning" technique. The legal problems associated with such a technique are explored in some detail.

133. "Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning" *Stanford Law Rev.,* Vol 12, pp. 638-652 (1960).

An excellent student note evaluating the 1955 California "greenbelt" statute and the 1959 California "open-space" statute and considering alternative methods of maintaining open space based on the powers of eminent domain, zoning and taxation. The major criticism of greenbelt zoning is that it depends on voluntary action of landowners. The major criticism of the open-space statute is that it does not authorize acquisition of open-space easements or development rights by condemnation. Concludes that a State agency should be vested with overall powers to preserve agricultural land and scenic areas, with the detail of conservation plans, but not the responsibility for supervision, in the hands of local authorities. Regional agencies are suggested as an alternative to a State agency as the locus of supervisory power

134. PUSHKAREV, BORIS. "Esthetic Criteria in Freeway Design." *Proc. HRB,* Vol. 41 (1962) pp. 89-108

135. SARGENT, FREDERIC O., "Scenery Classification." *Rep. 18,* Vermont Resources Research Center, Univ. of Vermont Agricultural Exper. Sta. (1967) 27 pp.

Starts with a definition of "scenery," discusses trends in "open" land and farm land, and then deals at greater length with scenery classification, including the topics of scenery rating systems, scenic site analysis, scenic site potentials, eyesores, eyesore analysis

by reconnaissance survey, and procedure for reconnaissance scenery survey. Concludes with six examples of scenery classification and analysis.

136. SAWTELLE, ROLFE B., "Experiences in the Acquisition of Scenic Easements by the State of Wisconsin." Paper presented to 24th Ann. Meeting, Mississippi River Parkway Commission (July 22, 1963) (unpub.)

137. SAWTELLE, ROLFE B., "Scenic Easements for the Great River Road." *Proc. of Conservation Easements and Open Space Conference*, pp. 47-52. Univ. of Wisconsin (1961).

A summary of the Wisconsin experience with scenic easements for the Great River Road, as of late 1961.

138. SHAFER, J. S., "Valuation of Easements." U.S. Bureau of Public Roads, Right-of-Way Seminar, pp. 34-34d (1959).

139. SNYDER, J. H., "Toward Land Use Stability Through Contracts." *Nat. Resources Jour.*, Vol. 6, p. 406 (1966).

140. STEUBER, WILLIAM F., "Scenic Easements and Interests for the Great River Road and Other Highways in Wisconsin." Report to the Natural Resources Committee of State Agencies (Feb. 9, 1965).

141. STRONG, ANN LOUISE, "Eminent Domain vs Zoning for Scenic Corridors." *Hwy. Res. Circ. No. 23* (1966) pp. 6-10.

A good brief discussion of the criteria to be applied in determining whether to rely on the police power or to purchase (or condemn) interests in land for scenic preservation and enhancement. The general conclusion is that (a) in rural areas where there is little development potential, zoning alone will suffice; (b) in rural areas where development is likely to occur in the near future, easements should be acquired; and (c) in urban areas where scenic corridor preservation is likely to result in severe loss in property values, fee-simple acquisition will be necessary. The author sets out some results of a study by Matuszeski of the effect of scenic easements on land values along the Great River Road in Wisconsin.

142. SUSMAN, THOMAS M., "Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land-Use Control." *Tex. Law Rev.*, Vol. 44, pp. 741-767 (1966).

A student note discussing the recently adopted Texas system for municipal enforcement of private restrictive covenants.

143. SUTTE, DONALD T., JR., "Scenic Easements." *Appraisal Jour.*, Vol. 34, p. 531 (1966).

144. "Techniques for Preserving Open Spaces." *Harvard Law Rev.*, Vol. 75, pp. 1622-44 (1962).

An excellent and well-documented student review of the various legal devices available to public agencies to preserve open spaces, both under the police power and under the power of eminent domain. There is a discussion of possible methods for combining the police power and eminent domain, and a brief treatment of tax techniques to aid in open-space preservation.

145. TULANE, ROY G., "History of Acquisition of Conservation Lands." *Proc. of Conservation Easements and Open Space Conference*, pp. 10-18. Univ. of Wisconsin (1961).

An interesting, brief, but rather comprehensive survey of the history of conservation law in Wisconsin. Includes a treatment of the history of laws establishing State parks.

146. TUNNARD, CHRISTOPHER, "Highway Scenic Potentials." *Hwy. Res. Record No. 182* (1967) pp. 1-4.

A generalized essay on visual surroundings as seen from the vehicle, which is preliminary to research which will be undertaken by the Department of City Planning at Yale in collaboration with the Connecticut State Highway Department. Deals with (1) the transurban view, (2) problems of sequential viewing, and (3) the task of composition.

147. U.S. DEPT. OF AGRICULTURE, "State Action Relating to Taxation of Farmland on the Rural-Urban Fringe." *Econ. Res. Serv. Bull. No. 13* (1961).

148. U.S. DEPT. OF COMMERCE, "Report on 1967 Highway Beautification Program to the United States Congress, Pursuant to Public Law 89-285, Highway Beautification Act of 1965." S. Doc. No. 6, 90th Cong., 1st Sess. Comm. Print. U.S. Govt. Print. Office, Washington, D.C. (1967) 61 pp.

Part I contains an estimate of costs, economic impact, and alternate or improved methods of accomplishing the objectives of the Highway Beautification Act of 1965. Part II is a report on standards, criteria, and rules and regulations as required by section 303(b) of the Highway Beautification Act of 1965. The tables of estimated costs and utilization of funds authorized and appropriated for fiscal 1966 are especially valuable, as are the economic impact study and the report on standards, criteria, etc. It should be noted, however, that no standards or criteria are set out for implementation of Title III of the Highway Beautification Act of 1965. Also includes a list of State studies pursuant to the Highway Beautification Act, and bibliographies on outdoor advertising, junkyards, and scenic enhancement.

149. U.S. DEPT. OF COMMERCE, BUREAU OF PUBLIC ROADS, *Policy and Procedure Memorandum 21-4.6, Acquisition of Highway Right-of-Way and of Strips of Land Adjacent to Federal-Aid Highways.* (Jan. 24, 1966) 4 pp.

Prescribes the procedures for implementing a portion of Title III of the Highway Beautification Act of 1965, dealing with acquisition of land designated as highway right-of-way needed for rest and recreation areas and of interests in strips of land adjacent to Federal-aid highways necessary for preservation, restoration, or enhancement of scenic beauty.

150. U.S. DEPT. OF COMMERCE, BUREAU OF PUBLIC ROADS, *Policy and Procedure Memorandum 80-9, Acquisition Procedures for the Control of Outdoor Advertising Signs and Junkyards and for Landscaping and Scenic Enhancement (Highway Beautification Act of 1965).* (Mar. 31, 1967) 9 pp. plus appendices.

Sets out in detail the policies and procedures relating to Federal participation in the costs of acquiring the property interests necessary for removal of nonconforming advertising signs, for removal or relocation of nonconforming junkyards, and for landscaping and scenic enhancement under the Highway Beautification Act of 1965. With respect to projects for landscaping and scenic enhancement, however, this memorandum merely states that the provisions of PPM 21-4.6 (Jan. 24, 1966) shall be controlling.

151. U.S. HOUSING AND HOME FINANCE AGENCY, URBAN RENEWAL ADMINISTRATION, *Open-Space Land Program*

Guide. U.S. Gov't. Print. Office, Washington, D.C. (1962) 42 pp.

Contains open-space definitions and specifies policies and requirements for Federal assistance under Title VII of the Housing Act of 1961.

152. U.S. HOUSING AND HOME FINANCE AGENCY, "Urban Expansion—Problems and Needs." Papers presented at Administrator's Spring Conference, June 7-9, 1962. (1963) 174 pp.

The emphasis is on regional analysis, including urban sprawl, enclave communities, open-space conservation, and speculative land prices.

153. VERMONT CENTRAL PLANNING OFFICE, *Vermont Scenery Preservation.* Montpelier, Vt. (Feb. 1966) 72 pp.

A valuable series of studies by Allen Fonoroff, Norman Williams, Jr., and Dorothy L. Moore. Topics covered include: (1) protecting roadside scenery in Vermont; (2) a model act to preserve and to enhance scenic values in Vermont in areas adjacent to or visible from State highways; (3) a model act to protect and to preserve the economic and physical well-being of the people of Vermont by regulating the location of, and licensing the operation of, junkyards; (4) regulation of signs; (5) a report on a study of scenic values and location of scenic sites and views in Vermont; and (6) the League of Women Voters of Vermont and the scenic highway check.

154. VOIGT, LESTER P., "Conservation Easements—Preliminary Instructions." *Administrative Directive No. 85,* Wisconsin Conservation Dept. (Jan. 1962).

155. VOIGT, LESTER P., "Wisconsin Conservation Easement Program." *Proc. of Conservation Easements and Open Space Conference,* pp. 61-67. Univ. of Wisconsin (1961).

A good brief description of the Wisconsin conservation easement program as authorized by the ORAP legislation of 1961. There is an interesting statement of plans for the future.

156. VOLPERT, RICHARD S., "Creation and Maintenance of Open Spaces in Subdivisions: Another Approach." *UCLA Law Rev.*, Vol. 12, pp. 830-855 (1965).

Contains an excellent summary of techniques for preserving open space—outright purchase in fee simple, purchase of conservation or scenic easements, compensable regulation, straight zoning regulation (primarily by imposing large minimum lot sizes), and planned unit development (cluster development). The author then goes on to advocate a method which combines outright public acquisition of open-space land in fee simple with financing by special assessments. The discussion of this method is based on the Open Space Maintenance Ordinance adopted in Los Angeles in 1964.

157. WASHINGTON CENTER FOR METROPOLITAN STUDIES, *Open Spaces and Our Cities* (1961) 21 pp.

Discusses why we need open spaces and what the Federal government in general, and the Housing and Home Finance Agency in particular, can do to advance this cause.

158. WEST, W. B., III, "Condemnation of Limited-Use Easements." *Proc. 6th Ann. Inst. on Eminent Domain* (1964).

159. WHITE HOUSE CONFERENCE ON NATURAL BEAUTY, *Report to the President and the President's Response.* U.S. Gov't. Print. Office, Washington, D.C. (1965) 47 pp.

160. WHYTE, WILLIAM H., JR., "Conservation Easements: An Overview." *Proc. of Conservation Easements and Open Space Conference,* pp. 3-9. Univ. of Wisconsin (1961).

A good brief summary of ways in which conservation easements may be effectively used in an open-space program.

161. WILLIAMS, NORMAN, JR., "Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors." *Hwy. Res. Record No. 182* (1967) pp. 25-38.

A very valuable paper dealing with legal techniques available to protect and promote scenic beauty along highway corridors, including (1) highway routing and design, (2) public acquisition and development of land and vistas in the corridor, and (3) regulation of private activities and uses of land in the corridor. Also discusses in some detail the legal basis for using the police power to regulate land use to achieve aesthetic purposes.

162. WISCONSIN DEPARTMENT OF RESOURCE DEVELOPMENT, *The Outdoor Recreation Plan.* (1966) 216 pp. (including appendices).

The comprehensive plan for State recreation facilities prepared pursuant to legislative directive and at the request of the State Recreation Committee. Topics covered include standards, demand, facilities, general description of the resources, the sites, meeting the needs, solutions, and action program. Extensive appendices are included.

163. WISCONSIN DEPARTMENT OF RESOURCE DEVELOPMENT, *Wisconsin Ten-Year Program* (1961).

164. WISCONSIN DEPARTMENT OF TRANSPORTATION, "A Market Study of Properties Covered by Scenic Easements Along the Great River Road in Vernon and Pierce Counties." *Spec. Rep. No. 5,* Land Economics Studies Unit, Appraisal Section, Bur. of Right-of-Way, Div. of Highways (1967).

A very useful report. The preface briefly sets out the development of Wisconsin's scenic easement program, a definition of scenic easements, the objectives of the study, and the research undertaking. The major part deals with the economic effect of scenic easements on residential, commercial, and agricultural property values along the Great River Road in Vernon and Pierce Counties, Wisconsin. Also includes as exhibits an early scenic easement document, purchaser's and assessor's questionnaires used in the study, a current scenic easement document, and the current scenic easement provisions for specific rights conveyed and specific rights relinquished.

165. WISCONSIN UNIVERSITY, *Workshop Manual for Conference on Scenic Easements in Action.* (1966) 85 pp. (including appendices).

An extremely valuable manual prepared for participants in Conference held December 16-17, 1966. This Conference was sponsored by the Wisconsin State Highway Department, the America the Beautiful Fund of the Natural Area Council, and the University of Wisconsin Law School. The manual was principally the work of Thomas Gose, a law student at the Uni-

versity of Wisconsin, who drew freely on many other sources, all duly acknowledged. The Manual contains valuable appendices.

166. WISCONSIN UNIVERSITY, *Conference Proceedings: Scenic Easements in Action.* (1967) 66 pp.

Contains the conference addresses, workshop reports, final summaries, and reference materials. The major contributions are listed in this bibliography under the names of the authors.

BIBLIOGRAPHIES

167. CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, *California Parkways: A Plan for a State Parkway System.* (1966).

Pages 69-70 contain a selected bibliography.

168. DAVIS, ELIZABETH G., JOHNSON, HUGH A., and HAREN, CLAUDE C., "Urbanization and Changing Land Uses—A Bibliography of Selected References, 1950-58." *U.S. Dept. of Agriculture Misc. Pub. 825.* U.S. Gov't. Print. Office, Washington, D.C. (1960) 212 pp.

An annotated bibliography containing 15 major subject headings, including regional studies, land use and land-use surveys, industrial location, regional planning, urban and metropolitan planning, city government, taxation and services, and annexation. Lists 1,319 items and contains an index by topic, geographic area, and author. There is much material on land use and the impact of urbanization on agricultural and other nonurban types of land use.

169. U.S. DEPARTMENT OF COMMERCE, *Report to the U.S. Congress Pursuant to Public Law 89-285, Highway Beautification Act of 1965.* S. Doc. No. 6, 90th Cong. 1st Sess., 1967. U S. Gov't. Print. Office, Washington, D.C. (1967).

Pages 57-61 contain bibliographies of material pertaining to the economic impact study dealing with outdoor advertising, junkyards, and scenic enhancement conducted by the Dept. of Commerce pursuant to the Highway Beautification Act of 1965. Not annotated.

170. URBAN LAND INSTITUTE, *Open Space Land, Planning and Taxation: A Selected Bibliography.* Prepared for the Urban Renewal Administration, Housing and Home Finance Agency. U.S. Gov't. Print. Office, Washington, D.C. (1965) 58 pp.

An annotated bibliography containing 297 items, covering the following topics: (1) research resources; (2) land planning and use; (3) regional studies; (4) land economics; (5) taxation; (6) public finance; and (7) the National Capital Region. The section on land planning and use contains general references and references dealing with open space, outdoor recreation, and urban fringe problems. An index of authors is appended.

171. WASHINGTON CENTER FOR METROPOLITAN STUDIES, *Open Spaces in Metropolitan Areas: Selected References.* (1961) 26 pp.

A selected bibliography on open spaces and related planning and legal topics, arranged by subject.

Published reports of the

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

are available from:

Highway Research Board
National Academy of Sciences
2101 Constitution Avenue
Washington, D.C. 20418

Rep. No.	*Title*
—*	A Critical Review of Literature Treating Methods of Identifying Aggregates Subject to Destructive Volume Change When Frozen in Concrete and a Proposed Program of Research—Intermediate Report (Proj. 4-3(2)). 81 p., $1.80
1	Evaluation of Methods of Replacement of Deteriorated Concrete in Structures (Proj. 6-8), 56 p., $2.80
2	An Introduction to Guidelines for Satellite Studies of Pavement Performance (Proj. 1-1), 19 p., $1.80
2A	Guidelines for Satellite Studies of Pavement Performance, 85 p.+9 figs., 26 tables, 4 app., $3.00
3	Improved Criteria for Traffic Signals at Individual Intersections—Interim Report (Proj. 3-5), 36 p., $1.60
4	Non-Chemical Methods of Snow and Ice Control on Highway Structures (Proj. 6-2), 74 p., $3.20
5	Effects of Different Methods of Stockpiling Aggregates—Interim Report (Proj. 10-3), 48 p., $2.00
6	Means of Locating and Communicating with Disabled Vehicles—Interim Report (Proj. 3-4), 56 p. $3.20
7	Comparison of Different Methods of Measuring Pavement Condition—Interim Report (Proj. 1-2), 29 p., $1.80
8	Synthetic Aggregates for Highway Construction (Proj. 4-4), 13 p., $1.00
9	Traffic Surveillance and Means of Communicating with Drivers—Interim Report (Proj. 3-2), 28 p., $1.60
10	Theoretical Analysis of Structural Behavior of Road Test Flexible Pavements (Proj. 1-4), 31 p., $2.80
11	Effect of Control Devices on Traffic Operations—Interim Report (Proj. 3-6), 107 p., $5.80
12	Identification of Aggregates Causing Poor Concrete Performance When Frozen—Interim Report (Proj. 4-3(1)), 47 p., $3.00
13	Running Cost of Motor Vehicles as Affected by Highway Design—Interim Report (Proj. 2-5), 43 p., $2.80
14	Density and Moisture Content Measurements by Nuclear Methods—Interim Report (Proj. 10-5), 32 p., $3.00
15	Identification of Concrete Aggregates Exhibiting Frost Susceptibility—Interim Report (Proj. 4-3(2)), 66 p., $4.00
16	Protective Coatings to Prevent Deterioration of Concrete by Deicing Chemicals (Proj. 6-3). 21 p., $1.60
17	Development of Guidelines for Practical and Realistic Construction Specifications (Proj. 10-1.) 109 p., $6.00
18	Community Consequences of Highway Improvement (Proj. 2-2), 37 p., $2.80
19	Economical and Effective Deicing Agents for Use on Highway Structures (Proj. 6-1), 19 p., $1.20
20	Economic Study of Roadway Lighting (Proj. 5-4), 77 p., $3.20
21	Detecting Variations in Load-Carrying Capacity of Flexible Pavements (Proj. 1-5), 30 p., $1.40
22	Factors Influencing Flexible Pavement Performance (Proj. 1-3(2)), 69 p., $2.60
23	Methods for Reducing Corrosion of Reinforcing Steel (Proj. 6-4), 22 p., $1.40
24	Urban Travel Patterns for Airports, Shopping Centers, and Industrial Plants (Proj. 7-1), 116 p., $5.20
25	Potential Uses of Sonic and Ultrasonic Devices in Highway Construction (Proj. 10-7), 48 p., $2.00
26	Development of Uniform Procedures for Establishing Construction Equipment Rental Rates (Proj. 13-1), 33 p., $1.60
27	Physical Factors Influencing Resistance of Concrete to Deicing Agents (Proj. 6-5), 41 p., $2.00
28	Surveillance Methods and Ways and Means of Communicating with Drivers (Proj. 3-2), 66 p., $2.60
29	Digital-Computer-Controlled Traffic Signal System for a Small City (Proj. 3-2), 82 p., $4.00
30	Extension of AASHO Road Test Performance Concepts (Proj. 1-4(2)). 33 p., $1.60
31	A Review of Transportation Aspects of Land-Use Control (Proj. 8-5). 41 p., $2.00
32	Improved Criteria for Traffic Signals at Individual Intersections (Proj. 3-5). 134 p., $5.00
33	Values of Time Savings of Commercial Vehicles (Proj. 2-4), 74 p., $3.60
34	Evaluation of Construction Control Procedures—Interim Report (Proj. 10-2), 117 p., $5.00
35	Prediction of Flexible Pavement Deflections from Laboratory Repeated-Load Tests (Proj. 1-3(3)), 117 p., $5.00
36	Highway Guardrails—A Review of Current Practice (Proj. 15-1), 33 p., $1.60
37	Tentative Skid-Resistance Requirements for Main Rural Highways (Proj. 1-7), 80 p., $3.60
38	Evaluation of Pavement Joint and Crack Sealing Materials and Practices (Proj. 9-3), 40 p., $2.00
39	Factors Involved in the Design of Asphaltic Pavement Surfaces (Proj. 1-8), 112 p., $5.00
40	Means of Locating Disabled or Stopped Vehicles (Proj. 3-4(1)), 40 p., $2.00
41	Effect of Control Devices on Traffic Operations (Proj. 3-6), 83 p., $3.60

* Highway Research Board Special Report 80

Rep. No.	*Title*
42	Interstate Highway Maintenance Requirements and Unit Maintenance Expenditure Index (Proj. 14-1), 144 p., $5.60
43	Density and Moisture Content Measurements by Nuclear Methods (Proj. 10-5), 38 p., $2.00
44	Traffic Attraction of Rural Outdoor Recreational Areas (Proj. 7-2), 28 p., $1.40
45	Development of Improved Pavement Marking Materials—Laboratory Phase (Proj. 5-5), 24 p., $1.40
46	Effects of Different Methods of Stockpiling and Handling Aggregates (Proj. 10-3), 102 p., $4.60
47	Accident Rates as Related to Design Elements of Rural Highways (Proj. 2-3), 173 p., $6.40
48	Factors and Trends in Trip Lengths (Proj. 7-4), 70 p., $3.20
49	National Survey of Transportation Attitudes and Behavior—Phase I Summary Report (Proj. 20-4), 71 p., $3.20
50	Factors Influencing Safety at Highway-Rail Grade Crossings (Proj. 3-8), 113 p., $5.20
51	Sensing and Communication Between Vehicles (Proj. 3-3), 105 p., $5.00
52	Measurement of Pavement Thickness by Rapid and Nondestructive Methods (Proj. 10-6), 82 p., $3.80
53	Multiple Use of Lands Within Highway Rights-of-Way (Proj. 7-6), 68 p., $3.20
54	Location, Selection, and Maintenance of Highway Guardrail and Median Barriers (Proj. 15-1(2)), 63 p., $2.60
55	Research Needs in Highway Transportation (Proj. 20-2), 66 p., $2.80
56	Scenic Easements—Legal, Administrative, and Valuation Problems and Procedures (Proj. 11-3), 174 p., $6.40

THE NATIONAL ACADEMY OF SCIENCES is a private, honorary organization of more than 700 scientists and engineers elected on the basis of outstanding contributions to knowledge. Established by a Congressional Act of Incorporation signed by President Abraham Lincoln on March 3, 1863, and supported by private and public funds, the Academy works to further science and its use for the general welfare by bringing together the most qualified individuals to deal with scientific and technological problems of broad significance.

Under the terms of its Congressional charter, the Academy is also called upon to act as an official—yet independent—adviser to the Federal Government in any matter of science and technology. This provision accounts for the close ties that have always existed between the Academy and the Government, although the Academy is not a governmental agency and its activities are not limited to those on behalf of the Government.

THE NATIONAL ACADEMY OF ENGINEERING was established on December 5, 1964. On that date the Council of the National Academy of Sciences, under the authority of its Act of Incorporation, adopted Articles of Organization bringing the National Academy of Engineering into being, independent and autonomous in its organization and the election of its members, and closely coordinated with the National Academy of Sciences in its advisory activities. The two Academies join in the furtherance of science and engineering and share the responsibility of advising the Federal Government, upon request, on any subject of science or technology.

THE NATIONAL RESEARCH COUNCIL was organized as an agency of the National Academy of Sciences in 1916, at the request of President Wilson, to enable the broad community of U. S. scientists and engineers to associate their efforts with the limited membership of the Academy in service to science and the nation. Its members, who receive their appointments from the President of the National Academy of Sciences, are drawn from academic, industrial and government organizations throughout the country. The National Research Council serves both Academies in the discharge of their responsibilities.

Supported by private and public contributions, grants, and contracts, and voluntary contributions of time and effort by several thousand of the nation's leading scientists and engineers, the Academies and their Research Council thus work to serve the national interest, to foster the sound development of science and engineering, and to promote their effective application for the benefit of society.

THE DIVISION OF ENGINEERING is one of the eight major Divisions into which the National Research Council is organized for the conduct of its work. Its membership includes representatives of the nation's leading technical societies as well as a number of members-at-large. Its Chairman is appointed by the Council of the Academy of Sciences upon nomination by the Council of the Academy of Engineering.

THE HIGHWAY RESEARCH BOARD, organized November 11, 1920, as an agency of the Division of Engineering, is a cooperative organization of the highway technologists of America operating under the auspices of the National Research Council and with the support of the several highway departments, the Bureau of Public Roads, and many other organizations interested in the development of highway transportation. The purposes of the Board are to encourage research and to provide a national clearinghouse and correlation service for research activities and information on highway administration and technology.