LAND PHILANTHROPY: ONE APPROACH TO OPEN SPACE PRESERVATION

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Open space land, like so many of our other natural resources, is becoming scarce. Increasing amounts of leisure time and the growing psychological pressures of modern day urban life have generated a very real need for open space areas of all varieties, both close to and far from the urban centers. Action in both the public and private sectors is required if our current and future recreational and park needs are to be met. Though Canada presently lacks comprehensive "open space" legislation, a number of legal tools are available in both these sectors which can be used for the protection and preservation of open space lands. (The more common of these devices include expropriation, purchase, zoning laws, conservation easements, restrictive covenants and property taxation.)

One valuable approach to open space preservation, which has unfortunately received little attention, is that of land philanthropy. The same incentives which prompt individuals to donate other kinds of assets to charitable organizations and government bodies [1] can also be drawn upon for encouraging donations of land for open space purposes. The effectiveness of such an acquisition scheme depends substantially upon both the manner in which such donations are solicited from prospective donors [2] and the types of incentives (especially financial ones) made available to them. Because the very notion of donating land, rather than money or securities, is a new one for many

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[1] Many federal and provincial statutes specifically provide for the acquisition of open space lands by government bodies by way of donation. *See especially* Park Act, B.C. Stat. 1965 c. 31, § 11(*a*); The Provincial Parks Act, ONT. REV. STAT. c. 371, § 9 (1970); National Parks Act, CAN. REV. STAT. c. N-13, § 6(3) (1970) *as amended by* Can. Stat. 1974 c. 11; The Provincial Parks Act, NFLD. REV. STAT. c. 49, § 3(*b*) (1952); Provincial Parks Act, N.S. REV. STAT. c. 244, § 2(1)(*b*) (1967); The Provincial Parks Act, MAN. REV. STAT. c. P-20, § 5 (1)(*a*) (1970); The Provincial Parks Act, ALTA. REV. STAT. c. 288, § 8(*b*) (1970); The Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act, SASK. REV. STAT. c. 54, § 7 (1965) *as amended*; The Recreation Development Act, P.E.I. Stat. 1969 c. 45, § 3(*b*); The Prince Edward Island Heritage Foundation Act, P.E.I. Stat. 1970 c. 39, § 8(1); The Wildlife Act, MAN. REV. STAT. c. W-140, § 6(4) (1970); The Municipal Act, Man. Stat. 1970 c. 100, § 379(2); Municipal Act, N.S. REV. STAT. c. 192, § 134(3) (1967); The Historic Objects, Sites and Records Act, Nfld. Stat. 1959 c. 76, § 12(*a*); The Municipal Act, ONT. REV. STAT. c. 284, § 352(69) (1970).

[2] Note, *Park Planning and the Acquisition of Open Spaces: A Case Study*, 36 U. CHI. L. REV. 642, at 655 (1969).

people,[3] any program employed to sell this concept to the public must be carefully designed to alleviate any fears that may be generated by such novelty.[4]

Although donations of land provide maximum protection of open space for long periods of time and at minimal initial expenditures,[5] like the land acquisition techniques of purchase or expropriation, they subsequently involve heavy costs to public bodies in terms of maintenance costs and foregone property tax revenues.[6]

The major financial benefit to the land donor flows from sections 110(1)(*a*) (charitable donations) and 110(1)(*b*) (gifts to the Crown) of the Income Tax Act.[7] Under these sections a taxpayer may claim a deduction when computing taxable income in respect of amounts[8] given as gifts to, *inter alia*, the Crown in right of Canada, the Crown in right of Canadian provinces, Candian municipalities and a variety of registered Canadian charitable organizations.[9] For donations to the latter two bodies, deductions cannot exceed 20 per cent of the income of the taxpayer for the year,[10] whereas deductions for donations made to the Crown (Canada or Canadian provinces) are of an unlimited nature for any one year (*i.e.*, up to 100 per cent of the income of the taxpayer for the year).[11] Further, under the gift

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[3] However, for certain individuals the notion is a familiar one, as indicated by recent open space gifts. See *Given Gift of $500,000 Wilderness Park*, The Toronto Star, August 17, 1973, at A-7; Fowler, *Conservationists Get 50,000 acres*, The New York Times, January 18, 1973, at 19; *Tract in Adirondacks Given State*, The New York Times, January 21, 1973, at 60; *U.S. Accepts Gift of Mountain Land in North Carolina*, The New York Times, July 9, 1973, at 40; *Island Haven to Become Park*, The Montreal Star, February 3, 1973, at A-5; Pennington, *Wildlife Farm Tycoon's Gift to Youngsters*, The Toronto Star, August 18, 1973, at H-16.

[4] Open Space Institute, STEWARDSHIP 55 (1965); C. LITTLE & J. MITCHELL, SPACE FOR SURVIVAL 68 (1971).

[5] Note, *Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development*, 57 IOWA L. REV. 126, at 160 (1971).

[6] In all provinces, lands belonging to Canada, any province, any municipality or charitable institution are exempt from property taxation. *See, e.g.*, Assessment Act, ONT. REV. STAT. c. 32, § 3 (1970).

[7] CAN. REV. STAT. c. 148 (1952) *as amended by* Can. Stat. 1970-71-72 c. 63, Can. Stat. 1970 c. 9, Can. Stat. 1973 c. 14, 29, 30.

[8] Can. Stat. 1970-71-72 c. 63, § 248(1): "In this Act . . . 'amount' means money, rights or things expressed in terms of the amount of money or the value in terms of money of the right or thing . . . ."

[9] A. GILMOUR, INCOME TAX HANDBOOK 540 (23rd ed. 1973):

> [Information Circular—73—11]. A "registered Canadian charitable organization" is . . . a charitable organization or trust in Canada as described in paragraph (f), (g) or (h) subsection 149(a) of the Income Tax Act . . . . To qualify under paragraph (f), (g) or (h) of subsection 149(1) the sole purposes and objects of the organization, corporation or trust must be (a) the relief of poverty, (b) the advancement of religion, (c) the advancement of education, or (d) other purposes of a charitable nature beneficial to the community as a whole . . . ."

Note that Canadian conservation organizations fall under the last category of this definition of, "registered Canadian charitable organizations".

[10] Can. Stat. 1970-71-72 c. 63, § 110(1)(*a*).

[11] *Id.* § 110(1)(*b*).

tax acts of the various provinces, absolute and indefeasible gifts to the Crown, charitable organizations or Canadian municipalities are exempt from gift taxes. [12] Land donors can maximize these tax benefits by donating their lands in yearly segments over a number of years. Provision in such a scheme should also be made to ensure that it is carried out even if the donor dies before its completion. This can be done by way of a testamentary gift of any segments of the scheme still outstanding at the time of the donor's death.

The solicitation of particular gifts of land can be facilitated by moulding the proposal to reflect the financial needs (tax position), interests and, possibly, idiosyncrasies of the donor. [13] Potential donors may be hesitant in donating lands because they require them as a dwelling-place. Such needs can be obviated through a gift and lease-back arrangement with the donor or by way of a land exchange between donor and donee. This latter device would operate so as to permit the government (donee) to acquire open space where greatly needed in exchange for a publicly-owned property elsewhere. There is nothing to prevent a public body from engaging in such a "give-and-take" approach to land acquisition, and several provinces even have statutory provisions providing for such a device. [14]

However, a gift of open space land is in itself insufficient assurance that such land will remain open for a long period of time. A gift of parkland to a municipality, for example, can easily be sold for commercial development purposes (and at great profit) five or ten years after the donation. Potential donors of land are well aware of such a fact and will be hesitant about parting with their lands unless they are fairly certain their intentions will be carried out. [15] For a gift of land to be effective in protecting the open space so donated, the following minimal requirements must be fulfilled: (1) the recipient must be a responsible body, and (2) the gift must be in such a form as to virtually preclude the possibility of it being later mishandled.

The suitable donee requirement is relatively easy to fulfill because tax advantages flow only when certain categories of recipients are benefited by the gifts. [16] The requirement as to the form of donation is a more difficult one since it is complicated by the existence of certain restrictions at common

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[12] *See, e.g.*, Gift Tax Act, Ont. Stat. 1972 c. 12, § 10; Gift Tax Act, B.C. Stat. 1972 c. 23, § 10.

[13] See Kershow, *Land Acquisition: Unique Procedures*, 6 PARKS AND RECREATION 15 (November 1971).

[14] *See, e.g.*, The Special Areas Act, ALTA. REV. STAT. c. 349, § 22 (1970).

[15] Open Space Institute, *supra* note 4, at 52:

> Most landowners who are inclined toward the donation of their land for open space use would like to insure that the recipients do not treat the gifts as a negotiable asset . . . . A suspicion of bad faith has always been lurking beneath the surface especially in respect to gifts of land to country and local government: not so much that they would sell it, but that they would convert it to a use inconsistent with the objectives of the philanthropist, such as a park taken over for a school site or a waste disposal plant . . . .

[16] These categories consist of the Crown, charitable organizations and municipalities.

law on the power of alienation. The two rules of significance here are: (1) the rule against perpetuities and, (2) the rule against grants subject to conditions repugnant to the interest granted.

Briefly, there are actually two kinds of rules against perpetuities (rules against remoteness of vesting) in Canada today. First, there is the common law rule against perpetuities which provides that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." [17] This rule is concerned with the possibility of a limitation vesting after the perpetuity period has been exhausted. Second, there is the statutory rule against perpetuities which has, as in Ontario for example, [18] lessened the severity of the common law rule by introducing a "wait-and-see" principle into the rule. That is, the validity of a limitation depends not on the possibility of its vesting beyond the perpetuity period, but on its actual vesting beyond that period.

As for the second rule, that of the rule against grants subject to conditions repugnant to the interest granted, one of the main concerns of the courts here is with those conditions subsequent which substantially interfere with the power of alienation of an owner. The rationale for this concern has been stated as follows:

> One of the incidents of ownership is the right to sell or otherwise dispose of the property. A condition against alienation is said to be repugnant to this right, and contrary to public policy, if it substantially takes away the tenant's power of alienation; and such conditions are void. [19]

The following forms of donating open space have been devised so as to work within the general ambit of the above two rules and at the same time to consider the various possible recipients of these lands. The resulting schemes differ as to their effectiveness in protecting open space according to the degree of success met in adapting or circumventing these rules.

Prior to examining these alternative forms of donating land, it will be helpful to define determinable and defeasible fee simples for they are basic tools which are relied upon in the ensuing analysis. These two types of conditions can be used to control the use of land in the following manner:

> A determinable fee is a fee simple which will automatically determine on the occurrence of some specified event which may never occur. If the event is bound to happen at some time, the estate created is not a determinable fee; for it is said to be an essential characteristic of every fee that it may possibly last forever . . . . [For example, X can convey to A a fee simple determinable by the following: "to A and his heirs as long as used for recreational purposes."]
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> Akin to but distinct from a determinable fee is a fee simple which has some condition attached to it by which the estate given to the grantee may be cut short. A grant of land "to X in fee simple on condition that he does

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[17] J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 1 (2nd ed. 1962).

[18] *See* The Perpetuities Act, ONT. REV. STAT. c. 343, § 4 (1970).

[19] R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 79 (3d ed. 1966) (footnotes omitted).

> not marry Y," for example, will give X a fee simple, which is liable to forfeiture if the forbidden marriage takes place . . . .
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> The difference between a determinable fee and a fee simple defeasible by condition subsequent is not always easy to discern. The essential distinction is that the determining event in a determinable fee itself sets the limit for the estate first granted. A condition subsequent, on the other hand, is an independent clause added to a limitation of a complete fee simple absolute which operates so as to defeat it . . . .
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> [As to the differences between these tools on determination,] a determinable fee automatically determines when the specified event occurs, for the natural limits of its existence have been reached and the land reverts to the grantor or, if the grantor is dead, to the person entitled under his will or intestacy. [This is called a possibility of reverter.] A fee simple upon condition merely gives the grantor (or whoever is entitled to his interest in the land, if the grantor is dead) a right to enter and determine the estate when the event occurs; unless and until entry is made, the fee simple continues. [This is called a right of entry (or re-entry).] [20]

Let us now turn to an examination of various forms of donating land for open space purposes. The following analysis is clearly not an exhaustive one, but is designed, instead, to be merely suggestive of the types of approaches which can be taken in this area.

First, land may be donated in the form of an absolute and indefeasible gift to the Crown in right of Canada or in right of a province, a Canadian municipality or a charitable organization. In all these cases the gift will be exempt from gift tax, [21] and certain income tax deductions will be allowed. [22] However, no guarantee exists which will ensure that the land remains as open space. Some protection is provided for an indefeasible gift to conservation organizations (with charitable status) in that such organizations are bound by the objects set forth in their charters. Nevertheless, a conservation organization could conceivably sell some of its sanctuaries if such an act was financially necessary for the activities of the organization. This again depends upon the scope of powers set forth in the charter.

Second, it can be argued that the common law rule against perpetuities in Canada, unlike England, does not apply to possibilities of reverter. [23] It may be possible, therefore, in Canadian provinces where this common law rule has not been altered by statute, [24] to grant, by way of gift, a determinable fee simple with the possibility of reverter vesting in the grantor. For example, A grants an open space area to B (a municipality), "until the property is used otherwise than as a park." It is wise for the grantor to also insert a clause in the gift deed assigning his possibility of reverter to a conservation organization. This practice serves the dual function of firstly, ensuring that

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[20] *Id.* at 75-78 (footnotes omitted).

[21] *Supra* note 12.

[22] See discussion above.

[23] B. LASKIN, CASES AND NOTES ON LAND LAW 52 (1964).

[24] In Ontario the possibility of reverter following a determinable fee simple is subject to the rule against perpetuities. *See* The Perpetuities Act, ONT. REV. STAT. c. 343, § 15 (1970).

the property once donated never falls back into the grantor's estate (for income and estate tax purposes) and secondly, of providing a suitable watchdog over the gift for future years. [25]

Third, in those provinces where the "wait-and-see" rule of perpetuities applies to both rights of entry and possibilities of reverter, the donation of open space will at least be protected for the duration of the perpetuity period. This period can amount to a substantial amount of time, especially if a life in being is relied upon for the calculation. In Ontario, however, the perpetuity period for a right of entry or a possibility of reverter is limited to a maximum of forty years. [26] Thus, in Ontario because of the existence of a "wait-and-see" rule, [27] a gift of open space land can be made to a charitable organization, municipality or the Crown by way of determinable fee simple or conditional fee simple (condition subsequent) and be protected for forty years. [28]

Fourth, one form of gift which permits the donor to circumvent the rule against perpetuities involves gifts to charitable organizations. Normally the rule against perpetuities applies to such donations. However, one exception has developed to this rule whereby a gift to a charitable organization followed by a gift over to another charitable organization upon a contingency which may or may not happen within the perpetuity period is valid. [29] For example, in the leading case of *Christ's Hospital v. Grainger,* [30] a bequest of property was made to the Corporation of Reading for the benefit of the poor of the town of Reading with a proviso that, "if the Corporation of Reading should, for one whole year, neglect to observe the directions of the will, the gift should be utterly void and the property be transferred to the Corporation of London in trust for a hospital in the town of London . . . ." [31] The court held that a contingent limitation over, of property, from one charity to another is not within the principle of the rule against perpetuities and that, therefore, the limitation was valid. In this manner a landowner can donate his land to charitable organization X (or a conservation organization with charitable status) with the provision that, should the land be used other than as public parkland, then to charitable organization Y (or a conservation organization with charitable status). The fact that the recipient may be a charitable organization rather than a conservation organization with charitable status makes little difference to the protection of open space through this scheme. The conditions of the gift dictate the degree of protection desir-

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[25] See Open Space Institute, *supra* note 4, at 53.

[26] ONT. REV. STAT. c. 343, § 15(3) (1970).

[27] *Id.* § 3.

[28] *Id.* § 15.

[29] This exception was established by the case of Christ's Hospital v. Grainger, [1849] 1 Mac. & G. 460, 41 Eng. Rep. 1343, and has been subsequently followed by both English and Canadian cases. See J. MORRIS & W. LEACH, *supra* note 17, at 189-94. This exception to the rule against perpetuities is not affected by the Perpetuities Act, ONT. REV. STAT. c. 243 (1970).

[30] *Id.*

[31] *Id.*

ed by the donor, and the scheme (described above) ensures the perpetuity of such protection.

Although the above discussion was directed towards ensuring that the intentions of a donor of open space lands are carried out, it might be noted that such restrictions or conditions may in many situations be inappropriate and even undesirable. Government agencies or conservation organizations may refuse to accept a defeasible gift on the grounds that they require freedom to deal with the property in subsequent years in a manner consistent with the overall goals of their agency or organization. Such goals may not necessarily contradict those of the donor, but instead may simply be the product of good business management practice and much foresight. [32]

Land philanthropy is one of those few techniques of land-use control which provide an opportunity to citizens, conservation organizations and governments to make a valuable and useful contribution to the daily life and welfare of their community. Because a gift of land is tangible, immediate and functional, it serves an educative role as well: it visibly demonstrates to the members of the community-at-large that they are not helpless in the face of the forces of urban growth and development, but that it is within their power to save certain segments of their natural surroundings. However, as the title of this note suggests, land philanthropy is only one approach to open space preservation. To be meaningful and effective, this tool must be used in a complementary fashion with other techniques in this area. To rely solely upon the philanthropic tendencies of a few individuals for the fulfilment of our open space needs is to entrust the public interest to a very unreliable keeper indeed.

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[32] Open Space Institute, *supra* note 4, at 55:

> For example, a municipally owned sanctuary might some day have its value as a wildlife area severely limited by nearby incursions of industrial or commercial land-use or perhaps superhighways. In such a case, the original owner might well have agreed that the town should sell it for a high commercial price and buy more suitable land elsewhere. If there were a reverter clause and if the deed otherwise made no provision for such a situation, the community could be forced into a dilemma not intended by the philanthropist.