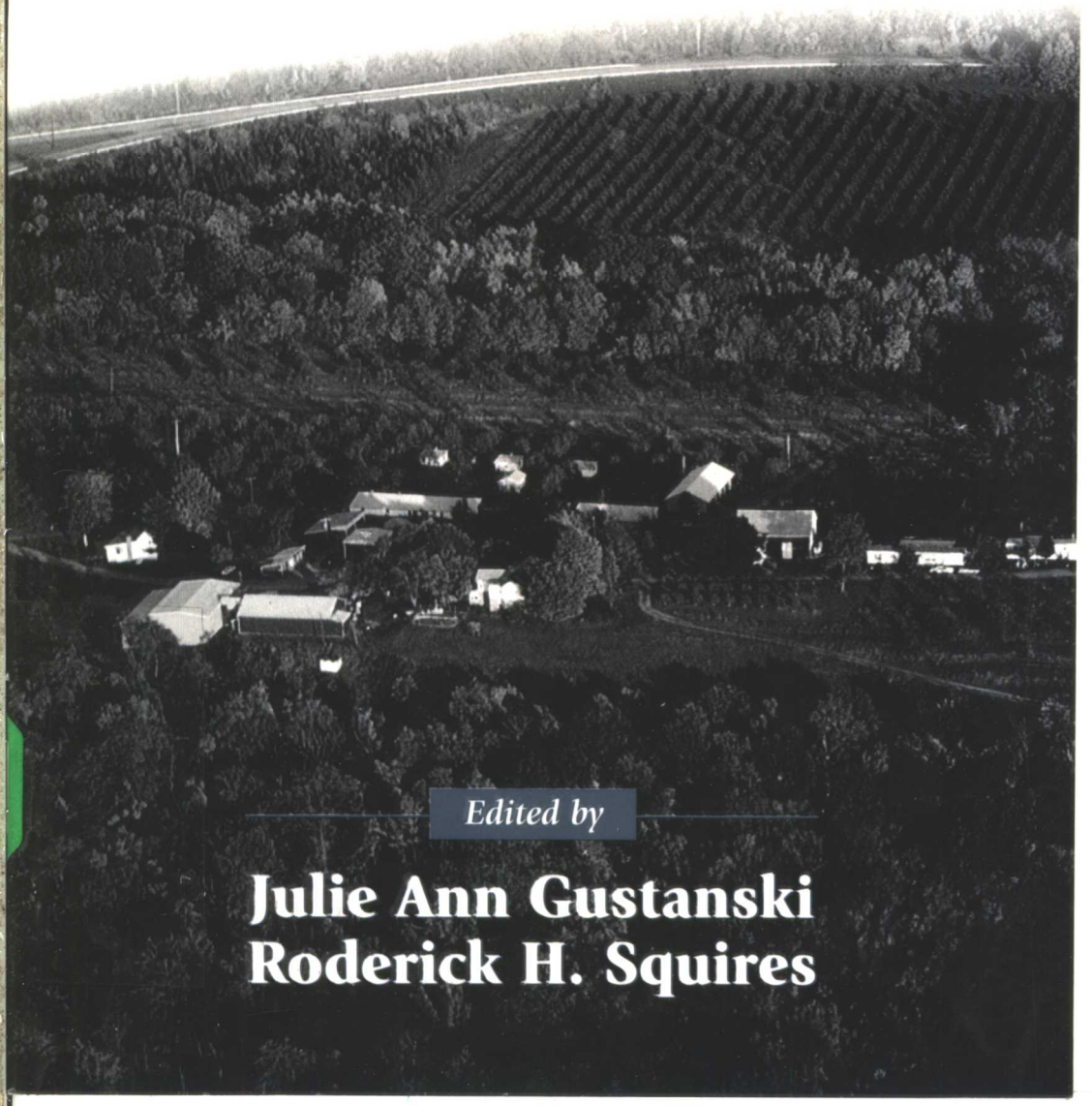
Protecting the Land

Conservation Easements Past, Present, and Future

Foreword by Jean Hocker



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Cover photo: Orchard along the Hudson River in the historic "Olana Viewshed," Columbia County, New York. Protected by The Scenic Hudson Land Trust, Inc., with a conservation easement restricting the land's development in perpetuity. Courtesy of Scenic Hudson, Inc.

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Foreword

In 1959, William H. Whyte wrote a technical bulletin for the Urban Land Institute called *Open Space for Urban America: Conservation Easements.* "It was probably the first time an entire publication had been devoted to explaining and promoting this then-obscure conservation tool," he said. It certainly was a major step forward in educating planners, conservationists, and policy makers about a new way to protect open land without acquiring it.

Not that conservation easements were brand new, even then. In fact, the first conservation easements in the United States were written in the late 1880s to protect parkways designed by Frederick Law Olmstead in the Boston area. In the 1930s, the National Park Service made extensive use of easements to protect land along the Blue Ridge and Natchez Trace Parkways. And in the early 1950s, the state of Wisconsin established a highly successful easement acquisition program to protect land bordering the Great River Road along the Mississippi River.

When Whyte wrote his small bulletin, however, easements were neither well known nor much used, even among those whose business was land conservation. One of the stumbling blocks was that lawyers found a number of legal uncertainties with conservation easements.

Conservation easements are not like easements lawyers were used to. First of all, they do not grant the holder the right to do something on another person's land, the way a utility or road easement does. Rather, they give the holder the right to *prevent* certain uses. A negative easement was not a common idea. Moreover, conservation easements usually run in perpetuity, something the common law does not like very much.

Finally, conservation easements are usually "in gross," that is, they benefit the public at large, rather than benefiting an adjacent or nearby property, as does an "appurtenant easement." There were questions about whether an easement in gross would be enforceable over time. As Russell Brenneman, a Connecticut attorney who was an early proponent of conservation easements, once observed, "An easement in gross is a very bad thing to be if you are an easement."

Thus, in the 1960s, thanks largely to the work of William Whyte and the dedication of lawyers like Brenneman, states began to enact legislation specif-

ically dealing with conservation easements. California, Connecticut, Massachusetts, New York, and eventually many other states designed state laws to clarify the uncertainties. If a state statute was well drafted, it defined what a conservation easement was, stated how they could be created, said that they are valid even though they are in gross, and declared how they could be enforced and by whom.

Not all the statutes were well designed, however, and by the late 1970s, there were enough states still without easement laws, or with inadequate laws, that the National Conference of commissioners on Uniform State Laws began work on a Uniform Conservation Easement Act (UCEA). This model conservation easement law was approved by the Commissioners in August 1981 and recommended for enactment by all states. A few months later, the American Bar Association gave its approval of the UCEA. It was a significant advancement for conservation easement law, prompting a number of states to adopt or revise easement statutes.

As this book points out, few states have adopted the UCEA exactly as written. Some have modified it quite a bit, perhaps to appease political interests or to address issues the enactors believed unique to their jurisdictions. The results vary and can be confusing for landowners and easement holders alike. Moreover, as conservation easements have become a commonly accepted conservation tool, some practitioners may even have forgotten that, in most places, conservation easements are creatures of state law.

Not surprisingly, land conservationists have paid a lot of attention to the requirements of federal tax law that govern deductibility of charitable gifts of easements, but enforcement of easements over time will depend heavily on state laws. This book not only reminds us of that, but also provides a wealth of information and analysis about those laws.

Anyone who has watched the use of conservation easements burgeon understands what a compelling tool easements are for protecting endangered natural areas, scenic properties, and working farms and forests. For many properties, it is hard to imagine a more appropriate tool. The case studies in this book recount some outstanding successes, painting a vivid picture of the complexity that can be involved in crafting sound easement transactions and building the partnerships necessary to ensure their success. These stories also demonstrate the extraordinary tenacity and skill of dedicated land conservationists who work through land trusts and the enormous difference their work is making in the lives of their communities.

Yet anyone who understands conservation easements is also acutely aware of how much of the work of protecting land begins *after* the easement is signed. Some of the case studies remind us that consistent attention is

required if easements are to work as planned. Monitoring and enforcement are tasks for perpetuity.

Finally, as the land trust movement and the use of easements matures, we are faced with questions born of our success: When do easements work and when is a different tool more appropriate? What land should be protected, and how do we choose? How does land conservation intertwine with the economic and social goals of our communities? How do we convey an understanding of the benefits of land conservation? The book suggests some ways of thinking about those questions.

The years since William Whyte wrote his technical bulletin have brought enormous changes to land conservation. Although then land conservation was largely a job for government, today the job is shared by public and private efforts, with nonprofit groups often providing the innovation. Although then the number of nonprofit land trusts was fewer than 200, today the number exceeds 1,200. Although then the emphasis was on public land acquisition, today the focus is increasingly on private lands and a panoply of conservation methods to protect them.

Perhaps nothing better illustrates these changes than the evolution in the use of conservation easements. Used wisely and well, easements will continue to be a major conservation tool for the twenty-first century, protecting precious natural areas and green space for generations to come.

Jean Hocker

Preface

The conservation easement has proved to be an effective tool for protecting the historical and ecological characteristics of particular buildings and landscapes, contributing in a unique way to the stock of protected landscapes in the United States. Using such easements, private landowners first decide to protect the land and second to do so by conveying some of their rights to use the land to a nonprofit organization or a government agency that is then charged with the responsibility of ensuring that the requirements of the easements are fulfilled.[1] They decide to do so because the benefit to them exceeds the cost involved the limited ability, to use the land surface in the future. For some, the prime benefits are intangible, the satisfaction at preserving a historic building or a spectacular scenic view, for example, and purely personal. To such individuals, the cost is inconsequential, even irrelevant. For most landowners, however, the prime benefits, although not the prime motivation, are the economic rewards they receive when they protect the land surface. They receive such rewards because land protection is considered a public, not merely a private, benefit, one that is widely shared. Consequently, protection receives the support of multiple jurisdictions that determine that its economic costs should be borne by all who will benefit. Landowners receive income and/or estate and/or property tax relief in return for conveying their real property rights; the community pays for those rights in the form of lost governmental income.

Contributors to this book describe examples of conservation easements with which they have been associated. The land protection purposes to which easements have been put are diverse. From protecting blufflands along the Upper Mississippi River, preserving a historic landscape in the Hudson River valley and farmland in Wisconsin and Pennsylvania, and providing buffers from sprawling urban development along national park system units in Tennessee and North Carolina, conservation easements have played a key role.

The conservation easement is a recent method of protecting the land surface. In many ways, it is a hybrid of the tools that have been used to protect lands throughout the twentieth century. Some of these earlier methods focus, as does the conservation easement, on the decisions that private landowners make about land use, with federal, state, and local governments providing

financial incentives to persuade owners of lands with specific ecological characteristics into protecting their land. In such an approach, private landowners convey no real property rights but are merely compensated for exercising them in a particular way. In a somewhat different approach, federal, state, and local governments prevent owners of lands with specific ecological characteristics from using land in ways that will destroy these characteristics. Regulating how landowners can exercise their real property rights without compensation involves considerable political will on the part of governments and has elicited charges of "taking" real property rights. These approaches share two characteristics: The land remains in private ownership, and the public has no right of access.

Other methods of protecting land do not focus on private landowners. Federal and state governments actually acquire land with specific ecological characteristics from private landowners and protect the surface. Sometimes such lands become part of a management unit that emphasizes protecting the surface and may, or may not, provide public access. Governments have acquired a range of private landowners real property rights. Until recently, they acquired all the rights and became fee owners; the lands became public and, usually, exempt from ad valorem real property tax. Because of the actual cost of acquiring fee title and the resultant lost of tax revenue to local governments, however, the federal and state governments are increasingly opting to acquire only some of the real property rights from private landowners. In some cases, they acquire a possessory interest and thus become partial owners of a particular tract of land. In some cases, they acquire a nonpossessory interest and thus have no ownership claims, and the lands remain private.

The conservation easement possesses the compensation characteristic of the first-described methods of land protection and the conveyance characteristic of the last-described method. Completely avoiding the imposition of regulatory controls on private landowners, land protected through a conservation easement typically remains in private ownership and thus remains on the real property tax rolls. The easement, a nonpossessory interest in the land, is conveyed to a government agency or a nonprofit organization that has land protection as a prime goal.

> Conservation easements occupy an appealing niche in the array of land protection techniques—halfway between outright public or nonprofit ownership, at one extreme and government land-use regulation at the other. Easements are more permanent and often restrictive than land use regulation, which can shift with the political winds. At the same time, easements are tailored to the protection requirements of the par-

> ticular property and to the desires of the individual landowner. Easements keep property in private hands and on the tax roles, and also carry a lower initial price tag than outright acquisition.[2]

The main difficulty associated with conservation easements is how the real property interests created by them, and qualifying as a charitable deduction for federal income tax purposes, have been treated by individual states and incorporated into the existing framework of real property law. Contributors to this book describe in some detail how different states have overcome this difficulty.

An Evaluative Context for Land Use Decisions

We need to use a broad perspective in evaluating conservation easements, a particular tool designed to achieve a particular goal in a particular way.[3] The decision of a current landowner to protect the land and the governments to promote land protection through this particular tool is merely the latest decision in a long line of decisions that both have made and have resulted in the very land surfaces that we now wish to protect.

Explaining how owners make such decisions demands that we look at decisions from a temporal perspective because the current ecological characteristics that are being protected owe their existence to decisions of successive landowners. Many landowners, however, have decided not to protect the land surface but to use the land to produce marketable goods and services. So, throughout the United States, protected lands exist alongside lands used for other purposes. Explaining why and how some owners decide to protect land and why and how some owners decide not to protect land demands that we also look at decisions from a spatial perspective.

Viewing conservation easements in this way places them in an appropriate social framework. After all, landowners who have decided to encumber their titles to land as a way of protecting it are merely part of a society consisting both of landowners, some of whom have decided to protect the land surface in other ways and some of whom have decided not to protect the land surface at all, and nonlandowners, who demand a variety of goods and an array of services that can only be produced or provided by landowners using the land surface in "nonprotective" ways. The various protected lands compose part of the kaleidoscope that is the American landscape.[4]

There is a problem in viewing conservation easements in this way. Conservation easements are tools that are specific to particular landowners. To examine how landowners make decisions, we need to create some general models of land use behavior. These models omit some of the specific details

that characterize an easement but rather illustrate how all land use decisions, that both protect and do not protect the land surface and contribute to the American landscape, get made. Such models possess the additional advantage that they can also illustrate the fundamental characteristics of the democracy in which we live, a significant personal freedom with significant social controls on those freedoms. The resultant visible landscapes provide evidence, "of the kinds of people we are and were, and are in the process of becoming," a public document that reflects the complexities, ambiguities, contradictions, and paradoxes that characterizes our democracy.[5] We just need to know how to read it.

Landowners construct artifacts, produce goods, and provide services for a marketplace. They seek to satisfy a goal or goals based on their knowledge about the temporal and spatial ecological characteristics of the land they own, not unusually distilled into an index of productivity, their access to mechanical skills, including capital, and their a priori evaluation of the likelihood of a particular action achieving a desired result: to take advantage of place (Figure P.1). These goals, along with the available empirical information, the access to mechanical skills, and the evaluation procedures, compose interacting elements in all land use decisions. They create an evaluative context in which particular landowners make decisions to use land. The varying importance of each element to different landowners and the varying nature of these elements across space and in time explain the tremendous variety in the uses to which the land is put.

Despite this variety, however, there are geographies of land use. Different landowners, making decisions within a different context, make similar land

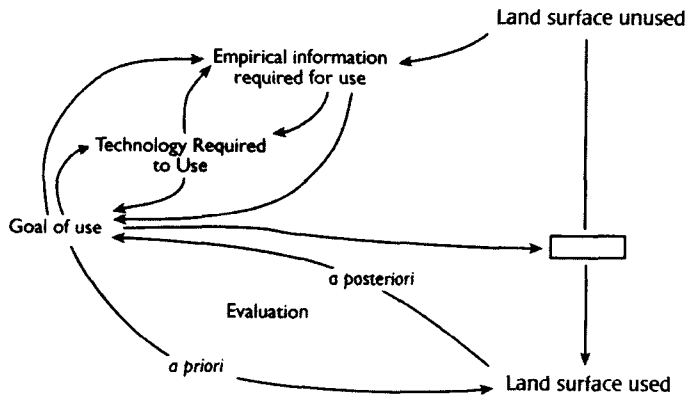

Figure P.1. A general land use model
Source: R. H. Squires

use decisions. Thus, individuals owning land on the margins of urban areas tend to make similar choices, as do individuals owning land in the corn belt of the Midwest. Moreover, a landowner tends to make the same sorts of decisions over short periods of time at least. There is some spatial and temporal consistency, some inertia, in land use decisions. How can we explain this phenomenon? Landowners are faced with a great deal of freedom in making land use decisions. Their freedom is not unlimited, however. In part, they are restricted by decisions they previously made. Any land use decision is really part of a temporal sequence of such decisions as each landowner evaluates the future, the likelihood of achieving a particular objective, in the light of the past and the present. Each land use decision is incremental, reflecting a past, a present, and a perceived future.[6]

Most of the restrictions on the freedom of a landowner derive largely from the relationship between landowners and nonlandowners. Some nonlandowners create the elements that form the evaluative context of the landowner, by promoting new goals, creating new technologies and new empirical information, and establishing new ways of assessing the outcomes of land use decisions. Other nonlandowners consume the goods and services landowners produce. Landowners, making decisions about how to use land, are faced with a constant stream of new technology, new information, and new ways of predicting and evaluating the outcomes of land use decisions. At the same time, they are also faced with a constantly increasing demand for goods and services.

How do conservation easements fit into this general land use decision model? Landowners establish easements on their property as one way of protecting land surfaces with particular ecological characteristics. The goal is to protect the land, the empirical knowledge concerns the characteristics that are to be protected, and the mechanical skill is the easement itself. Landowners who choose to use their land in this manner anticipate that their efforts at protecting the land surface will be successful although the easements need constant monitoring by those nonprofits or government agencies to which they are conveyed.

A Structural Context for Land Use Decisions

Landowners are part of an organized society in which relationships between all individuals, organizations, and governments are defined, a society in which some behaviors are encouraged and rewarded and other behaviors discouraged and penalized.[7] They are steered into making decisions about how to use their land by the rewards and penalties that stem from statutes, rules, and judicial opinions of multiple jurisdictions.[8] Appreciating social organization and the rewards and penalties faced by landowners is key to under-

standing landscapes. It would be a mistake, however, to focus solely on the behavior of landowners as a way of explaining landscapes. Landowners are enmeshed in complex relationships with nonlandowners, and their land use decisions reflect the decisions of all who live in a jurisdiction. Every land use decision, in fact, must be set against the rewards and the penalties that steers the behavior of all members of a jurisdiction. Described in this manner, all land use decisions should be examined against the backdrop of the continuous and acrimonious debates about the role and responsibilities of governments for producing goods and providing services.

The outcome of these debates, the statutes, rules, and judicial opinions that make up the law, defines sets of expectation and obligations for everyone. The law provides a structural context for all land use decisions creating a set of alternatives for landowners faced with choosing how to use land. Multiple jurisdictions have elegantly and inelegantly defined, differentially promoted, partially enforced, and variably protected the rights of use that give landowners expectations and obligations in making land use decisions. Expectations create opportunities for particular landowners and may require compensation if not met. Obligations, or duties, imposed on landowners effectively limit those expectations, and, if not fulfilled may result in penalties. In a similar manner, multiple jurisdictions have also elegantly and inelegantly defined, differentially promoted, partially enforced, and variably protected the rights that give nonlandowners expectations and obligations in making decisions about what goods and services to demand and actually acquire. Like landowners, if nonlandowners expectations are not realized, some compensation may be owed, and if nonlandowners do not fulfill obligations, they may be assessed penalties.

Viewed this way, landscapes document how individuals, organizations, and governments exercise rights that are channeled in certain directions by jurisdictions with powers to control those rights. Governments "steer" the exercise of all freedoms in particular directions, responding to public debate about the role and responsibility of governments to produce goods and services.

The Production Spectrum

Landscapes, created by landowners who evaluate alternatives created by the law and decide to use land in particular ways, can be summarized as a production spectrum (Figure P.2). Private land use and their artifacts reflect public policy as much as national parks. Both arise out of the debate regarding the role of governments and their responsibilities.

At one end of the spectrum are the public lands, owned by jurisdictions that use lands to produce goods and provide services that both supplement

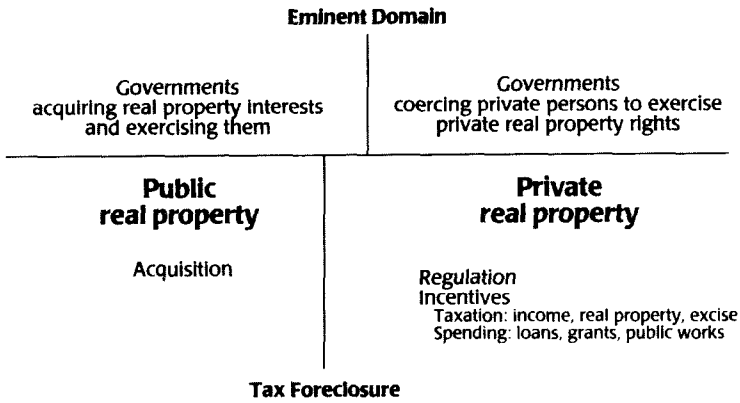

Figure P.2. A Production Spectrum
Source: R. H. Squires

and complement those produced by private landowners. Such goods and services include those not produced at all by private landowners—defense, justice, education, and wilderness, for example—and those produced in part by private landowners, outdoor recreation, lumber, and, most important for our viewpoint, land protection. The amount of public land and how it is used changes as constituents in a jurisdiction change their minds about what goods and services government should produce and whether such goods and services should be produced from publicly owned, rather than privately owned, land.

At the other end of the spectrum are the private lands owned by individuals and organizations. Governments play a vital role in the production of goods and services from such lands by coercing private landowners into making specific land use decisions. There are two principal forms of coercion. The first is a general coercion, unfocused on any specific decision. Governments have constructed transportation systems permitting private landowners to produce good and services and move them to market via road, rail, waterway, and airways. The second form of coercion is more direct and focused. Governments discourage certain land use activities, prohibiting some activities or assessing financial penalties. They also reward certain land use activities, by providing financial incentives, for example. In addition, governments prohibit or reward landowners for producing specific goods and services by placing limits on the quantity and quality of goods and services produced. In such instances, governments focus their attention more on the rights of the consumers than on the landowners and producers, ensuring safe products, healthy food, effective services, clean air and water, and goods and services

that no landowners provide without coercion. The nature of the coercion changes from time to time as constituents in a jurisdiction collectively change their minds about what goods and services they require and how government should ensure private landowners produce those goods and services.

Conclusion

Conservation easements necessitate, first, laws defining the role and responsibility of governments in encouraging the protection of land, creating a context in which private landowners will choose to protect their land. Second, they require action by individuals and organizations in response to the law. The federal government encourages conservation easements through the federal income tax code. Individual states define, protect, and enforce the real property interests created by conservation easements. They also encourage their use by offering income and property tax incentives. Landowners exercise their real property rights to protect a particular land surface and to take advantage of monetary compensation offered by the governments, conveying part of their bundle of sticks to a third party. Organizations, especially land trusts, provide the third party oversight required by federal and state law. How state and local units of government have carried out this task and how landowners and nonprofit land trusts have responded is the focus of this book.

Such an analysis may help explain why particular individuals, particular organizations, and even particular governments do not favor the use of conservation easements. Some may argue that land protection is best produced from public lands or from private lands by governments regulating the behavior of private landowners rather than governments creating a new class of property rights. Some may not regard land protection as a responsibility of governments at all. In a democracy, such as ours, there will always be opponents of any goal that is established. Such opposition is both the blessing and the curse of a democracy. As Ackermann wrote,

> No longer a night-watchman the state surveys the outcome of market processes and finds them wanting. Armed with a prodigious array of legal tools, it sets about improving upon the invisible hand—taxing here, subsidizing there, regulating everywhere. The result of all this motion may well be something that redounds to the public good—a cleaner environment, a safer workplace, and a decent home. Nonetheless, these welfare gains can rarely be achieved without social cost—though many may gain, some will lose as a result of the new government initiative.[9]

This book concerns the implementation of a particular types of legal tool aimed at producing a particular type of land use, or rather avoiding a particular type of land use, with a specific goal in mind, protecting the ecological characteristics of the land surface.

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Notes

1. Conservation easements, like other easements, run with the land and are encumbrances to the title. They are also nonpossessory. Easements and licenses are widely employed land use devices that have proved to be a source of frequent litigation and a topic of much legislation. Moreover, the variety of easements and licenses has steadily expanded over time. See Jon W. Bruce and James W. Ely Jr., *The Law of Easements and Licenses in Land,* rev. ed. (Boston: Warren, Gorham, and Lamont, 1995), p. vii.
2. Janet Diehl and Thomas S. Barrett, *The Conservation Handbook, Managing Land Conservation and Historic Preservation Easement Programs* (San Francisco: Trust for Public Land, 1988), p. 2.
3. My research and teaching focus on describing and explaining, first, the location and appearance of specific landscapes and second, the connections and disconnections between different landscapes in various contexts and at different spatial and temporal scales. I emphasize that our democracy requires public debates, and the outcomes of those debates, given legitimacy through statutes, rules, and judicial opinions, frame the decisions that individuals, organizations, and governments, landowners and nonlandowners alike, make, many of which influence land use activities and the landscapes. The framework was developed and is used to teach students about land use and about governments, not merely about conservation easements or land protection. This preface, then, is a statement of an approach, which seems to coherently explain the visible landscape, in terms of the society that created it, on the one hand its diversity from place to place and its apparent dynamism, and on the other, its apparent inertia. In my classes, I use a large number of disparate examples and case studies, many of them beyond the scope of the present work. My research into public land history has benefited considerably from such an approach. Clearly, the framework must be refined when applied to specific cases that deal with particular locations, time periods, and individuals, organizations, and governments.
4. Landscapes comprise visible objects although they clearly embody and reflect a range of human emotions. Although landscapes reflect how we use land, water, wildlife, minerals, and air, I specifically restrict my comments to activities influ-

encing the land surface because this is the principal focus of conservation easements. Land use activities have profoundly altered the nation's surface and underground waters, the biota, with which humans share Earth, and the envelope of air above.

5. Peirce F. Lewis, "Axioms for Reading the Landscape, Some Guides to the American Scene," in *The Interpretation of Ordinary Landscapes*, edited by Donald W. Meinig, 11–32 (New York: Oxford University Press, 1979).
6. The term *muddling through* was introduced by Charles Lindblom to characterize the disjointed incrementalism process of making public policy. "The Science of Muddling Through" *Public Administration Review* (Spring 1959): 79–88. The same sort of analytical approach can be used to examine how decisions of all sorts get made, not just the decisions that involve several hundred individuals and questions of national and statewide significance that comprise public policy. Warren Johnson, *Muddling Toward Frugality* (San Francisco: Sierra Club Books, 1978), noted: "The process of muddling through is a gutsy, down-to-earth process full of inefficiencies and inconsistencies. It takes an inordinate amount of time to take modest incremental steps forward and significant bold steps are clearly not in the cards. . . . It keeps this country pretty close to the middle of the road, while permitting slow faltering adjustments to change" (p. 151). Johnson argues that such a characterization conforms to Plato's definition of democracy, "a charming form of government, full of variety and disorder and dispensing a sort of equality and inequality to equals and unequals alike" (p. 151).
7. As William Blackstone noted, "Every man, when he enters into a society, gives up part of his natural liberty, as the price of so valuable purchase . . . obliges himself to conform to those laws which the community has though proper to establish." *Commentaries on the Laws of England. A Facsimile of the First Edition of 1765–1769* (Chicago: University of Chicago Press, 1979), vol. 1, p. 121.
8. Such steering has long been accepted: "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in the commonwealth is derived directly or indirectly from the government, and held subject to those regulations, which are necessary to the common good and general welfare. Rights of property, like other social and conventional rights are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature may think necessary and expedient." (*Commonwealth v. Alger*, 7 Cushing's (Massachusetts) Reports 51 at 84, 1851.
9. Bruce A. Ackermann, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) p. 1.

Acknowledgments

The underlying premise for *Protecting the Land* began in 1995 when 4Ever Land Conservation Associates initiated a project to take a collective and reflective look at the current nature of the legal and practical framework of land conservation across the United States.

Initially, the project's aims were limited to a critique of land conservation legislation across the nation. From this maiden concept, it was concluded that a broader context for examination was important in understanding where we as a nation have been, where we are, where we are going in our ever evolving relationship with the land, and what role conservation easements have played in facilitating this evolution. Consequently, the project began to take on a broader aspect, which is reflected in the structure of the book. The views expressed throughout the book do not necessarily represent the views of the sponsoring organizations or those working or represented on their various governing boards, nor are the views expressed to be taken as those of 4Ever Land itself. Rather, they are the views from a broad spectrum of professionals working to protect cherished landscapes across the country.

We are indebted to a great many people for their help and guidance with this book. In particular, we are enormously grateful to our editor at Island Press, Heather Boyer, and all individual contributors and their research associates for their knowledge, insights, advice, and support. We have gained immeasurably from our numerous enjoyable and wide-ranging discussions and advice and could not have written such a volume without their help. We are also grateful to the many people who gave of their valuable time to speak with us and share their ideas, insights, and hospitality. We would also like to specially thank Barbara Warren; general manager of 4Ever Land for her countless hours dedicated to orchestrating the organization of conference calls, correspondence, and various aspects of proposal preparation and the emerging manuscript.

It is as appropriate here as anywhere else to say that none of the people mentioned herein bears any responsibility for what we have written. We have greatly appreciated assistance of those at both the University of Edinburgh and University of Minnesota, and those contributors whose knowledge of transferring electronic images greatly outweighed our own.