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### RECREATION EASEMENTS

Land is a community asset. If the term 'land', or more specifically "property", is considered a composite bundle of rights (for example the right to buy, to sell, to inherit or to develop), what has commonly been called "private property" is, in fact, private ownership of some of these rights. For purposes of the public good, it has become usual for the public sector to assume control, without purchase, over the remaining rights through such techniques as zoning by-laws and official plans. Easements, an additional technique, allow the public sector to acquire further rights by purchasing them.

An easement, which has its roots in common law, is "the purchase of something less than all of the rights in land."<sup>1</sup> A prime advantage of the easement type of acquisition is that it "goes with the land." The easement condition is attached to the deed and remains in effect in perpetuity.

Easements may take control of many different rights. Although their full potential has not been realized, in Ontario they have been used for example to gain service and utility conveyances, property access and mining rights.

The demand for land, including land for recreation, has been rapidly increasing and although acquiring land in fee simple (i.e. full ownership) and retaining it in public ownership for public use will likely remain the basic method of developing areas for outdoor recreation, privately owned land can offer supplementary opportunities for certain types of outdoor recreation that do not interfere with the private owner's use of the land. While not an exhaustive list, the following activities fall into this category -- driving for recreation, hunting, fishing, snowmobiling and hiking.

Easements for recreation and conservation have been used quite frequently in many parts of the United States. Channel change easements, slope and drainage easements, and scenic easements along highways are common. Wisconsin, in particular, has made extensive use of recreation and conservation easements. The Wisconsin Departments of Conservation and Highways, and the Bureau of Sports, Fisheries and Wildlife in the U.S. Department of the Interior have acquired the following easements:

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1. Harold D. Jordahl, Jr., "Conservation and Scenic Easements: An Experience Resume", Land Economics, (Vol.39, 1963), p.344.

- (1) Negative Easements<sup>2</sup>.-- prohibitions against erection of non-conforming buildings, or commercial and industrial use of lands adjacent to highways; erection of outdoor advertising; dumping of trash adjacent to highways; destruction of trees, shrubs or vegetation; and burning, filling or drainage of wet lands.
- (2) Positive Easements<sup>3</sup>.-- permitting public fishing, hunting and trapping; weed control; fencing; tree, shrub and food patch planting for streambank and stream channel improvements; posting of signs; and flooding.<sup>4</sup>.

Conceptually, there are few problems in using an easement to acquire land for recreation; practically, some implementation problems do arise. The major one is determining the cost of the easement itself -- what is its value and what is the assessed value of the property rights which remain? This problem must be worked out for each individual case. The American experience indicates that the success or failure of the use of easements depends on whether people want the easement concept to work and also on the individual who is negotiating the easement.

A second problem is that some people have expected too much from easements and have, as a consequence, been disappointed by them. An easement is not a low-cost substitute for the fee simple purchase. It is the purchase of a right in land and its cost depends on the value of that right. Sometimes the purchase of an easement would cost nearly as much as the fee simple (e.g., purchase of development rights in prime downtown land whose value is dependent on the development potential of the land). And sometimes the purchase of an easement would cost much less than the fee simple (e.g., purchase of development rights in land which has low development potential or purchase of a fairly minor right in land, such as a pedestrian right-of-way over fields). It is important to emphasize that, while purchase of easements may save money, the primary benefit of easements is that they provide an additional method of preserving land for public use.<sup>5</sup>.

In Ontario, there are only a few cases where easements have been implemented for recreation. For example, in 1967 an amendment to the Game and Fish Act of Ontario (Chapter 30, Sec. 20) allows the Minister of the Department of Lands and Forests to enter into agreement with landowners to transfer hunting and fishing rights to the Crown. They also receive the right

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2. A negative easement is a right to prevent a property owner from using his land in specified ways; normally for specific types of land use and activities.
  3. A positive easement is a limited right to make use of land owned in fee simple by someone else.
  4. Jordahl, p.352.
  5. Several advantages accrue to both the landowner and the public sector. For example if a scenic easement was acquired in the path of rapid urban expansion, the landowner would receive tax protection; protection from adjacent adverse land uses and consequently enhancement of the value of his property in terms of environmental quality. At the same time, the land would remain on the tax rolls; the public sector would not have to maintain it; the land would remain productive; and the public would have conserved land for recreation without having to bear the fee simple costs.

to manage the land which includes improving the habitat, fencing and stocking. The Gertler report on the Niagara Escarpment, which has yet to be implemented, is the only Canadian study which has fully considered the use of easements for recreation. It recommends the use of easements to conserve parts of the escarpment.

The conceptual and philosophical base exists for the use of easements in acquiring land for recreation. Consequently, the required legislative changes would be minor. In Ontario, before easements can become an effective means of acquiring land, the right to expropriate rather than negotiate is needed. At present, the public sector has the right to expropriate all the rights of land (i.e. to buy the land for public purposes) but it does not have the right to expropriate partial rights or an easement for recreation.

#### Recommendations

- 1.) Easements should be used more frequently to acquire areas for recreation.
- 2.) The minor legislative changes required to allow a broader use of easements to acquire land for recreation should be made.
- 3.) The public sector should have the right to expropriate a recreation easement.