

# Evolution of Easements and Tax Abatement Programs

Or thoughts on fixing ideas that are moving targets

By BARBARA McMARTIN

## Abstract

*Easements and tax abatements are not new, but their use as an environmental tool is recent, particularly in the Adirondacks. They are complicated ideas, barely thought out, and much in need of definition. This article explores their origins, present problems, suggestions for the future, and proposes opening a dialogue that may lead to legislative changes.*

## Introduction

“Easement” is a term that has been imbued with numerous concepts over time. It has evolved and, in recent years, done so fairly quickly, from the idea of someone giving a right or privilege of using a possession to another. The concept of an easement continues to evolve by adding new attributes or rights that can be sold or donated and now even further refining the concept, with regulations and laws, some of which are peripheral to the initial right. Somehow, in the attempt to fix all our good ideas, easements have picked up a set of regulations before we even knew what certain easements entail, before they are even defined to meet modern needs. An easement is still an evolving idea, perhaps too amorphous to be spelled out yet, but too valuable an idea not to be described and used.

Easements have come to be associated with the ownership of land. Until

---

*Barbara McMartin is an Adirondack writer whose 24 guidebooks and industrial and political histories have covered much of the region's background. She may be reached at [adirbarb@telenet.net](mailto:adirbarb@telenet.net).*

the past century or so, if you owned land you could build on it, harvest its produce — including timber — and post it to prohibit public access; thus claiming exclusive right to anything associated with the land. Owning land meant owning a bundle of rights associated with the land — taking water, stocking fish, permitting hunting, fishing or camping, protecting views. That bundle of rights grew, reflecting the growing complexity of society.

An owner could sell or give one or more of the rights in the bundle, while retaining underlying ownership of the land. Until the 1980s, in New York State, only adjacent landowners could acquire those rights. Easements could also be granted for removal of gas and minerals and so on. Protecting views, limiting development, and obtaining acreage were initially among the main reasons for acquiring easements.

Land ownership evolved in the last half of the nineteenth century and through the twentieth century to include parks commonly owned and protected by the public; but the public's desire for parkland exceeded its ability to purchase or repurchase all the land thought necessary to be protected. First, watershed protection was paramount, then hunting and fishing access, and finally recreation. In the twentieth century people realized that chopping up tracts of land and building on them would preclude large scale harvesting of timber. More importantly, it would preclude the protection of open space, an idea that in the 1970s came to be understood as the hallmark of the Adirondack Park.

Land was defined by its values for all. Private property was put in the context of the commons. The bundle of rights was enlarged to cover these new, common attributes because they were perceived to represent a greater good. The state expanded its easement concepts and attempted to write laws to regulate them. The underlying owner's rights were considered paramount, not the state's, and herein lies the basis of many of the legal problems associated with modern easements.

To supplement the state's financial limitations in acquiring Forest Preserve land and to preserve the remnants of the Park's forest products industry, there was a tool ready to be adopted—the easement. The owner could sell the state a part of the bundle of rights, at first usually only the right to develop the land. The 1970s law allowing non-adjacent landowners to acquire easements led the Adirondack Nature Conservancy to acquire the development rights on the Rockefeller Bay Pond Tract. There was the hope that giving up those rights might reduce taxes on the property, but that was not the case.

We have been describing the Adirondacks as a mix of public land (the Forest Preserve) and private land. Within the past thirty years the hybrid category — of easements — has taken prominence. Of the half of the Adirondack Park that is private, over half of that nominally private land is now easement land. It has all appeared so quickly and without adequate planning that I believe a crisis is looming. This article will describe the crisis and suggest ways of dealing with it.

## Taxing public lands

Questions of managing forests did not go away in the early 1900s with the lessons that should have been learned from the attempts at scientific forestry. Foresters struggled to deal with problems of fires and lack of forest regeneration. Many tried, but few succeeded. In fact, at the 1915 New York State Constitutional Convention, Louis Marshall charged that scientific forestry was a front to conceal additional harvesting. He considered whether the state should regulate timber harvests, but decided in 1922 that it would not be practical "to require the Conservation Committee to make and promulgate regulations with respect to the cutting, removal or destruction of trees upon privately owned forest lands in the Adirondack Park ... and to establish a plan of permanent forest management affecting such forest lands agreed to by the owner thereof and by the Conservation Commission." Pulp and timber companies have been unanimous in not wanting advice from government agencies. The larger companies have hired their own foresters with mixed results. The smaller landowners had benefited from the now defunct program of Conservation Department (CD) foresters whose advice was so valuable from the 1950s through the 1970s.

The bulk of New York State's funds come from real property taxes that are levied by counties or school districts. Because Forest Preserve lands were a benefit for all, their watershed protection alone was considered sufficient justification for tax payments on state lands, hence the state paid taxes to localities. This established a precedent in which the state paid for all residents' interests relating to the state's land. This principle was extended to non-public lands in the 1920s.

Many acres in the late 1800s had been destroyed by unsound logging practices. By the early 1910s, the effects of the fires of 1903 and 1908 were still

obvious. Many forests remained fields of brambles. (*There is a subtle parallel with today in that some of the logging on industrial forest tracts has been so severe in recent years that regeneration has been hindered. This paper will draw a comparison between the earlier time and the present when large landowners are asking for financial help.*)

Landowners believed that the real property tax placed an undue burden on them since they derived no income from their crops until they were harvested, a period of at least twenty years. The Fisher Law, passed in 1926, was intended to improve forest management practices by adding yield taxes to property taxes. The Fisher Law (480) continued to be debated for the next fifty years. During this time, third party benefits of forest protection were also debated and by the 1960s these benefits (open space, scenic beauty, watershed preservation, and a sanctuary for upland game) were already considered more important than the land's stimulus to forest investment.

The Fisher Law (480) promoted early and possibly premature timber harvesting. Because there were so few timber companies enrolled in the program, the loss of property taxes by counties was not yet the serious problem it became later. Reform of the Fisher Act (into 480A) was accomplished in the early 1970s. Section 480A still has two major flaws: 1) an undue emphasis on forest management, which means that land that is not managed actively and regularly harvested is not eligible, and 2) there is no state reimbursement to counties which would prevent major shifts in local taxes. (The details of the Fisher Act Laws are so complicated that it is no wonder these tax laws are flawed. Summaries of the laws can be found in Volume Two of the Temporary Study Commission and Volume Two of the Technical Reports of the Commission on the Adirondacks in the Twenty-First Century.)

## Easements and Taxes

The next big shift in the designation of easements occurred in the 1980s as people no longer saw them as primarily a benefit for individuals or individual companies. The state realized that certain rights retained — forestry in particular, hunting cabins, and access — needed to be monitored to protect the rights obtained by the state.

In 1983 Article 49 of the Environmental Conservation Law gave authority for public agencies and not-for-profit corporations to acquire conservation easements. Initially, these easements were directed at limiting development as a means of protecting the integrity of the land. Some easements allowed public access. Because they gave partial interests in real property, the precedent of the Forest Preserve with respect to taxation was applied. Taxable easements run with the land and most often have reverted to the state as the state has been able to acquire them from such third parties as the Adirondack Nature Conservancy.

The problems of splitting taxes based on two attributes of the land and two owners of each attribute contrasts with the relatively simple apportionment of taxes on Forest Preserve land. But easements have become complicated by the societal aspects of the bundle of rights — the preservation of public vistas, endangered species, wetland protection, and so on. How do you put a value on the parts of a bundle? Somehow there has to be a way of computing taxes that will reflect the parts of the bundle. This, too, has to be consistent. The local taxing authorities can set the totals, but there ought to be guidelines for dividing up the bundle. Owners with easements often obtain state or federal tax breaks, mostly as the land changes hands. Few owners have obtained local tax breaks on the basis of easements alone, but easements are often coupled with putting land under Fisher Act management. This places the tax burden directly on the local

communities (for town, county, or school taxes) since the legislature has not passed any bill that would create funding to reimburse local communities.

### Easements and Tax Abatements

Easements are not tax abatement programs per se. They are one-time payments for an underlying portion of the fee title to the land. They serve as tax abatements because they can reduce the value of the land. Many owners with easements still maintain 480A status to reduce taxes. Their one-time payments appear most often as the land changes owners, reducing the cost to the new owners.

New York State has accepted some smaller easements, such as the land around Elk Lake or International Paper Company's gift of land along the Raquette River, but the active purchasing of conservation easements that required that the state address timber harvesting did not begin until the late 1980s. Easements from Lyme Timber, McDonald Investments, Lassiter, Champion, and Yorkshire-Hancock-GMO are among the largest acquired by the state. The state has struggled with tax abatement programs to supplement easement agreements.

One of the first Adirondack easements acquired by the state was the McDonald Long Pond parcel. Nearly 19,000 acres constituted the Horizon Tract; sold to Lyme Timber and in 1999 placed under a conservation easement. Finally the property was sold to McDonald Investments, Long Pond LLC. Up to this point, there were no specifications for what an easement should contain. The seller was able to specify the conditions of the sale. The state claimed that they pretty much had to agree with the seller's desires, although there was much give and take. Further, the growing influence of environmental groups meant they wanted to be heard in the negotiations for writing easements, although

their influence was not strongly felt until the 1980s. Environmental groups, mostly not based in New York, have actively sought to acquire and underwrite the negotiations so the environmental group could be in a position to actively own and manage the tracts.

**Conservation easements do not necessarily specify public access, location of roads, placement of cabins, or use of vehicles, particularly ATVs, and proper management of each one of these activities is essential to good forest management.**

In the case of McDonald, the state was in the position of writing an easement agreement without knowing what it entailed. Today this easement is termed a "black eye" for the department. The agreement left some hunting cabins on the tract, permitted public access but not during hunting season, kept roads open to the public for that access, and allowed the owners to continue harvesting timber. *However, the easement included no forest management language at all.* It was business as usual, take as much as you can harvest, keep the roadsides and loading areas neat, assume no one will check to see if the harvest left seed trees or even trees that may have a future marketable value. The failure to include forest management language has prompted the state to improve the writing of that component

of the easement. Conservation easements do not necessarily specify public access, location of roads, placement of cabins, or use of vehicles, particularly ATVs, and proper management of each one of these activities is essential to good forest management.

Like all such easements, this one was to be in perpetuity, but now the underlying owner is offering to sell the tract. Except for stating that there should be no development, the easement does not state what happens to subdivisions that follow old lots lines and whether they would supersede the prohibitions against chopping up the tract. Some permanent camps were left, but nothing in the easement spells out their owners' recreation rights. Nothing spells out oversight of those owners.

Around 1989 Lassiter acquired several large tracts in the northwestern Adirondacks and immediately offered them for sale. A full-court press by environmental groups resulted in the state offering to buy part of the land and to place part under easement. Lassiter retained a third portion. The arrangement was not well thought out: some portions of the tract remain inaccessible to the public despite the easement agreement that access was to be perfected.

Technically the owner of industrial forest land should be able to specify harvest techniques and future plans, but experience has shown that this is generally done very casually. For years there were many exceptions, but in the past decade almost every owner of large forest tracts has ignored the future. Land under forest management plans, like 480A, fare better, but there is limited oversight. Even the practice of "selective harvest," which has been traditionally employed in the Adirondacks, has been corrupted. It never really meant take the best but also leave the forest in the best condition for future harvests. As a result there are many spoiled forest stands and the pressures of the last few years have meant that even the larger industrial tracts have

been subject to “take the best and leave the rest” harvesting. The most disconcerting owners have been the corporations with large forest tracts that have fought in an organized fashion against government guidelines and oversight. The corporations claimed their professional foresters were more capable of planning harvests.

Since the 1880s, guidelines for management of the Forest Preserve have developed. They are still emerging, mostly in response to new and modern challenges. The constitution has provided a basis for evaluating these challenges and although it does not work perfectly, its protection of state lands is exemplary.

New York State has tried to keep its forests in timber production and there have been several discussions of how the state should aid timber production. Tax abatement for private lands was an obvious way to proceed. The Fisher Forest Tax Law (480) was passed. It allowed a partial tax exemption on forest land under supervision of foresters in the Conservation Department (CD). This tax abatement law was flawed since it allowed the owner to do no harvesting and CD foresters were not allowed to monitor the tracts.

The new tax abatement program (480A) established in 1974 enlarged the minimum acreage that could go into the program and required owners to actively harvest their land and to have a consulting forester prepare a timber harvest management plan. (The process is complicated and none too popular with smaller landowners.)

All along the state has given the Department of Environmental Conservation (DEC) inadequate funding for these tax abatement programs. Owners have failed to reimburse localities. There has been a move since the early 1970s to have the state reimburse local governments, but the legislature has failed to act on several different sources of funding for this.

In New York we seem to recognize a problem, speculate that we need to do something to solve it, generate related

problems, dawdle for decades, and finally come up with legislation, regulations, whatever, that would have anticipated some of the consequences of the inaction. We talk and debate a lot, but rarely try to understand the future and its consequences. I am constantly amazed at how little foresight there is in our legislature and in discussions of special interest groups, especially environmental groups. (No wonder New York’s Legislature heads the list of the country’s most dysfunctional.)

**In New York, we  
seem to recognize  
a problem,  
speculate that we  
need to do some-  
thing to solve it,  
generate related  
problems, dawdle  
for decades, and  
finally come up  
with legislation . . .  
but rarely try to  
understand the  
future and its  
consequences.**

The 1960’s discussion of a need for a super zoning code for private land resulted in the adoption of the Adirondack Park Land Use and Development Plan. It is not perfect, but it and its maps and definitions have been given the force of law. *But, where are the guidelines for easements?* As this article shows, the challenges for managing easements far exceed the challenges for managing the Forest Preserve.

Gradually, as the state engaged in acquiring more easements, more problems were solved, but there never has been an overall set of guidelines. The process of writing easements grew haphazardly,

with new ideas incorporated in relation to newly perceived problems or opportunities, often without referring to the overall goals of easements or forest management.

Reforms were proposed under Governor Cuomo in 1994. In 1998 under Governor Pataki a proposal to fund state payments to a tax abatement program was defeated; the use of monies from the Environmental Protection Fund was rejected the following year. Use of the general fund was defeated in 2001 and use of part of the registration funds for ATVs never made it out of committees.

### Rethinking easements and tax abatements

There is a serious problem with the state’s current patched together solution to the difficulties of melding easements and tax abatements, even though the two very different concepts are inexorably intertwined as the state tries to protect its interests as it addresses the expansion in the bundle of easement rights. It was relatively simple when easements considered only development rights. Their value could be calculated and the tax advantages had some realistic guidelines. But the first forest conservation easements that permitted the continued harvesting of timber were not so simple to assess. Not only did the state fail to put forest management language into the easement agreements, it wrote very loose and not terribly effective guidelines. Further, funding for monitoring of easements, wetlands, roads, and access is woefully inadequate and the monitoring programs are not coordinated between Albany and the DEC regions. Cutbacks in DEC staff for forestry have meant that there is no clear summary of when and how staff should monitor easements.

Taxation of land from which development rights have been removed can be a part of the writing of an easement agreement. But all other aspects of forest management are temporal. They will, over time, require revisions and do not belong in the discussions of “in perpetuity”

or conditions running with the title to the land. In a sense, selling development rights equates to selling part of the land; not so for selling forests, building roads, and so on. In fact, one senior executive with a not-for-profit has proposed that easements should only specify development rights.

This suggests a new approach: a way of separating easements from administering them. I believe that easements language has to have absolute guidelines for the safeguards that are essential to the state's interests, but which may need to be modified over time. Examples will do a better job of indicating what I mean. An easement will require that its affect on the land be monitored by professional foresters on a regular basis – say every ten years. The guidelines to be reviewed should include harvest, forest health, provisions for local employment, potential markets, condition of roads, access, hunting camps, wetlands, and so on. The review should call for a revision of the management plan within *guidelines* that are as fixed as the easement itself.

Previous programs of having state foresters assist owners in preparing management plans and then reviewing them carefully disappeared because of budget cutbacks, and this suggests another problem to be addressed in the guidelines for easements: Who is going to monitor the forests and wetlands? Who is going to inspect the camps that remain, check that roads are open to the public if that is part of the agreement? These agreements are sort of hybrids — they must be part of the easement to ensure that they are included with the deed for the property; but they are actually tax abatements and policies that often need revisions.

Public use of easement lands has fixed principles, but the details also need to be spelled out in agreements. The owner's special needs during harvesting raise havoc with public use. There must be some consistency of public easements that allows for the variables. Signage at trailheads, brochures, information with hunting and fishing licenses, phone numbers, internet addresses, all will help.

It takes staff and money to keep this sort of information up to date. Many problems currently will be helped if we can have consistent times of access as well as consistent means of alerting the public.

Another in this "hybrid" category of easements and agreements is how to manage forests to ensure that the owner who retains the right to harvest (or to do nothing) will make sure that the forest is well-cared for. It is the responsibility of the easement to require this, but caring for a forest requires flexibility. We still do not know enough about "scientific forestry" to guide the future, nor do we have enough long-range studies and base-line reports to be able to judge if in 30 or 50 or 100 years we are on the right track. We do not know enough to manipulate forests, but we must, perhaps by studying growth rates. We need to have economists in on the discussions, people who can predict markets and create new ones. The fact that owners of large timber tracts have been asking for state help, for tax abatements, indicates their plans for the future of their forests have really been inadequate.

Neither the Adirondack Park Agency (APA) nor DEC has adequate guidelines for harvest techniques. Lately there have been proposals to encourage a level of standards by adopting the "green certification" that is offered by third parties. Many certifying outfits result in watering down the standards, leaving the standards to the landowner, and establishing the lowest common denominator for monitoring. There is a need for more stringent standards — homogenous so the public can know what to expect, but based on comprehensive inventory. These informal standards do not substitute for adequate management guidelines. These need to be streamlined and must include the right of DEC foresters to enter and inspect forests under tax abatement programs.

The management plans must have certain characteristics. Any economic analysis should include an inventory of the existing Adirondack forest. They should include elevations, soils, natural

forests types (hardwoods, softwoods, etc), roads, recreational opportunities including a study what non-motorized recreation opportunities are available, waterfronts and wetlands, and areas to be preserved. The inventory of the former Champion lands was an improvement over earlier such studies. The Adirondack Mountain Club (ADK) assisted with the river inventories; but the ultimate product seems to have missed the question of what was going to happen to the roads. The inventory of easement lands should be comprehensive and funded and the funding should be part of the initial agreement. This problem persists currently in the IP case which has inspired the DEC to propose that third party organizations certify forests. Again, I favor having a cadre of trained foresters in DEC do the inventories.

The slow growth of Adirondack forests, the high cost of harvests, and the fact that the region does not lend itself to monocultures all make it difficult to specify meaningful standards and relatively simple inventories.

Furthermore, any analysis cannot just be made of the characteristics of the land, nor even of the economy of the state with respect to the use of wood products. An inventory must consider the economics of world resources and future fiber needs. This economic analysis must involve industry leaders, academics, and governments and it must be done on a local and regional basis as well as worldwide. Parenthetically, the result will undoubtedly indicate that costs would probably prohibit a new pulp plant. There always needs to be a plant or two to use scrap — hardwood chips for various composite boards or for fuel. Such inventories may indicate that the Adirondacks should look to producing fine boards and veneers — the European model of truly husbanded forests.

The admission by DEC that funding is inadequate to create management guidelines and monitor them, suggests that there ought to be a fixed source of funding. The state could fund tax abatement programs, collect stumpage fees, or

require fees for entering tax abatement programs. Perhaps the easement should require that the owner participate in tax abatement programs as in the examples above. Thus entering an easement agreement would generate funds.

I believe that the other aspects, timber harvest, access, and so on, should not be spelled out as a part of the easement. However, easements should require that there should be a general guideline for them and they should be amendable. Rather than reworking a combination of 480 and 480A, I think the transient agreements, which protect the range of state interests in easements, should be completely revised. Most importantly tax abatements should not be limited to actively managed forests. Forest preservation should be considered, but given that easement land is supposed to protect jobs and industry, preservation should not take precedence over actively managed forests. DEC's forestry programs needs to be adequately funded, reinvigorated, and given powers to inspect land under any tax abatement plan.

I could not begin to predict what easement laws will do in the future, but we do need guidelines for creating them. Although they are bound to change, their evolution must be directed. Every time there is a new proposal for an easement it adds new parts to the bundle of rights that require new laws and regulations. The former Champion lands, where public access was desired, provides such an example. No one thought about the consequences of keeping roads and trails open and funded. This is still under discussion. Neither was the loss of nearly twenty historic hunting clubs studied adequately. Further, that easement was touted as a model when all we have is another variation of the bundle. Already the IP easement is being heralded as an opportunity to provide a model for other easement agreements. *It is not.* It is a chance to fine tune criteria that may work in other instances. Fortunately, IP's current management with respect to recreation has already provided examples of many kinds of leasing agreements that

can be adopted in other instances, depending on the land and its recreational potential. It is an opportunity to develop criteria for such use depending on the different conditions.

### Conclusion

There are many peripheral questions to be resolved; the main one concerns taxes. It is the prerogative of towns to establish town, county, and school assessments. Taxing, based on an assessment, should be their prerogative, but there should be criteria for the way taxation is done for easement lands on such components as buildings, breaking tracks into developed and undeveloped portions, waterfronts, forest cover, access, and remaining development rights.

Land will inevitably appreciate, even without development rights. As other rights rise in value, we also have to provide for some flexibility in relation to the proportion of parts of the bundle to be taxed.

So, we are dealing with moving targets, we are trying to write laws and regulations without seeing where the evolution is going, what additional characteristics will be added to the easement concept and the agreements that will protect both the owner's and the state's rights. This sense that we are writing for a perpetual easement, as we have been attempting, conflicts with the lack of base knowledge — and the misconception that we are writing about easements as if they could be fixed. We are going about this as if the process is set in stone, *when in reality it is evolving!* Not only do we not understand the way the concept is changing we have no understanding of the direction of the evolution. Is it possible to write laws without seeing where evolution is going? We are going to have to try, but flexibility is essential.

We ought to be having discussions such as the statewide forums that preceded the adoption of the Forest Preserve or the APA Act. We need the suggested guidelines for writing easements, not the easements themselves, and the agreements

that support them. We have put the cart before the horse. We are barely ready to begin to discuss the guidelines, but we should. Instead of the easement running with the deed, the standards that create the easement conditions should be fixed as long as the concept of easements and the writing of easement laws is in a state of flux.

It is easy to put together a list of the benefits to the Adirondacks of forest conservation easements. It is possible to create an even longer list of the state's problems in creating and managing those easements.

The list for the good side is topped by the way easements that limit development enhance the open space character of the Park. Forest land under easement does complement and enhance the Forest Preserve.

These easements do aid the economy; they provide raw materials for the region's two remaining paper companies, International Paper and Finch, Pruyn. They make it possible for those companies and others to hire local loggers. Sometimes these easements provide public access. They provide funds and liquidity to companies and not-for-profits seeking to acquire forest land.

The down-side is even longer. No protocols exist to guide the writing of agreements that are not fixed in deeds, ones that may require amendments. They reflect the desires of the owner and the state. They are often influenced by other groups. They vary widely and confusingly.

*These ideas are incredibly complex; they are suggestions to be discussed and I hope readers will begin a dialogue with me and others. This article had its origins in chapter six of The Privately Owned Adirondacks. In writing that chapter I realized how moving ahead with easements without a plan had put the state in an untenable position. I also believe that the Adirondack Park Agency Act should be amended to include a new category of state/private lands — easements need to be defined and given a stature similar to the Forest Preserve.*