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THE EASEMENT APPROACH: CAN IT RESCUE HIGHWAY VISUAL QUALITY?

A panel discussion
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INTRODUCTORY REMARKS OF DR. ROSS D. NETHERTON,
RESEARCH DIRECTOR, COMMISSION ON HIGHWAY BEAUTIFICATION

This session is sponsored jointly by three committees of the Highway Research Board -- the Committee on Environmental Issues in Transportation Law, the Committee on Roadside Environment, and the Committee on Eminent Domain and Land Use. Our program will consist of a panel discussion designed to explore the prospects, problems and techniques of protecting and enhancing roadside scenic quality through public acquisition of land and particularly through less-than-fee interests in land.

Public acquisition of land or property rights is a familiar technique for protection of scenic and environmental resources in which there is a public interest. For at least 50 years it has been selectively used by Federal, State and local governments.

It is a technique which has important advantages over others, such as regulation of land use through the police power, and indirect influence of private land development through taxation, contractual arrangements, and the planning process.

Based on the promise of its selective use in the 1940's and 1950's several important Federal-aid programs in the 1960's provided authority for increased reliance on land acquisitions to achieve their goals. Major legislation in this category included the Land and Water Conservation Fund Acts of 1965 and 1968, the Highway Beautification Act of 1965, Demonstration Cities and Metropolitan Development Act of 1966, Historic Preservation Act of 1966, and programs creating national systems of trails and scenic rivers. State enabling laws authorizing participation in these programs followed on a substantial scale.

On its face, this appears to form a promising basis for both widespread and versatile use of the acquisition technique. And many instances of such use can be cited. But, at the same time, when the experience of these programs if fully reviewed it appears that serious problems have hampered acquisition of less-than-fee interests, and, indeed, may now be discouraging extensive use of this technique.

If so, it is a serious matter; for it is in this direction that the acquisition technique has its best opportunity to be responsive to variable situations of landowners and needs of the community. Here, by the transfer of specific property rights selected in relation to particular goals or plans, there are opportunities to design patterns of land use which enhance scenic corridor quality, serve the needs of conservation or resource development, and, at the same time, minimize economic hardship in the private sale or use of land.

What has been wrong with the practice of less-than-fee acquisitions by public agencies? What has been right about it? And what can be done to improve this approach to protection of the scenic quality of the roadside? The problems range through various aspects of the public agencies' legal authority, appraisal theory and practice, land management, communications and public relations, and intergovernmental relations. Altogether they comprise a widespreading background for the remarks of the panelists.

REMARKS OF LARRY ISAACSON, CHIEF, LANDSCAPE SECTION, SCENIC ENHANCEMENT DIVISION, FEDERAL HIGHWAY ADMINISTRATION

The Scenic Enhancement Division of the Federal Highway Administration is responsible for administering the Highway Beautification Program carried on under the Highway Beautification Act of 1965. (PL 89-285, October 22, 1965). Title III of this act authorized the Secretary of Transportation to approve as part of the cost of construction of Federal-aid highways the cost of landscape and roadside development, including acquisition and development of publicly-owned and controlled rest and recreation areas and sanitary and other facilities reasonably necessary to accommodate the traveling public. This contemplates acquisition of land in fee, normally contiguous to and part of the highway right-of-way, and development of faciliteis which are directly accessible to motorists for their use as they drive off the main traveled way for stops of relatively short duration.

Another feature of Title III authorized a somewhat broader scope of activitiy which complemented this development of the right-of-way areas. It provided that an amount equal to 3 percent of the funds apportioned to a State for Federal-aid highways in any fiscal year from funds specifically appropriated for highway beautification would be used for landscaping within the right-of-way, and for acquisition of interests in land and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways. These funds could be used for acquisition of sites for rest and recreation areas, and sanitary and other facilities either within or adjacent to the right-of-way which were reasonably necessary to accommodate the traveling public. In contrast to the case of funding pro-

vided for construction costs, Federal funds appropriated under this provision of the law did not have to be matched by State funds.

During the early stages of the highway beautification program, the State highway agencies were asked to give scenic acquisitions the highest priority in their Title III projects. This was done because landscaping and fee acquisition of land for rest areas and scenic overlook points could be funded from the Highway Trust Fund as part of construction and right-of-way costs. Subsequent to 1968, however, funding of scenic less-than-fee acquisitions declined steadily as priorities in the highway beautification program were shifted to emphasize the control of outdoor advertising. Thus, the main experience that was acquired in less-than-fee acquisitions for highway beautification were acquired in the years 1966 to 1969.

In terms of utilization of Federal beautification funds by the States -- and I am excluding here a few States, like Wisconsin, which started acquiring scenic interests under a State-funded program in the early 1960's -- I believe we now see an upswing in the interest in this subject. The Federal-aid Highway Act of 1973 requested that a feasibility study of scenic highway systems be made. This is being made at the present time. The same highway act authorized funding to resume progress on the Great River Road program. A great part of the success of the Great River Road project, and scenic highways, will depend on the subject of the discussion today -- the acquisition of less-than-fee interests in the roadside land, and incorporation of scenic values into highway corridors. The third indication of increased interest in scenic land acquisition at this time is the forthcoming report of the Commission on Highway Beautification, which will have an opportunity to evaluate what has been done and recommend future courses of action.

Returning now to the status of scenic acquisition programs as of the end of 1973, I have the results of a brief survey of the States conducted by the FHWA Field Offices to ascertain their experience with scenic acquisitions. The results may provide some interesting background information, although the survey inevitably leaves many questions unanswered.

SURVEY RESULTS

Question 1

Does or has the State ever acquired less than fee interests for scenic purposes?

Answer: 50 percent responded yes; 50 percent responded no.

Question 2

Does the State have legal authority to acquire less than fee interests (not necessarily for scenic purposes)?

Answer: 96 percent yes; 4 percent no

Question 3

Is the program generally considered successful or unsuccessful?

Answer: Successful - 24 percent; mixed feelings - 6 percent; unsuccessful - 48 percent; untried - 18 percent; no active program - 2 percent; and no comment - 2 percent.

Question 4

What comments can be offered to improve the program?

Answer: By far, the most frequently mentioned item dealt with the need for a stable program of funding. Closely behind, and covering the same basic point, was the desire to establish a high enough priority that would allow the program to develop.

Other comments mentioned items such as: tax benefits; acquire scenic lands at the time of right-of-way acquisition; improve coordination within the highway agency; enforcement or establishment of adequate zoning; improve State legislation; allow utilization of Federal-aid highway funds 319(a); permit use of eminent domain; and training for program personnel. Hopefully, this summary survey will give a current view of experience to date by the States under the Highway Beautification Act.

Several other activities are underway at the present time which also may be of interest. The Highway Beautification Commission has just released a draft of its 2-year study of the current program. It is hoped that this report will make some comment on this aspect of the program. The report itself will be used as input for the upcoming Congressional hearings for the beautification program, which may also discuss this program. The second activity underway is a pilot study by one State highway agency with a Federal agency to investigate the opportunities and/or limitations for managing Federal lands with scenic resources which are visible from the Federal-aid Highway System. The goal is to inventory and analyze visual values as they relate to land controls and legal authority within an existing highway corridor. The study will seek out innovative ways to advance the program at

minimum cost by overcoming red tape and other myths or misconceptions.

The Federal Highway Administration will also be starting an inhouse review of the scenic lands program. It is anticipated that this effort will include field review and discussion with all levels of program personnel.

Hopefully, these remarks have assisted us to view the overall program with a current perspective as the other panelists provide insights into more specific areas of scenic land preservation.

REMARKS OF WARREN LICHTY, CHIEF COUNSEL
NEBRASKA DEPARTMENT OF ROADS

Most of my remarks will concern Nebraska's "Chain-of Lakes" program. This program has a good deal to do with the State's efforts to beautify its Interstate highways; but it was carried out chiefly with fee acquisition of the land that was used. Only in a few instances were easement used in the initial development plan. Nevertheless, I think a good deal of the development plan could be accomplished just as well through less-than-fee interests as through putting the fee title in the public.

On a map of Nebraska one sees that Interstate 80 runs the length of the State east-to-west, and in the middle of the State -- roughly from Grand Island to North Platte -- it follows the Platte River for about 135 miles. The Platte is a rather interesting river. Most people have heard of the Platte as being a mile wide and an inch deep; but there is another noteworthy fact about it. It has several times the amount of water percolating through the sandy soil surrounding it as actually flowing in the river bed.

Near Grand Island, where the highway crosses the Platte River, we find the first of these lakes developed in conjunction of the borrow pits used in construction of the road. When the soil was removed for the construction job, the excavation reached down into the level where ground water was found. As the water percolated into the excavation, a lake developed, which had a good permanent level, and also a steady change in the water because of the underground aquifer.

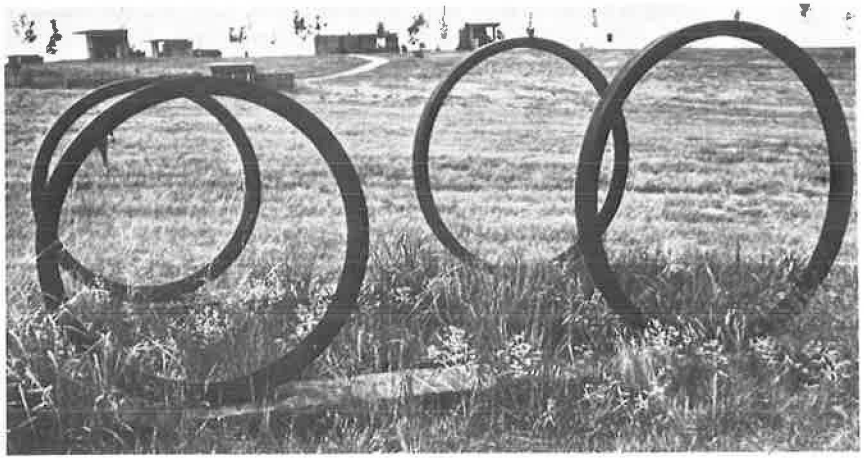
Nebraska has no seashore or mountains, so we have to do what we can with the resources we have. We feel that we have created facilities which provide an attractive setting for the highway, and which also are invaluable recreation areas. Some of the earlier lakes had rectangular or geometric shapes; but with plantings and other landscaping by the State, and with the inevitable growth of natural vegetation around a body of water, the sharp geometric lines of these lakes

Cooperative arrangements between Nebraska Game and Parks Commission and Department of Roads made possible the development of recreational facilities in selected rest area sites in Nebraska's Chain of Lakes

Contouring the shoreline and landscaping has converted the sharp outline of a construction borrow pit into an attractive pond which enhances both the view from the highway and increases the enjoyment of the roadside rest area.

Following their use as borrow pits during highway construction, roadside excavations adjacent to I-80 in Nebraska have been converted into ponds which enhance the environment of roadside rest areas.

Hoops representing the wheels of covered wagons mark a spot where the route of the Oregon Trail still is visible at a highway rest area serving I-80 in Nebraska.



became softened and somewhat irregular. Also, as the naturally sandy soil of the backslopes of the pits wore down and sluffed off, the outer shapes of these lakes took on slightly irregular lines. Our landscape people count on this to continue as time passes, resulting in natural looking lakes. Some of these borrow pits were turned over to the States Game and Parks Commission, which developed programs of maintaining wildlife habitats in conjunction with the highway department's program of rest areas and scenic overlooks. Thus, the traveler who stopped at such an area would not only enjoy the beauty of the lake, but also have facilities for picnicking, camping, fishing and occasionally, trailer parking. Whether these lakes are retained by the Department of Roads, turned over to the Game and Parks Commission or held in private ownership, they are stocked with fish by the Game and Parks Commission, and many tourists as well as residents have enjoyed this aspect of Nebraska's rest area development program.

Provision for trailer parks in conjunction with lakes and rest stops is particularly important because where these facilities were not provided, trailers and other recreational vehicles often were parked unlawfully in the safety rest areas, and thereby used space needed for transient passenger cars. Places now provided for trailers have hookups for all facilities.

In addition to the development undertaken by the State, there has been some private development around these lakes. Where the highway has run alongside the Platte River there is only limited opportunity for private development. The river meanders, and has several channels for considerable distances. Also, in places it is as much a woodland as it is a river. So, it is natural there are various stages of development around these lakes, depending in some cases on the attractions that are also offered by the nearby river.

In a few instances the State has determined that it was more desirable to obtain an easement for its borrow pits rather than acquire the sites in fee. In these cases, when the lake was developed at the site of the pit it remained in private ownership, but the public has a chance to enjoy the beauty of the lake, nonetheless.

Some of our roadside areas are some distance from the roadway, and allow more space for landscaping and working with the setting of the lake itself. In other instances it has been possible to develop the public facility in connection with private facilities. One such case was the Marinatha Bible Camp, which started out with a small lake in one corner of a parcel of land used as a church retreat. As the highway construction got to this point, the camp owners asked if the nearby borrow pit could be connected with their lake

when the State finished excavating the pit. This was done very easily, and the fill was used to vary some of the contours of the pit. As a result, a single body of water was developed and the camp has a beautiful lake facility for swimming, fishing and canoeing, while the motorist on the Interstate has a very nice view as he comes around the curve in the road. Everyone benefited by that arrangement.

At the Sutherland Rest Stop the Nebraska Department of Roads was able to take advantage of a unique feature already present at the site. Close to the right-of-way were some tracks and ruts which were left from the wagons that traveled the old Oregon Trail. The ruts were more pronounced at this point because as the wagon trains came west they veered south to avoid O'Fallon's Bluff, which now, of course, has been cut down substantially to let the Interstate go through. But back in the middle 1800's the wagon trains couldn't get across this area, so this particular point became the one through which all the wagons passed. Repeated passages of the wagons gradually wore ruts which are still visible, and mark the trail down to the place where the rigs crossed the Platte River.

When the site for this rest stop was acquired, sufficient additional land was taken to include part of these Oregon Trail tracks, so they could become a feature of the rest area. From the buildings in the rest area, sidewalks were built down to the spot where metal hoops the same size as wagon wheel rims were mounted on blocks to show how the old wagon wheels fitted into the ruts. Several groups of four hoops were mounted in this way, and, with a little artistic license, they may help people remember the old prairie schooners and imagine the way they looked. Consideration had been given to placing replicas of the actual wagons here,but in the end it was decided that a symbolic presentation might actually be more effective. And, the public reaction has been very favorable.

The State Game and Parks Commission programs for developing recreational uses of the lakes and their shorelines also has been very well received by the public. The areas developed by the Commission are handy to the highway and the rest stops, and swimming and fishing are both activities that do not take much advance preparation where there is easy access to the facilities.

Private development of tourist attractions along the right-of-way has sometimes benefitted directly from the lakes program. Near the city of North Platte, a privately-owned attraction called Fort Cody, a replica of a frontier log stockade or fort, was located adjacent to Pit No. 1 on this route. The pit, when developed as a lake, provided a pleasant transition area between the Fort and the highway right-of-way. Some trouble was encountered in developing this lake, because the contractor doing the excavation objected to digging out a lake. He argued that this was not a necessary highway purpose, and the taking of borrow should be

limited to fill for building the highway. The court agreed with the State, however, that making a lake was a legitimate purpose, and so a lake was created out of Borrow Pit No. 1.

There are other types of development which can enhance or create scenic attractions. At the Seward Interchange, a little west of Lincoln, a foot bridge has been built over the Little Blue River at a point where a wooded area formed the site for a rather pretty park. At the rest area a pathway was constructed away from the parking area to the bridge and the park. This pathway gets the motorists out of their cars, to walk around a bit and relax in pleasant scenic surroundings. This was another instance where opportunities to add to the natural scenic quality of the highway were recognized and developed. The most extensive development, however, has concerned itself with the lakes.

Generally, our feeling is that these lakes are the finest type scenic enhancement projects we could have. Bodies of water such as these offer one of the nicest changes of scene practical in our type of terrain, since we do not have any strikingly contrasted changes in elevation with mountains or canyons, and we do not have any wilderness forested areas. We find that the scenic pleasure that travelers get from our lakes is only part of the benefit. Our swimming, fishing, and boating is a big attraction. But most people just like them for the chance to stop, get out and walk around them a bit, and feel a relaxation and refreshment they otherwise would not have.

REMARKS OF ALLEN HARPINE
LAND ACQUISITIONS DIVISION, NATIONAL PARK SERVICE
U.S. DEPARTMENT OF THE INTERIOR

The National Park Service is a pioneer in the field of scenic easements, having first begun to acquire them in the 1930's for the Blue Ridge Parkway, running through the mountains of Virginia and North Carolina, and for the Natchez Trace Parkway, running through Alabama, Tennessee and Mississippi. Today the National Park Service holds scenic easements over more than 25,000 acres in more than two dozen different park areas. Of the total acreage under scenic easements, three-fifth has been acquired within the last five and one-half years; so you can see that by no means has the National Park Service given up on the use of scenic easements as a means of preserving the natural beauty.

I might explain briefly just what the Park Service means by a scenic easement. Essentially, it is some type of restriction on the development of the land. The terms of these restrictions, or this easement, will vary from project to project,and some-

times even within the same project; but invariably they will restrict the development which may be put upon the land to a greater or lesser extent. Normally the restrictions provide for the land to be kept in residential or agricultural use. In some cases even that may not be allowed without some limitations. If residential use is allowed, there generally is a density restriction on the use, such as one dwelling every five acres, or whatever the land management agency feels is necessary to maintain the area as it is desired.

Scenic easements in the Park Service are used extensively on the Blue Ridge Parkway and Natchez Trace Parkways, which are most comparable to the circumstances of Interstate and primary highways. They also are used in the protection of roads within the National Parks from unwanted development. Within the past few years, most of the easements that have been taken are to implement the National System of Scenic Rivers program. In this program, the Park Service is directed to use its acquisition to set up several such "wild and scenic rivers", and has done considerable planning and acquiring for these river projects in two instances--the Ozark National Scenic River in Missouri, and the St. Croix River in Wisconsin and Minnesota. These riverways offer a certain parallel situation to the highways. You start with the river itself, and then acquire a narrow strip of land in fee alongside the river banks to provide areas for facilities and have absolute control of the banks. Then further back from the fee strip, land is placed under scenic easements. The width of the strip under easement varies, as do the terms of the easement, with the character of the land.

The Park Service has made use of scenic easements in a variety of other situations. For example, it has a scenic easement over an historic church in Yorktown, Virginia, the terms of which are that the building and site be left just as it was when the early settlers of Yorktown built it.

Despite this, it is true that there is a certain degree of disillisionment has set in with regard to scenic easements on the part of management officials directly concerned with their enforcement and administration. Interestingly enough, difficulties do not seem to arise with respect to the owners from whom the easement originally was obtained. The real problems seem to come after the encumbered fee has changed hands perhaps two, three or four times, and maybe after 20 years has passed. These problems have been most acute at the parkways where acquisition took place from 20 to 40 years ago. The new owners complain that they were not aware of the scenic easement's restrictions or were misled by the sellers as to the real effect of the scenic easement, or that someone else misled them regarding their obligations under the easement.

Of course, the fact that these previously wild and rural areas have had modern development catch up with them has not helped the atmosphere for continued enforcement. Management officials on the parkways, and particularly on the Blue Ridge Parkway, have become discouraged with scenic easements, and for the past several years have been working out exchanges in which scenic easement restrictions are traded off in return for a lesser acreage of land in fee simple. In the 1930's and early 1940's land in the mountainous areas was purchased for the Blue Ridge Parkway at an average price of $40 per acre for fee title, and about $15-30 per acre for scenic easements. On the basis of 1,200 acres of scenic easements acquired in the early days of the Blue Ridge Parkway, and with rough arithmetic, you can see that the fee simple on the easement lands could have been acquired for perhaps $20,000. There is no question that the Park Service has spent more than that in trying to administer these scenic easements and enforce them, and, in some cases, to finally trade them off.

Among the perplexing questions that have arisen is the one of cutting timber and trees. Most of the scenic easements held by the National Park Service either prohibit this or restrict the cutting of trees above a certain size. This, of course, sharply curtails the value of the underlying fee to the owner, and may leave him with little more than the privilege of paying taxes on his land.

A troublesome case of this nature arose a few years ago on the Natchez Trace Parkway in Mississippi. Here a scenic easement had been obtained which, among other provisions, prohibited the cutting of trees. At the time the easement was procured the land was used for the cultivation of cotton, and contained no trees. Subsequently crop production was abandoned, and the land grew up in trees through natural regeneration. Years afterwards the owner proceeded to harvest the timber. A Park Ranger saw him, and viewed it with alarm. A court action was brought for a injunction to stop the cutting of the trees, and also to have an accounting of the value of the timber already cut and sold. Well, of course, long before we could get into court and get an injunction the trees were gone and down at the sawmill; but ultimately an injunction was issued which prohibited the owner from cutting trees or otherwise violating the terms of the scenic easement, and authorized the National Park Service to enter on the premises and plant more trees. Attempts to collect the sale proceeds or damages from the landowner were abandoned, although he was assessed about $50 in court costs.

This case raises several interesting questions. First, what good is an injunction after all the damage has been done? In other words, how much real protection can one give a scenic area through legal action?

Second, in this particular case, why should the United States have to pay for restoring the land when the owner or his predecessor in title was paid for the scenic easement, and the owner profited from the sale of the timber?

Third, should the United States have expected the trees to be spared by the owner when there were no trees there at the time the scenic easement was purchased?

Fourth, is it really reasonable or practical to have an absolute prohibition on cutting of trees at all? And, interestingly, in the last few years the Park Service has modified this provision of its easements in some instances and allowed the cutting of trees under proper forestry management principles. Unquestionably, this is a much more practical arrangement on which to carry on cooperative programs between the landowners and the government.

In the acquisition of scenic easements a number of questions may arise concerning valuation. For example, if acquisition of scenic easements does not lessen the value of the land retained by a landowner, or if it actually enhances value, what price should be paid for the easement? This very question has arisen regarding the National Park Service's program in Piscataway Park in Prince George's and Charles Counties, Maryland. In 1961 Congress enacted legislation to protect the view of the Maryland shore from Mount Vernon. This legislation contained authorization for a shoreline zone to be acquired in fee simple or any lesser interest, and a preservation zone in which scenic easements alone were to be acquired. A substantial portion of the latter zone consisted of a high-class rural residential subdivision in which the owners have made it a point themselves to protect the rustic character of the area by means of restrictive covenants. These covenants provided for a single-family residential use only on lots of not less than five acres each. The covenants also restricted the cutting of trees except to the extent necessary to clear homesites.

Noting this, the Park Service patterned its easements after the terms of these covenants, except that the scenic easements run in perpetuity while the covenants could be terminated at the end of 20 years by majority vote of the lotowners. Due to the interest of the lotowners in protecting this land the Park Service was successful in obtaining donations of scenic easements over a large number of the lots. However, not all were donated, and purchases or condemnation proceedings were commenced for the remainder. Studies made for the Park Service by both its staff and by contract appraisers showed that no reduction in the value of these lots has occured because of the imposition of the easement. Indeed, there has been some enhancement in value because of the desire of upper and middle-income buyers to live in a

scenicly protected area. Because of this enhancement of value, it was not possible to arrive at an estimate of just compensation to be paid the owner by means of a before-and-after appraisal. The National Park Service thereupon determined to set its compensation offer at an amount equivalent to one-half the assessed value of the land without improvements. This was the same formula adopted by Prince George's County, Maryland when it afforded property tax relief to owners who donated scenic easements to the Park Service or another land management agency.

One final comment might be made about a question which sometimes has been raised regarding the Park Service's conversion of scenic easements into fee ownership of lesser amounts of land. It is asked whether this is necessarily an indication of failure of the easement. May it not be desirable, in some circumstances, to re-examine the need for an easement after a period of time--say, 20 years, similar to the case of the private covenants in Prince George's County--and renegotiate it where the public interest can be protected by a lesser or different arrangement? Possibly one could view the Park Service's experience this way, but the modifications I mentioned earlier were not made with that in mind. In the cases where perpetual easements have been renegotiated, it has been because they turned out to be unworkable, and there was too much objection on the part of the affected landowners, and too much difficulty in trying to enforce it. This emphasizes the importance of the maintenance and enforcement aspects of easement programs.

REMARKS OF RUTH R. JOHNSON
SCENIC ENHANCEMENT DIVISION, OFFICE OF ENVIRONMENTAL POLICY
FEDERAL HIGHWAY ADMINISTRATION

Background

The Highway Beautification Act of 1965 authorizes Federal approval and participation in the cost of acquisition of strips of land, and in the improvement of lands necessary for restoration, preservation and enhancement of scenic beauty along all Federal-aid highways. This type of activity did not start with the 1965 law, but actually commenced in 1940 when the Federal-Aid Highway law authorized the use of up to 3 percent of Federal funds regularly apportioned to the States for this purpose. The funds were not required to be matched by the State. However, since this money came out of the road building funds, most States preferred to use it for road construction rather than use it for scenic enhancement.

From 1940 to 1965 only about six instances are found where States used their apportionments to acquire scenic easements.

In 1965 the law was changed to provide that an amount equivalent to 3 percent of the State's Federal-Aid apportionment can be used for this purpose out of general funds in the treasury and not highway trust funds.

During the first two years of the program, FY 1966 and 1967, the authorizations for scenic enhancement amounted to $120 million each year, an amount which was close to the 3 percent level. But since that time, the scenic enhancement program has been funded at a level very much below the statutory authorization.

This may not have been a complete tragedy, however, because during the years of full funding the State's experience turned up a good many problems, all of which need to be answered before public funds on a major scale are invested in such land acquisition. Before funding levels are increased, a hard look should be taken at the strategies and techniques of scenic land acquisition, and possibly new concepts and methods need to be developed.

Review of Experience

With this in mind, the Federal Highway Administration currently is studying the subject of scenic acquisitions with a multidisciplinary team of landscape architects, appraisers, lawyers and planners. The objective of this study is to identify the problems that currently are most important, and suggest some of the options that are available for solving them. It is a study which will be interested in new approaches, as well as improving customary procedures; and it will also be alert to the possibilities that further research and developmental work may need to be done in some areas. Where such possibilities are found, they may well be subjects appropriate for the Highway Research Board's programs. The current FHWA study will be made over the next six months, and will welcome all contributions of experience or suggestions from States or other public agencies and private groups having an interest in the subject.

Experience to date has indicated that most scenic easements have begun to follow a set pattern. They are normally cast in negative form, by restricting or prohibiting the landowner from making certain uses of his land. Where positive rights are given, they generally relate to enforcement of the negative ones, as, for example, right of entry on the private land to inspect or correct certain conditions. The restrictions are taken in perpetuity and basically restrict new building construction, the cutting of mature trees, and the maintenance of dumps, and billboards.

Typically, the easement will allow the placement of utilities and roads where needed.

The scope of the restrictions placed on the land is clearly one important point for inquiry. Are the restrictions just mentioned too much or too little? To deal with this question, it may be necessary to look at other aspects of the problem.

Quantify Goals

First, it is suggested that a serious effort should be made to quantify the scenic values that are involved in roadside areas. Opinions do differ widely on where acquisition for scenic enhancement should be undertaken. Is there a way to compare scenic resources, either by measuring against standards of consensus, or against each other to determine priorities?

Somewhat similar questions arise in the field of land use planning when inventories and master planning studies are made; and possibly the techniques of solving such problems could be applied to scenic beauty. Also, art criticism has developed to the point where consensus among experts seems to be possible; why isn't the same thing possible in connection with scenic enhancement? Once such procedures come into use, it may be possible to master plan the scenic enhancement and preservation of highway corridors, and establish priorities and programs based on rational plans.

Efforts to quantify scenic values inevitably will draw one into a more careful definition of scenic goals for the highway corridor. For example, if the most important scenic feature of an area is the view of a distant mountain, perhaps this will be preserved solely by a height restriction on roadside development, and no other restriction on the use of the land need be imposed. The same might be true for preserving the panoramic view of a city from highways which approach it. Defining the protected area in terms of a cone of vision from the highway may, in such circumstances, make much more sense than imposing a uniform set-back of all development in the roadside area. The practice of defining land use controls around airports may offer parallels. Here the approach patterns of planes are described in conal shapes. Within such areas, land uses, including the height or objectives on the ground are controlled in accordance with the lines of the cone-shaped approach area. Areas to remain clear are acquired.

When a system is developed to quantify scenic values, it becomes easier to establish and adhere to priorities in enhancement of roadside areas. For example, if there is a major need to preserve areas close to a town where land development is progressing at a high rate, the priority for acquisition will be given to the area that is undergoing most

rapid development because delay only means paying more for the same thing when it finally is acquired. Acquisitions in rural areas, on the other hand, can receive low priorities because pressures for development are reduced.

Land Use Planning

Correlation of land acquisition programs with local zoning and land use control programs of other agencies is extremely important. Regional master-planning is going on all over the United States, and is being implemented by a variety of means. Thus, a site or feature which is designated for protection by acquisition of a scenic easement might turn out to also be marked for preservation on the regional master-plan, but by zoning rather than acquisition. In such a case perhaps the acquisition plan should be shelved until it becomes clear whether zoning will work, or until the zoning is ready to change. Many States today have laws establishing the basis and framework for regional planning, with protection for a variety of sensitive features--"areas of national, regional or State significance," "Interstate highways," ponds and streams, etc. Typically such State laws deny the right of local agencies regulate land use except in accordance with the State's or region's master land-use plan.

Other land management agencies of the Federal Government (like Forest Service, National Park Service, etc.) with land acquisition programs should have their programs coordinated with those of the highway department, particularly where roads traverse or give access to outdoor recreation areas or historic or scenic sites. Zoning, planning and programs of other governmental agencies with objectives similar to those of the highway department have, in most instances, been totally neglected in designing a scenic land acquisition program. This is unfortunate because, a combination of land use regulations and land acquisitions may be the best way to reconcile all the interests involved.

Enforcement

Another problem which needs emphasis is the enforcement of less-than-fee interests. After they are acquired, how are the public's rights protected? Since the landowner remains in posession of the encumbered land, the public agency frequently gets itself into the role of a regulator of the owner's use of his land in its details. It is neither practical nor desirable to let the easement program become so sophisticated that it approximates the enforcement of a zoning or building code. The other extreme is a total lack of enforcement interest once

the easement has been acquired. This latter situation raises a question as to the worth and propriety of acquiring the easement in the first place.

Some examples of what I mean are provided by the fact that years ago a number of States took 150-foot billboard setbacks when they acquired highway right-of-way. Essentially it had the same effect as a scenic easement. Twenty or thirty years later many of these same States enacted compliance laws under the Highway Beautification Act for the purpose of controlling billboards. As they inventoried their roadsides they found that billboards had moved into the setback area over the years without opposition from the highway department. Consequently these highway departments now are having a very difficult time trying to get them out, and one may fairly question whether the courts will be very sympathetic to a State that failed to enforce its rights for so many years. So, the problem sometimes is that public interests have simply not been cared for once they have been acquired, and in the process they may have been lost.

Another problem arising out of enforcement efforts is illustrated by the case where a State acquired scenic easements over parts of farm where the owners customarily grazed cattle. The terms of the easements prohibited the farmers from allowing cattle to overgraze the land, and specified that the grass should not be allowed to get below a specific number of inches. There was good reason for this, based on erosion control and grassland management principles, but the farmers naturally resented being restricted in their grazing practices and were not inclined to cooperate in the program. One can also imagine that neither the farmers nor the highway department were likely to take seriously the job of monitoring the pastures to assure that the grass level was sustained up to the standard specific in the easement. If this really is an important aspect of range management or erosion control, probably it should be expressed in regulatory provisions of the law relating to land use or conservation; certainly it would be better to put it there and let the rangers enforce it than to try to make the scenic easement concept large enough to accommodate it.

The Tax Structure

The tax structure, and its relationship to the problem of improving scenic acquisition programs, is a subject on which much more information and understanding needs to be developed. Quite possibly a research center, such as the Highway Research Board, should undertake this task, rather than any operating highway agency. The availability of tax incentives could be a great help to a right-of-way agent when he approaches a farmer to try to persuade him to part with a scenic easement.

Ironically, there are certain tax incentives already in State and local laws which are not generally known, and certainly not highlighted by highway department right-of-way agents. The right-of-way agents of the highway department should be familiar with the State and local tax structure, together with the administrative rulings and judicial interpretations that apply, as part of the background of his proposition to the landowner. Preferential tax treatment, deferred taxes, bonuses and subsidies for the purpose of inducing owners to keep land in undeveloped or low development conditions exist in a number of States. Yet, regretably, it is not easy to find out just how many of what type there are, and what lessons can be learned from their experience. Research is needed to show how these laws compare, and, beyond that, how they are interpreted in practice.

Some legal scholars have argued that when a scenic easement is acquired, some portion of it must be tax exempt because it is owned by the State. How much, and under what circumstances can an easement become tax exempt? Again, this is something that would be quite suitable for a research study by the Highway Board.

In zoning law and tax law land is rated according to the highest and best use to which land lawfully can be put. As soon as a scenic easement is given, the highest and best use may change substantially. Where it does, it would seem a reduction should be made in the taxes on that parcel of land. Maybe we have not been doing as much as we could to get tax reductions for landowners who give scenic easements; and, if the tax laws provide for various forms of tax relief, these inducements should be used in scenic easement programs.

Another aspect of the tax question is raised by exploring the possibilities of resale with covenents or lease-back of land acquired in fee by public agencies. This has the advantage of putting land back into a revenue-producing status even though it has been acquired by the public for purposes of protecting its value or guiding its development.

Cost Considerations

Turning from the economics of the tax question, a related major area for investigation and development is the cost of less-than-fee acquisition. In many cases it is reported that the cost of scenic easements runs as high as the cost of the fee. In such cases highway administrators naturally ask why they should settle for less than the fee, and accept all the added problems of enforcement of easement conditions which will be involved.

Perhaps one of the major problems concerning the cost of easements comes from the fact that farmers typically like to

keep their property liquid. When this liquidity is decreased, many farmers will prefer to sell the entire fee rather than keep land with restricted usefulness. However, the drawback of fee acquisition is that the property is then erased from the tax rolls altogether. Rural communities may not be enthusiatic about a program which could adversly affect their tax base.

One question that has been raised concerns the value that should be put on an acquisition which actually works to the benefit of the landowner. How can these benefits be offset? Normally, of course such benefits are not considered in the highway land acquisitions because many States' laws do not allow benefits to be offset in condemnation. But these benefits may be substantial in the case of easements which protect scenic quality of a parcel of land and its surrounding area; and the propriety of the rule against offsetting benefits should be reexamined in these situations. Perhaps cases where benefits are great should not be handled by less-than-fee acquisitions, but rather by imposing police power regulations on the land use. Or, instead of protecting the public's interest through planning and zoning, perhaps this is a case where systems of convenants among neighboring landowners themselves could be utilized. Such covenants may well have an attraction to owners in an area which will benefit generally from measures that maintain scenic quality.

Most right-of-way agents who have had experience in highway projects feel that it is hopeless to expect that benefits will be offset, either by court order or by landowners' voluntary recognition and allowance of them in negotiations.

When the economics and psychology of land use restrictions are more fully understood, they may suggest different approaches.

Legal Interests to be Acquired

All the problems mentioned here necessitate an inquiry into how should we define the legal interests which should be acquired by the public.

Related to this, of course, is the initial question of when to regulate and when to acquire. Zoning is a useful police power tool, but by its own nature it is a temporary form of control which changes as pressures for development shift and grow. Thus, where the public objective is to permanently preserve a scenic or environmental feature, public acquisition is generally preferrable to zoning control.

However, there is great latitude between land use regulation and fee simple acquisition. Where the middle ground can serve the public interest, various degrees of "temporariness" or "permanence" may be imagined and provided for through legal arrangements. Precisely which type of control is wanted must be decided in the light of what will be adequate for the scenic need.

When looking for new ideas for approaching the problems of resistance to easement acquisition, consideration should be given to acquisition of interest for periods of less than perpetuity. There might be some appeal to acquiring easements for specified periods of years, with options to renew at the end of the term. Such an arrangement would allow landowners to keep their property a bit more liquid than under the present perpetual easements, since each owner would know that at the end of the easement period there would have to be a new negotiation to decide whether it would continue. Under such circumstances, owners might give easements for a lot less money than they now feel they must charge for a perpetual restriction on their potential use.

Many times it works out that the expected useful life of a public facility, such as a highway or a bridge, is about 20 years. After that time it must be rebuilt or replaced, or otherwise adapted to the new circumstances which prevail. Why not take the same attitude toward programs of acquisitions for protection of scenic and other environmental values? They are just as susceptible to obsolescence as the functional engineering features of a highway; and perhaps scenic acquisition plans need to be periodically reviewed in the light of whether they still are the best way to protect the public's interests. In some cases it may appear that prevention of undesirable development in a particular area necessitates continuation of the easement, or the acquisition of fee title. In others, it may appear that changes in the surrounding area during the intervening years have made the original purpose unattainable, or no longer necessary, and the best thing to do may be to release the easement or try to swap it for a similar restriction in another location where scenic protection will be needed and attainable in the future.

In areas that are undergoing rapid land development and population growth, perhaps we should consider creating a scenic easement that is renegotiable when conditions change, rather than at a fixed term of years. This uses a parallel to zoning practice, and the changes of the zoning map to reflect evolving conditions of development in a community. Courts have a long record of sustaining landowners who seek to have their land rezoned to a different use because the character of the surrounding land has changed since the original zoning. Thus, the right to renegotiate a scenic easement might be tied to certain specific degrees of change in the zoning of the area; or the right might be recognized in accordance with application of zoning principles. When renegotiation takes place, one of the most important issues may be whether to give up the easement so the owner can develop or dispose of his land unrestricted, or to buy the fee and make the restricted use permanent. Tying the reconsideration of scenic easements to the operation of existing land use controls has the advantage of making use of a mechanism which not only

is involved in the same activity--that is, adjusting private land use development to community plans and objectives--but has an established and fairly familiar mechanism built into it for making period adjustments to changes in land use due to population trends.

If all this leads to the objection that a scenic easement which is not perpetual and is renegotiable amounts to very little more than an option to purchase land, I say, what's wrong with an option to purchase? It may be the most sensible and economical thing to do under some circumstances. An instance occurred in Idaho where the highway department was buying scenic easements along a certain stretch of highway, and came to a golf course. The proprietors of the golf course were not sure they wanted to restrict the use of their land permanently, and thought that at some future time they might want to close the golf course and develop other types of facilities. Along with this was the further consideration that while the property was used as a golf course there really was no need for any restriction on its use--at least for the purpose of preserving the scenery. Accordingly, the only interest which the public had was to see that when and if the owner ever decided to terminate the use of his land for a golf course there would be suitable restrictions placed on whatever subsequent use was selected. In such a situation, an option to purchase the land or a scenic easement if it ceased to be a golf course would protect the public's interest quite adequately.

The FHWA study now getting started will want to give some thought to the problem of clearly identifying what we want to protect, enhance, and restore. Only when we put these program objectives clearly in focus can we draft easements and deeds which are discriminating in their scope. We need to be more innovative in our legal drafting if we are to reflect the individual needs of landowners. For example, the story is told of a farmer who had been approached by a negotiator for an easement, and said he would like to cut some of the trees on his land from time to time as he needed fire wood or other personal uses around the farm. The negotiator had no authority to allow this under the easement, and he had to refuse. At this the farmer replied that the State might just as well start condemnation proceedings to take the entire fee, because he had no interest in talking any further about an easement.

Here was a case where a little more flexibility on the part of the negotiator might have let him work out an arrangement which would have satisfied both the needs of the State and the desires of the farmer. Tree-cutting is a constantly reocurring matter, and the Park Service's suggestion for establishment of forest management guidelines for handling the easement areas, in contrast to a flat-out prohibition against any cutting, might make a great deal of sense.

Does this mean that each and every scenic easement should

be tailor-made to the landowner's personal desires? No; going too far in this direction obviously leads to making the administration and enforcement problem unmanageable. A middle ground has to be found. I suggest that it may be possible to build the terms of all easements around certain basic goals of scenic protection, and certain prohibitions or general restrictions which promote these goals. If the scenic values and the undesirable impacts on these values can be quantified, measured, and compared, then it may be quite possible to establish a scale of priorities for each parcel of roadside land and adjust the restrictive terms of the easement to acquire only what is absolutely necessary. Such an approach would seem to appeal to landowners.

As to negative versus affirmative easements, I feel we should use negative easements wherever possible. Affirmative easements generally mean the State has the right to enter private property and take some form of direct action on the land. This type of activity in turn, frequently results in complicating the enforcement process.

When to Take the Fee

Lastly, we should not ignore the importance of knowing when to take land in fee for scenic protection. There are many cases in which the public should take a fee interest without even considering an easement. Among these cases are the ones where there is no other private development use that is feasible, as for example, a cliff or wetland or flood plain where development is both imprudent and impractical. Many States have reported that they have reluctantly purchased fee interests when they tried to obtain scenic easements but found the costs were almost as high as the fee itself. Possibly this is an indication that they should have been acquiring fee interest from the beginning instead of scenic easements.

Determining when to take a fee and when to settle for less-than-fee interests may be complicated question in many situations, but it is critical. A good deal of land is involved in any major scenic enhancement program, and if it is all acquired in fee by the public, it is no longer on the tax roles.

I realize that these suggestions regarding modification and expansion of the less-than-fee acquisition program raise a great many questions which, so far as I know, have not been answered by any of the experience of scenic enhancement efforts so far. However, the concept of acquiring less-than-fee interests remains a very sensible one, which theoretically ought to work to the advantage of both the land-owners and the public. The fact that problems have arisen in the administration of the scenic easement portion of the highway beautification program over the past several years should not be taken as a sign of a futile policy or objective, but rather a sign of faulty design

of the tools and tactics by which we have attempted to implement our policies. With luck, we can correct these faults; and that is what our FHWA task force intends to study.

GENERAL DISCUSSION

DR. NETHERTON. May I pick up this point and ask a question? So many of the things you identified as questions for study ultimately go back to a good definition and understanding of what the public agency wants to and thinks it should acquire to protect the community's interest.

I would like to ask Mr. Isaacson about the state-of-the-art in landscape architecture and roadside design for defining acquisition goals and fitting them to the public's interest.

MR. ISAACSON: Just yesterday in the meeting of the Highway Research Board's Committee on Roadside Environment, a method of inventorying, identifying and giving quantitative values to scenic views was presented. This was the first time a study of this type of which there are many, effectively related to the highway user. A few days ago I would have answered without hesitation that the "State of the Art" in Landscape Architecture and roadside design was, in my opinion, highly subjective. However, the approach presented yesterday appeared to deal realistically with the highway user; and because of this it adds to our knowledge.

So, the state-of-the-art for visual quality analysis varies according to the goals, competence and experience of the organizations that are interested. For example, Wisconsin and California probably have the most sophisticated statewide systems available at the present time. New Hampshire, on the other hand, has a scenic road program aimed at preserving stone walls and maple trees. Unsophisticated perhaps, but yet important to that particular area of the country.

DR. NETHERTON: Let me carry on with that by asking about handling public interests in values other than scenic. Shouldn't judgments about when and where to acquire scenic interests consider the values that are directly associated with outdoor recreation, conservation, and the like? For example, how does the Park Service determine when, where and how much interest in land is needed?

MR. HARPINE: These considerations are not made separately for each isolated site, but initially they are introduced into the planning that is done for an entire area. For example, when the St. Croix National Riverway was planned, a team went up and down the river and viewed it from the standpoint of its value overall. From this they formulated a set of goals for the preservation and protection program--end results which they wanted

to achieve, you might say. After that, in light of these goals, a preservation and development strategy was developed. And this, in turn, became the basis on which the protective measures were determined for each site. In the type of work the Park Service does, this seems to make the best sense.

Of course, where there are areas in which it is known in advance that scenic easements will have to be used, more deliberate planning is possible.

And, as far as public use facilities are concerned -- including the approaches and access to them -- the Park Service's policy is always to acquire fee simple title.

DR. NETHERTON: The Nebraska Department of Roads inherited some of its recreation potential in the highway corridor by having the borrow pits already dug and used as part of the highway construction process. But I am wondering how the determination was made to take the borrow pit site either in fee or easement.

MR. LICHTY: It was not exactly an inheritance. It might very well have gone the other way, and the borrow pits might have been opened under a temporary arrangement with the landowner which left the State with nothing after it had taken out the fill it needed in that vicinity.

As it happened, someone in the Department did some original thinking when they were about to start the project, and as the highway construction approached Grand Island and the Platte River the department began to integrate the development of the roadside lakes with the plan for the highway. From that time on, development of the lake chain was a deliberate effort, and it followed a definite concept of highway and roadside development. We had some litigation over one of the pits, but generally this was accepted by everyone. Of course, we did not take all of the borrow used on I-80 from these pits; much of it came from dredging the river. And there were some constraints which arose because of the necessities of construction.

DR. NETHERTON: The thing that comes through to me from both of these last comments is the importance of coordinating and working from a plan which has a broad view of the road and the region through which it is laid out.

This touches on something that Mrs. Johnson mentioned, namely that the acquisition plan should be correlated with other area development plans at an early stage, and continuing throughout the life of the project.

With regard to recreational use of these borrow-pit lakes by the general public while at the same time allowing private ownership and development of the shoreline, how was public access arranged? Was this lake built on land acquired in fee and later resold subject to restrictions in favor of public access?

MR. LICHTY: No, in every case where water recreation facilities for the public were developed, the Roads Department already had done some coordinating with the Nebraska Game and

Parks Commission beforehand. So, according to plan, when the land was acquired it was either acquired in fee, and with enough additional space to provide a site for the public access, parking, and other recreational buildings. Or else, an easement was bought to give access to the lake across private land, and recreation facilities were developed at the shore of the lake on another easement.

Very definitely, however, there was an understanding that wherever a roadside lake with outdoor recreation potential was developed there should be public access under the aegis of either the Department of Roads or the Game and Parks Commissions.

DR. NETHERTON: The matter of appraising has come up in several of the comments. What is the current state-of-the-art as far as valuation of less-than-fee interests is concerned?

MR. LICHTY: Generally the problems are the same as apply to fee acquisitions, except that the landowners are, in many instances much less definite in what they actually know about how easements affect land value.

DR. NETHERTON: Is this because there is little market data from transfers of land encumbered by easements?

MR. LICHTY: I think it was conceded in the beginning that these lakes, together with some of their surrounding land, were going to make the land more valuable than it had been before. But this is not always easy to sell to a jury, especially before the development takes place so they can see for themselves what it will look like.

Of course, in this same area the road was built almost on the edge of the high bank of the river; and beyond this, between the road and the river, there are accretions. The history had always been that when a piece of land was sold, it went to the "high bank", and any accretions went with it. Normally in the purchase of land this was understood, and nothing needed to be said about it, or generally was said. Therefore, when we separated the landowner from his accretions, he argued that the taking involved something of substantially more value than what was described in the deed. This was, of course, a fee acquisition problem. Where an easement was taken, the principal dispute usually was over the existence of a special benefit.

DR. NETHERTON: How does the Park Service approach the problem of valuation of easements?

MR. HARPINE: We have no particular methodology, and in each case we make an appraisal and make an offer based on it. The law required us to base our purchase on something that is as close as possible to fair market value.

In every instance I know about, the appraiser has made a "before-and-after" comparison -- that is, he appraises the value of the underlying parcel of land before the easement is given, and then he estimates the value of this same land afterward with the easement restrictions taken into consideration. The difference in these two figures may be substantial in a rapidly developing or urbanizing area where the opportunities to change land uses come rather rapidly. Since the landowner's

freedom to make the most of these opportunities is important to the owner, the loss of it may be estimated at as much as 80 to 90 percent of the full value of the fee in many instances. On the other hand, in a rural area where land uses are stabilized, and the restrictions do not seriously interfere with existing uses, the cost may be almost nominal.

Earlier I referred to an actual situation where we enhanced rather than diminished the value of the land. Here we went to the expedient of offering the owner one-half of the assessed value of the land alone as shown on the tax records. We did this because we don't think it is proper to go to a landowner and say he must pay us for the privilege of letting us take something from him. We feel we have to offer something, even if it may be only nominal value.

MR. ARNOLD (Texas): Is the basis of your negotiation for purchase of an easement the fact that your law prevents you from acquiring it through eminent domain? Or are there other reasons why you choose to purchase?

MR. HARPINE: In some projects the Park Service can condemn for easements, and in others it cannot. However, regardless of what procedure we are using, we still go through the appraisal process for each instance of an acquisition. We want a finding and a record of the effect of the taking on the land.

MR. ARNOLD: If you have the authority to condemn, what reason is there to want an easement for a term of years with an option to purchase the full fee interest after that? I am referring to Mrs. Johnson's suggestion.

MR. HARPINE: The Park Service would see no advantage there because it assumes in the beginning that what it acquires will be needed in perpetuity. There would be no need to face the situation Mrs. Johnson was speaking about when she suggested easements for periods of time.

MR. ARNOLD: It seems to me that you are likely to have to pay market value for the acquisition whether you do it today or twenty years from now when a fixed-period easement expires.

MR. HARPINE: Frankly, I don't know what considerations might be thought of if this was explored. The Park Service always has dealt in perpetual easements, whether bought or donated; and I can think of no situation right now in which the Park Service would be interested in a temporary scenic easement. We work on the premise that the National Parks of this country are forever. I can imagine, however, that there might be some situations in which you would have to redesign some highways at periodic intervals because of changes in the way they are used.

MR. ARNOLD: That's right, but if a highway is moved to a new location after a period of time, there will be no need for an option to purchase scenic land at that site.

DR. NETHERTON: The only context in which I have heard the idea of a temporary easement discussed is the one that

deals with the landowner's willingness to give a less-than-fee interest in his land. If it is a temporary one, he may be more inclined to do it than if it is a permanent one.

MR. HARPINE: I believe the Park Service experience backs up Mr. Arnold's feeling. People who own land do not like to be told there are things they cannot do with it. And it doesn't make much difference whether the restriction is going to be for a fixed period of time or forever. If you approach them with a proposition that restricts their use, many will say they are not interested in any type of easement, and that the public agency can acquire the entire fee if it wants to control its use.

This is a very important trait of human nature that has to be considered. And that may be one reason why the Park Service's people in the field are somewhat disillusioned with the prospect of getting scenic easements. They just do not appeal to the landowners as much in practice as they do in theory. If one is working in an area which is ripe for development of more intensive uses or different uses, the task of securing scenic easements is very difficult. In these areas, however, it sometimes has occurred that the local people have gotten interested in a project and have made contributions of easements voluntarily.

MR. ARNOLD: In Texas we are facing this situation in connection with the acquisition of easements to protect the scenic setting of former President Lyndon Johnson's home. There is a certain view from the house where you can look over the hills and valleys to the Pedenales River, but if we are talking about scenic easements I just can't see any way I can get out of paying almost the value of the fee. I mean, we will be telling these people they can't build on their land, and they have to keep it in a park-like condition forever.

MR. HARPINE: That is absolutely right. The Park Service has encountered similar situations in a great many cases, and I don't know that there is a simple answer to the question.

We were paying almost 100 percent of the full value of the property in some cases before the former Director of the National Park Service put a stop to it with a policy that unless there were special circumstances he did not want to pay more than 20 percent of fee value for an easement. We have generally stuck to that policy, and where we have to pay substantially the price of the fee we make it a practice to ask for the fee. We feel we might as well get the full fee so we can do what we want with the land. If it is decided that pasture, woodland, or even crop cultivation is compatible with the public's interest, the land can always be leased to private individuals for their use. From the standpoint of the public agency, this seems to be a lot better than trying to tell a farmer what he can or cannot do with his land.

DR. NETHERTON: If there is any usual form of scenic easement, I suspect it is along the line developed by the Park Service for the Blue Ridge Parkway and by Wisconsin for the Great River Road. The restrictions placed on the land in these easements included (1) limitation of buildings to farm

and residential structures, with no new nonconforming uses but existing nonconforming uses allowed to continue, (2) prohibition against cutting mature trees and shrubs beyond what is necessary for normal maintenance, (3) prohibition against dumping, (4) prohibition against billboards, and (5) on the positive side, authorization for necessary utility lines and roads. This is all the public took under its easement.

What is the reaction to this set of limitations? Should there be a right of entry added to the easement so the public agency can enter the land to maintain or enforce its terms? Apparently it is useful, because Wisconsin added this right to its easement form after originally omitting it. Also, under some circumstances there might be some desire to have other positive rights, such as flowage easements or drainage, and other similar public rights.

MR. RYAN (New York): The New York Department of Transportation tried to obtain easements in an area where it thought everything favored it. This was in the Finger Lakes region where, in the spring of 1968, we proposed taking easements along certain roadside areas so that the view of the lakes and the hillside vineyards could be preserved. By taking an easement over 600 feet of the roadside this view could be preserved because the land sloped away from the road and down to the lake. We did not need to restrict building beyond 600 feet because it would not interfere with the view. We did not need or want to prevent agricultural activity or horticulture as it had been carried on for years. The most drastic restriction in our proposal was a height restriction on buildings that were built in the easement area.

Some people in the area were enthusiastic about the proposal, but others were opposed to it because they felt they were losing the right to build their buildings along the edge of the highway where they thought they should be located. The ones who protested loudest were the ones who had plans to subdivide their land into building lots sometime in the future.

DR. NETHERTON: In a situation like you encountered in the Finger Lakes region, do you think it might have been any advantage to you to try to negotiate for a temporary easement? Would this have helped deal with those landowners who thought they foresaw a time when they could subdivide their land into building lots?

MR. RYAN: We did not consider trying to get anything less than a permanent easement, but perhaps we should have. However, the group that was most opposed to allowing any restriction on their opportunities to develop homesites probably would not have been interested in this alternative.

Most of the land between the road and the lakes was in pasture. Where resort hotels and other buildings already were built in this area they all were oriented to the lake, with their backs to the highway. Under our proposed easement, the

State highway maintenance crews would have the right to enter the roadside areas and mow the grass and keep the foliage trimmed so there could be a view of the lake from the road.

MR. ISAACSON: I would like to raise a question about another aspect of this subject. I wonder to what degree experience in this program varies over time. Many organizations initiate an easement program after they have identified the visual resources they wish to preserve or enhance. When they start this program everything looks good. But as they progress and more people become involved, they encounter increasing opposition both in terms of policy and cost of acquisition.

I think someone should plot the initial rise and subsequent leveling off of enthusiasm and success of easement acquisition programs. I think they would produce the same type of curve. Even if everything is perfect in the beginning, as far as circumstances favoring the program, I feel that a negative reaction increases with the passage of time.

DR. NETHERTON: You seem to be suggesting that an acquisition program can and should be looked at like zoning is -- namely, it is what someone once called "an impermanent constitution", which changes from time to time as the public's attitudes evolve. I am intrigued by your suggestion, however, and I believe it means that we should ask the socio-economic researchers and behavorial scientists to help explain the phenomenon of the rise and fall of scenic easement support.

MR. HYDER (Missouri): Would the suggestions that Mrs. Johnson made depend on the communities establishing land-use planning and control systems, such as I understand the Federal law now under consideration would require? What effect would the proposed Federal assistance to local land planning have on these suggestions?

MRS. JOHNSON: I am not fully informed on the latest developments in the National Land Use Policy and Planning Assistance bills, but I think there is a parallel between them and the State legislation I mentioned which sought to get local protection of areas of State or regional significance from the effects of unplanned land development.

If Congress should use this approach to encouraging land-use planning and protection of areas of special concern or vulnerability, I think it could operate in the same way in relation to a program of public scenic acquisitions.

MR. HYDER: I believe the Federal law would require that a complete land use plan be developed by each State.

MRS. JOHNSON: Yes it would; and land use plans can change over a period of time. But there is likely to be less change in the areas of special national State or regional significance, and so a land-use regulation under the State's plan could work to provide adequate protection for the public's interest. Thus it might turn out that there would be no necessity for acquiring a scenic easement in that situation.

MR. MRACEK (Illinois): Looking back over this discussion, I think most of the talk has highlighted the problems that are being encountered in scenic easement programs. I don't believe I have heard much positive support for them, and I am wondering if the panel members feel that on balance, with all things considered, the scenic easement and other less-than-fee interests offer the highway departments valuable tools for increasing scenic enhancement of the roadsides.

DR. NETHERTON: In this question we might have the basis for a final summarizing comment by each of the panelists. Let us ask them for their reaction to that question.

MRS. JOHNSON: I think it is a very useful tool; and it may be we were maligning it a bit too much today. Possibly it is not the concept of less-than-fee interests that is faulty, but rather the way we have been trying to sell the idea to the public and work it out with the landowner.

We need to find out the underlying reasons for the resistance that has occurred; and, when we understand this, I think we can make easements into very valuable tools, It lets us get into the area between land-use controls which are regulatory in their nature and the acquisition of complete fee interests, and that middle ground may be one in which we can meet the landowner and work with him for scenic effects which will benefit him as much as the general public.

MR. LICHTY: In Nebraska we have acquired easements to prevent outdoor advertising along the full length of Interstate 80. We have no problems with this, and we are glad we acquired them. By having this less-than-freehold interest in the land we know we have control of that problem.

This fits in with what Mrs. Johnson said earlier about knowing where you want to go in scenic enhancement and environmental protection, and wherever it is possible, these acquisitions should be made at the time the road is initially being constructed or new right-of-way is being acquired. For some reason, when an easement is requested at the time other land is being taken in fee, it does not seem to concern the owners as much as when it has to be acquired separately and after the right-of-way is obtained.

Another thing, if you are taking an easement that prohibits a long list of specific acts, the owner is likely to think that the Government is taking his land without paying full value of it. This is a reaction to many easement deeds, and where the list of the public's restrictions is a long one, it may be a situation in which the land should be acquired in fee.

MR. ISAACSON: As I see our situation now, 24 percent of the States believe their experience has been successful. Personally I would like to know what these definitions of success are. I am sorry this definition cannot be based on 10 years of experience under a fully funded program. As it is, much of our reaction has to be based on fragmentary experience

of a case here and a case there. At this point in time, therefore, I feel very strongly that our greatest need is to correlate our information as fully as possible, and undertake new studies where we can do so, all with the objective of evaluating the lessons learned from actual experiences with scenic acquisition.

It is heartening, but somewhat unsettling, to receive as much mail as we do asking for criteria and other advice for scenic enhancement of the roadsides. There is a very great and real interest in this matter which we should not ignore. But, the first question I have to ask these people is, "What do you want to do?" Most of the time they do not know. Their organization does not have a program with clearly stated objectives.

Criteria without a set of goals or objectives are meaningless to me. I am not convinced by people who say that if they just have some criteria they will develop their program. I think this is going at the problem backwards. You have to know what you want to accomplish before criteria to achieve this result can be stated. The same thing applies to any discussion of techniques; they should be selected only in light of the program goals.

MR. HARPINE: I think I would have to take a somewhat negative view of the prospects for scenic easements, but I am not a complete pessimist.

For example, in our parkways, which is the only place the Park Service has any long-term scenic easement experience, I think we have seen the most evidence of failure. And this may be because scenic highways inevitably generate their own deterioration by setting in motion economic forces that lead to roadside development. People like a scenic area, and immediately want to move there, despite the fact that this is what will destroy the scenery.

Many park and recreation people now feel that would have been better off 30 or 40 years ago to have bought fee simple interest in the land we wanted. As far as some of the newer programs are concerned, I think it is too soon to say whether such programs as the Scenic Riverways, for example, are going to have better success with their easement acquisitions. I think the actual acquisitions in this program have been reasonably smooth and successful. There is some resistance, but overall the easements are being acquired without undue strain and expense.

I believe that Mr. Lichty put his finger on a key point when he said that if you are going to make scenic easements a success you had better be in an area where the type of scenic easement you want is not out of line with what the public and landowners in that area want. If you go into an area which is ripe for development for highpriced land uses, and you want to restrict the changes of land-use, you naturally are going to get a mighty cold reception from them. But if you can get into

an area which is still rural and isolated, and particularly if the people have a pride in their scenery and surroundings, you have a real potential to work with. Scenic easements in a place like this are much more attractive. Currently the Park Service is associated with the Maine Coast Heritage Trust, which is a private organization interested in preserving the scenery. This organization has been most helpful to the Park Service in securing the donation of easements to preserve scenic beauty. In places like this scenic easement programs have their greatest potential.

DR. NETHERTON: If I may also have the privilege of a closing comment, also, I would like to make it guardedly optimistic. While I acknowledge all of the difficulties than we have been able to mention this morning, I believe there is a future for the less-than-freehold interest acquisition. I believe this for two reasons: the first has just been touched by the last two speakers who mentioned the importance of goals in developing overall scenic beauty programs. It is unquestionably true that easement acquisition has to keep in step with the public's pride and desires regarding its environment. Where there is a "pride of place", as there evidentally is in places like the Maine coast, there is likely to be a fairly well defined set of goals and consensus about how much restriction will be accepted in order to achieve them.

The second reason I am optimistic is that I believe it is a matter of necessity that we keep trying. As I see the whole range of methods and techniques which are available to implement plans for roadside amenities and land-use, it is only in this area of less-than-fee acquisitions that we have any room for innovation and responsiveness to the needs of landowners. Between outright fee acquisition and the control of land-use through the police power, there is no better technique that the law has to offer.

With that I will bring this session to a close by expressing to all the panelists the sincere thanks of the Highway Research Board, and my own sincere thanks to the Chairman of the Board's Committee on Roadside Environment and Committee on Eminent Domain and Land Use for joining in their sponsorship of this discussion.

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