

# Defining the Role of Conservation in Agricultural Conservation Easements

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*“Over the green squares of the fields and the low curve of a wood there rose in the distance a grey, melancholy hill, with a strange jagged summit, dim and vague in the distance, like some fantastic landscape in a dream.”<sup>1</sup>*

*Farmland preservation has become an important pursuit for those seeking to protect the working landscape against conversion to nonagricultural use. One of the most common approaches for securing this protection is through the targeted use of agricultural conservation easements, typically perpetual land-use agreements designed to limit incompatible activities in order to preserve future agricultural viability. There is, however, a growing tension within these perpetual agreements, particularly between the need to allow farmers substantial flexibility to adjust to future business conditions and the desire to protect significant noneconomic values, including the conservation and environmental benefits that these lands also provide. It is the purpose of this Article to evaluate the role of conservation efforts within this overall framework and to evaluate the potential options for securing greater protection of these important rural amenities.*

*To this end, Part I of this Article explores the various motivations that fuel farmland preservation nationwide. Part II discusses the evolution of farm policy towards its current degree of multifunctionality and the corresponding development and use of agricultural conservation easements as the preferred protective mechanism. Part III addresses the growing tension within these agreements as agricultural practice continues to evolve. Last, Part IV investigates the various approaches that can be used to protect the environmental attributes of protected agricultural lands. Ultimately, agricultural conservation easements will always require a balance between*

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1. 2 ARTHUR CONAN DOYLE, *The Hound of the Baskervilles*, in THE ANNOTATED SHERLOCK HOLMES: THE FOUR NOVELS AND FIFTY-SIX SHORT STORIES COMPLETE 3, 37 (William S. Baring-Gould ed., Clarkson N. Potter, Inc. 1967) (1902).

*allowing flexibility for accommodating future needs and protecting rural amenities, but these agreements should actually result in a balance and ensure that the increasingly important conservation and environmental benefits associated with the working landscape are being adequately protected.*

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INTRODUCTION

One of the most difficult issues associated with contemporary farmland preservation may not be how to actually secure a targeted property, as there are a variety of tools available for pursuing this goal, but how to appropriately define what values are actually being conserved. Currently, one of the most common methods used to protect farmland is the acquisition of agricultural conservation easements.<sup>2</sup> Agricultural conservation easements, as typically perpetual agreements designed to limit incompatible activities in order to

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2. Henry E. Rodegerdts, *Land Trusts and Agricultural Conservation Easements*, 13 NAT. RESOURCES & ENV'T 336, 336 (1998) (profiling the use of this tool generally); *see also* John B. Wright, *The Power of Conservation Easements: Protecting Agricultural Land in Montana*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 392, 392–99 (2000) (profiling the use of this tool generally). It should be noted that that there is a debate within the land conservation community about the appropriate characterization of these property interests, and many states, through their enabling legislation, use different terminology. For the purposes of this Article, however, “agricultural conservation easement” or “conservation easement” will be used to refer to these protective interests collectively as it is the terminology most commonly utilized within the field. *See generally* Michael A. Wolf, *Conservation Easements and the “Term Creep” Problem*, 2013 UTAH L. REV. 787 (2013) (exploring this debate and the nature of this property form overall).

preserve future agricultural viability, require close consideration regarding precisely how to promote and accommodate this continued agricultural use.<sup>3</sup> These projects, however, often also seek to preserve significant open space and environmental attributes associated with the working landscape.<sup>4</sup> Increasingly, the potential challenges posed by this multifunctional role have started to come into focus, given the growing complexity of these agreements and the varied functions that they serve.<sup>5</sup> In short, there is a growing tension between the agricultural and conservation values protected through these agreements. Although these values are often well aligned, they do not necessarily end up always being compatible.<sup>6</sup>

Ultimately, if agricultural conservation easements are to continue being the best tool to achieve farmland preservation goals, it will be necessary to appropriately define the balance between these competing land-use priorities. This task will not be an easy one, and the way that this issue is addressed will likely depend on the motivations of the landowner and the easement holder, the funding sources, and a host of other considerations at the local, state, and federal levels.<sup>7</sup> This Article explores some of these challenges.<sup>8</sup> Specifically, this Article will focus on how conservation considerations, in particular, can be better identified, integrated, and protected within these efforts; in short, it will explore the actual role of conservation within agricultural conservation easement efforts.

To this end, Part I briefly explores the various motivations and rationales for pursuing farmland preservation to provide the necessary context for the

3. AM. FARMLAND TR., *SAVING AMERICAN FARMLAND: WHAT WORKS* 35–37 (1997) (discussing the issues associated with agricultural conservation easement drafting).

4. ELIZABETH BYERS & KARIN M. PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 198–206 (2d ed. 2005); see also J.B. Ruhl, *Agriculture and Ecosystem Services: Strategies for State and Local Governments*, 17 N.Y.U. ENVTL. L.J. 424, 425–27 (2008) (questioning the balance within agricultural policy generally and arguing that these initiatives are, by default, largely agro-centric).

5. BYERS & PONTE, *supra* note 4, at 198–208; see also Jessica Owley & Adena Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Private Land Uses*, 51 LAND USE POL'Y 76, 76–84 (2016) (discussing the evolving state of conservation easements).

6. See, e.g., *Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 88 Va. Cir. 341 (2014) (interpreting the competing interests and values embodied within an agricultural conservation easement). There is, however, often also a strategic value to including multiple purposes—to avoid potential extinguishment if the original purpose is no longer secured by the express terms of the agreement. See Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1, 9–10 (2012) (discussing this issue from a drafting perspective).

7. Jesse J. Richardson, Jr., *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. AGRIC. L. 163, 164 (2007) (“Many would dispute the claim that an intensive hog operation, for example, constitutes ‘open space.’ In fact, ‘open space’ and farmland are very different.”).

8. Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 111–12 (2015) (describing the current operating ecosystem for conservation easements as a “legal mosaic” based upon the complicated multi-purpose platform upon which these agreements attempt to operate).

current scope of these efforts. Part II provides a working overview of the history of agricultural policy as it has gradually evolved to become increasingly multifunctional and profiles the role that agricultural conservation easements currently play within this larger framework. Part III explores the tensions often contained within agricultural conservation easements with a specific focus on a recent Virginia decision as a case study. Last, Part IV considers the various ways that conservation benefits are secured and explores options for better addressing these interests moving forward. Ultimately, agricultural conservation easements will always require a careful balancing of competing priorities—both economic and noneconomic. But ensuring that the conservation attributes of these parcels are appropriately secured will be increasingly significant given the importance of these protected lands for the future of our food supply and the working landscape.

### I. WHY AGRICULTURAL CONSERVATION EASEMENTS?

Agricultural conservation easements have become important nationwide over the past several decades as a form of private/public land-use control because they serve several policy objectives.<sup>9</sup> These functions can be roughly broken into three larger categories: (1) cultural/social; (2) economic; and (3) conservation/environmental, which will be addressed in turn.

This rough sort, however, is intended only as an analytical framework for broad-brush categorization, as any one of these identified motivations could potentially fall into multiple strands of these associative values. For example, facilitating intergenerational succession planning could likely fall into all three categories: cultural/social (viewing farming from an agrarian viewpoint as a valued cultural practice), economic (thinking of farming as the business that it very much is), and conservation (facilitating a longer-term horizon and land-use ethic). It is, in part, this malleability of terms and purposes that makes defining or classifying the actual motivations behind farmland preservation efforts somewhat of a challenge—particularly when these values come into perceived or actual conflict.<sup>10</sup>

#### A. Cultural/Social Values

One of the primary rationales for supporting farmland preservation activities is the cultural/societal benefits associated with this land-use form. Three primary cultural and social factors will be explored in this Subpart: (1)

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9. See SAMUEL N. STOKES, *SAVING AMERICA'S COUNTRYSIDE: A GUIDE TO RURAL CONSERVATION* 1–6 (2d ed. 1997) (profiling the purposes for the use of this tool).

10. For one example, an early critic of farmland preservation referred to these efforts (which were characterized as being motivated by food security) as “simply a smoke screen for property owners who want a bucolic view.” Michael Bunce, *Thirty Years of Farmland Preservation in North America: Discourses and Ideologies of a Movement*, 14 J. RURAL STUD. 233, 240 (1998) (noting the ongoing debate over farmland preservation).

the sector's significance from a collective identity standpoint, (2) the agrarian argument for farmland preservation, and (3) protecting local food networks.

### 1. *The Sector's Significance in Our Collective National Identity*

Historically, farming enjoys a somewhat iconic status within the American popular imagination.<sup>11</sup> Going back to the founding of the republic, farming has been a part of our collective societal identity at both the local and national levels, and the land usage associated with this economic activity is a vital component of this shared legacy.<sup>12</sup> This importance has been retained even as our society has become increasingly urban, and, in some ways, our agricultural lands have become even more valued as a diminishing resource.<sup>13</sup> As a result, many have argued for protecting this land-use form for its ongoing significance—both natural and cultural—and tourism has certainly capitalized on this uniqueness.<sup>14</sup> For example, “[p]eople vacation in the state of Vermont or Steamboat Springs, Colo[rado], because they enjoy the scenery created by rural meadows and grazing livestock. In Lancaster, P[ennsylvania], agriculture is still the leading industry, but with the Amish and Mennonites working in the fields, tourism is not far behind.”<sup>15</sup> These areas, although admittedly exceptional, are not isolated examples, as they represent the value of farmed land to society overall as an increasingly valued rural amenity.<sup>16</sup> As our

11. Blanche Lincoln, *Protecting Our Rural Heritage*, FORUM J. & FORUM FOCUS (Winter 2010), <http://forum.savingplaces.org/connect/community-home/librarydocuments/viewdocument?DocumentKey=f437d3d1-dfe9-4c71-badf-d13f1ed762a6&CommunityKey=00000000-0000-0000-0000-000000000000&tab=librarydocuments> (noting the cultural importance of this economic sector—both locally and nationally); see also Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992 ANN. SURV. AM. L. 235, 236–37 (1992) (profiling the significance of this sector from the social and political context).

12. Joseph A. Conforti, *Regional Identity and New England Landscapes*, in A LANDSCAPE HISTORY OF NEW ENGLAND 17, 17–23 (2011) (discussing agrarian land use and impacts on the New England cultural landscape); see also SALLY K. FAIRFAX ET AL., BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004, at 174–76 (2005) (explaining that land “trusts had also long recognized that Americans have a deep cultural connection to farms and ranches; the Holstein in Vermont and the cowboy in Wyoming are effective symbols to deploy in promoting land conservation”).

13. See, e.g., *It Starts with the Land: Securing a Future for Farming*, ME. FARMLAND TR., <https://www.maineFarmlandTrust.org/it-starts-with-the-land/> (last visited Jan. 15, 2017) (articulating the organization's motivations for pursuing its farmland protection goals).

14. Neil D. Hamilton, *Rural Lands and Rural Livelihoods: Using Land and Natural Resources to Revitalize Rural America*, 13 DRAKE J. AGRIC. L. 179, 180–81 (2008) (profiling a recent trend towards reconsideration of the varied values that agriculture and rural America represent). As a direct result of this value perhaps, agritourism has become an important component of some rural economies. See Elizabeth Dooley, Note, *Watch Where You're Steppin' Out Here: Why States Should Adopt Legislation to Promote the Diversified Farming Practice of Agritourism*, 15 DRAKE J. AGRIC. L. 455, 457 (2010) (noting this development and exploring state laws promoting/facilitating this economic activity).

15. AM. FARMLAND TR., FACT SHEET: WHY SAVE FARMLAND? 2 (2003), [http://snyderfarm.rutgers.edu/DeerFAQ/\\_pdf/Why%20Save%20Farmland.pdf](http://snyderfarm.rutgers.edu/DeerFAQ/_pdf/Why%20Save%20Farmland.pdf).

16. William Neuman, *Small U.S. Farms Find Profit in Tourism*, N.Y. TIMES (June 9, 2011), <http://www.nytimes.com/2011/06/10/business/10tourism.html> (discussing this trend nationally).

historic land-use patterns are altered and farms become increasingly fragmented, there is a material and emotional sense of loss that farmland preservation efforts, at their best, are ideally able to blunt.<sup>17</sup>

## 2. *Making the Agrarian Case*

Beyond the collective role of agriculture in our national identity, farming as a way of life has significant meaning to the communities located within the working landscape.<sup>18</sup> Although in occasional conflict with more economic drivers, and perhaps of gradually diminishing influence, agrarianism still has powerful impact and meaning, as farming represents a way of life for many farmers and their families who often have long associations with the land.<sup>19</sup> “Agrarians are not so much concerned with the services that farmers (or farmland) offer society, but with the continuation of farming for its own sake.”<sup>20</sup> This view generally asserts that farming is more than simply an economic pursuit, but has other, more widespread societal benefits.<sup>21</sup> Agrarian principles and thinking play a role in fueling interest in protecting farmland at the local, state, and national levels, and has been part of the case made to support these initiatives.<sup>22</sup>

## 3. *Protecting Local Foodways*

A recent trend toward small scale and local agriculture continues to expand and has become an increasingly meaningful component of the overall food system. This function serves to support the case for additional investment in farmland preservation.<sup>23</sup> Advocates contend that “broader crop diversity makes agriculture more resilient, opens opportunities for new producers, and

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17. Sean F. Nolon & Cozata Solloway, Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 592–93 (1997).

18. TIM LEHMAN, PUBLIC VALUES, PRIVATE LANDS: FARMLAND PRESERVATION POLICY, 1933–1985, at 1–20 (1995). Agrarianism as a motivating factor for farmland preservation is admittedly hard to quantify and measure. See Matthew J. Mariola, *Losing Ground: Farmland Preservation, Economic Utilitarianism, and the Erosion of the Agrarian Ideal*, 22 AGRIC. & HUM. VALUES 209, 209–10 (2005) (framing the debate over the purpose of farmland preservation as between utilitarianism and agrarianism as a lens for evaluating the latter’s relative decline).

19. Wendell Berry, *A Defense of the Family Farm*, in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM? 347, 347–60 (1987).

20. Mariola, *supra* note 18, at 215.

21. See Steven C. Black, *The Business of Farming as an Agricultural “Way of Life”*, 20 CHOICES 161, 161–64 (2005) (discussing the tension between farming as a way of life and an ongoing business concern).

22. Mariola, *supra* note 18, at 211–13; see also Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 213–18 (2006) (exploring the often disparate treatment of rural attributes—including within the landscape preservation and land-use contexts).

23. Neil D. Hamilton, *America’s New Agrarians: Policy Opportunities and Legal Innovations to Support New Farmers*, 22 FORDHAM ENVTL. L. REV. 523, 527 (2011) (discussing this emerging sector’s environmental bent). But see Rachel Armstrong, *On Infertile Ground: Growing a Local Food System Through Agricultural Conservation Easements*, 19 DRAKE J. AGRIC. L. 149, 149–50 (2014) (profiling some of the competing values associated with this effort).

helps meet consumer demand. Alternative marketing systems, typically involving some form of direct marketing, can result in higher farm prices and in farmers retaining a larger share of the consumer's food dollar."<sup>24</sup> Easement holders particularly interested in agriculture at this scale can draft their easements with this agricultural form in mind and can also work to make the land more available for smaller-scale operations, demonstrating the ability of these efforts to accomplish this particular objective within the greater farmland preservation mission.<sup>25</sup> In certain areas, agricultural conservation easements can be important for ensuring that these lands continue in active agricultural use.<sup>26</sup> For example, some easement holders focus on using this tool to provide beginning farmers a path to enter into this business and have used affordability restrictions or options to purchase at agricultural value to facilitate these transfers.<sup>27</sup> As concern continues to grow over the often-substantial barriers to entry to new agricultural operators, agricultural conservation easements may help to facilitate expanded access to important working lands.<sup>28</sup>

### B. Economic Considerations

Economic considerations also play a leading role in farmland preservation, beyond the obvious fact that the transactions that secure land against heightened developmental pressure are often major financial transactions.

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24. Neil D. Hamilton, *Emerging Issues of 21st Century Agricultural Law and Rural Practice*, 12 DRAKE J. AGRIC. L. 79, 84–89 (2007) (evaluating the potential role of emerging alternative food systems within the rural economy).

25. There are strong regional variations in farmland preservation, given the variations in land and agricultural operations. See John C. Bergstrom & Richard C. Ready, *What Have We Learned from over 20 Years of Farmland Amenity Valuation Research in North America?*, 31 REV. AGRIC. ECON. 21, 21–23 (2009) (exploring these regional variations).

26. See, e.g., *Shelburne's Barr Farm Conserved and Sold to New Farmer*, VT. LAND TR., <https://www.vlt.org/barr-farm/> (last visited Aug. 13, 2017) (profiling protection of working farm). It should be noted, however, that this decision is necessarily operation- and situation-specific. See Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 820–22 (2016) (arguing that agricultural conservation easements can have negative operational consequences and may make agricultural activity more difficult to maintain). But see Brian J. Schilling et al., *The Future of Preserved Land: Ownership Succession in Three Mid-Atlantic States*, J. AGRIC. FOOD SYS. & COMMUNITY DEV., Winter 2014–2015, at 129, 129–53 (exploring succession issues and concluding that most protected land has remained in active agricultural use).

27. Neil D. Hamilton, *Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security*, 19 N. ILL. U. L. REV. 657, 659–62 (1999) (exploring the potential for greater convergence in these policy objectives). The Vermont Land Trust has been particularly effective in using this tool for providing beginning farmers access to land. See Tom Slayton, *Celebrating 40 Years of Learning and Growing on the Land: Changes in Farm Conservation*, VT. LAND TR., [www.vlt.org/celebrating-40-years-learning-growing-land-changes-farm-conservation/](http://www.vlt.org/celebrating-40-years-learning-growing-land-changes-farm-conservation/) (last visited Aug. 13, 2017); see also Katie Hannon Michel, *Landless: Legal & Policy Tools for Transferring Vermont Farmland to the Next Generation of Stewards and Food Producers*, 39 VT. L. REV. 461, 482–84 (2014) (discussing the strategies for securing access to working farmland).

28. See, e.g., *Farms for the Future Initiative*, PECONIC LAND TR., <https://www.peconiclandtrust.org/Future.html> (last visited Aug. 8, 2017) (explaining a Long Island land trust's actions to provide access to working lands for the next generation of the region's farmers).



Three economic-based justifications will be explored in this Subpart: (1) facilitating succession planning, (2) ensuring food security, and (3) promoting the stability and economic future of rural economies.

### 1. Ensuring Operational Viability

In recent years, agricultural conservation easements have provided a potential mechanism to assist farmers in accomplishing business-related objectives, including facilitating intergenerational transfer.<sup>29</sup> It is a bit of a truism that many farmers are “cash-poor, land-rich,” as the working land is often by far their most substantial asset, and it may not generate a corresponding rate of economic return to accomplish many of their financial objectives.<sup>30</sup> Most farmland protection efforts involve compensating the landowner for the potential value of the development that they are foregoing as a result of this transaction.<sup>31</sup> Monetizing some of this asset value may allow the farmer to utilize the proceeds to pay off debt, to acquire additional farmland to keep the operation viable, or to invest in needed on-farm infrastructure.<sup>32</sup> Notably, this transaction may not require much, if any, change in the day-to-day operation of the farm, and therefore it can be an attractive tool for financial planning.<sup>33</sup> The role of agricultural conservation easements in facilitating these

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29. Jane E. Hamilton, *Beyond Agricultural Conservation Easements: Ensuring the Future of Agricultural Production*, SAVING LAND (Summer 2013), <https://www.landtrustalliance.org/news/beyond-agricultural-conservation-easements-ensuring-future-agricultural-production> (profiling various land trust strategies for including succession planning within their farmland preservation efforts); Edward Thompson, Jr., *Conservation Easements: Preserving American Farmland*, PROB. & PROP., Nov.–Dec. 1992, at 13-14 (discussing the business functions this mechanism can play). Securing the transfer of agricultural lands is viewed as a major structural problem for the future of this sector given the high valuation of this asset and the continued aging of the farm population. See Alecia Mueleners, Note, *Finding Fields: Opportunities to Facilitate and Incentivize the Transfer of Agricultural Property to New and Beginning Farmers*, 18 DRAKE J. AGRIC. L. 211, 213–19 (2013) (profiling the emerging challenges in this area).

30. Kate B. Deal, Note, *Incentivizing Conservation: Restructuring the Tax-Preferred Easement Acceptance Process to Maximize Overall Conservation Value*, 101 GEO. L.J. 1587, 1593 (2013) (discussing the need to adjust incentives to account for this fact); see also Janet L. Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105, 146 (1983) (“If one considers that there are many landowners who are land-rich, yet cash-poor, it is easy to see how the use of a [tax-incentivized] deduction as an incentive for donating conservation easements may not be the most effective method . . .”).

31. See, e.g., *Agricultural Easements*, ME. FARMLAND TR., <https://www.maineFarmlandTrust.org/farmland-protection-new/agricultural-easements/> (last visited Aug. 8, 2017) (describing the organization’s current transactional models); see also BYERS & PONTE, *supra* note 4, at 199 (noting the purpose behind many of these transactions is to facilitate the owner’s financial objectives).

32. Joshua M. Duke et al., *Illiquid Capital?: Are Conservation Easement Payments Reinvested in Farms?*, 38 APPLIED ECON. PERSP. & POL’Y 449, 462–68 (2016) (evaluating the role of easement transactions in providing liquidity to certain types of agricultural operations).

33. FARMLAND INFO. CTR., AGRICULTURAL CONSERVATION EASEMENTS 2 (2016), [http://www.farmlandinfo.org/sites/default/files/Agricultural\\_Consevation\\_Easements\\_AFT\\_FIC\\_01-2016.pdf](http://www.farmlandinfo.org/sites/default/files/Agricultural_Consevation_Easements_AFT_FIC_01-2016.pdf) (discussing the fact that these agreements are flexible and can be designed to “meet the needs of individual farmers and ranchers and unique properties”).

operational objectives can be important for ensuring that these lands continue in agricultural use, including in transferring the property to the next generation and allocating capital between on- and off-farm family interests.<sup>34</sup> As concern continues to grow over the often-substantial barriers to entry to new agricultural operators, agricultural conservation easements may help to facilitate expanded access to working lands.

## 2. *Securing the Food Supply*

One of the ongoing goals of the farmland preservation movement has been to ensure the continued protection of our nation's food supply in light of the substantial loss of farmland to suburban expansion post-WWII.<sup>35</sup> Some of the lands that are most challenged by development pressure rank among the most productive agricultural lands.<sup>36</sup> Given the associated costs, once farmland has been converted to urban use, it rarely will revert back to an agricultural use.<sup>37</sup> Ensuring that prime soil remains available for food and fiber production is viewed by some advocates as critical to retaining the ability of the agricultural sector to serve national as well as international markets.<sup>38</sup> As noted above, beyond national markets, farmland preservation can also play a significant role in ensuring access to local food production—an increasingly important market segment.<sup>39</sup> As a result, most farmland protection programs, at least in the eastern United States, focus on protecting prime soils, or those most capable of

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34. AM. FARMLAND TR. & CONN. FARMLAND TR., CONSERVATION OPTIONS FOR CONNECTICUT FARMLAND: A GUIDE FOR LANDOWNERS, LAND TRUSTS & MUNICIPALITIES 2 (2010) (discussing use of funds by program participants).

35. Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237, 242 (1998). This also goes beyond our borders as U.S. agricultural production is responsible for an outsized percentage of the world's grain production. See, e.g., Margaret Rosso Grossman, *Prime Farmland and the Surface Mining Control and Reclamation Act: Guidance for an Enhanced Federal Role in Farmland Preservation*, 33 DRAKE L. REV. 209, 210 (1983) (discussing U.S. production as a component of global agricultural markets). A potential criticism of farmland preservation efforts is that these efforts may actually serve to impair active agricultural use, for example, by facilitating conversion of these parcels to so-called hobby farms. A recent study, however, did not find this to be a significant trend. See Paul Gottlieb et al., *Are Preserved Farms Actively Engaged in Agriculture and Conservation?*, 45 LAND USE POL'Y 103, 103–16 (2015) (discussing post-protection use of this land).

36. See, e.g., Nicolai V. Kuminoff et al., *Farmland Conversion: Perceptions and Realities*, U.C. DAVIS AGRIC. ISSUES BRIEF, May 2001, at 1, 3, <http://aic.ucdavis.edu/oa/brief16.pdf> (discussing this issue and the complicated factors behind the state's development picture); Timothy J. Houseal, Comment, *Forever a Farm: The Agricultural Conservation Easement in Pennsylvania*, 94 DICK. L. REV. 527, 528–30 & n.26 (1990) (presenting the food security case for this form of campaign).

37. Karl E. Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem*, 8 ECOLOGY L.Q. 655, 659 (1980).

38. *Farmland Protection Policy Act*, U.S. DEP'T OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/fppa/> (last visited Aug. 8, 2017); see also U.S. DEP'T OF AGRIC., FARMLAND PROTECTION POLICY ACT ANNUAL REPORT FOR FY 2014 TO THE SENATE AND HOUSE AGRICULTURE COMMITTEES 3–5 (2015) (profiling the losses of prime soil and agency efforts to combat or stem these losses).

39. TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND 20–21 (1997).

supporting productive agricultural activity.<sup>40</sup> Food security, in fact, is one of the most cited early rationales for farmland preservation efforts and has been a strong motivating factor over the history of the movement.<sup>41</sup>

### 3. *Protecting the Rural Economy*

In many rural areas, the region's productive farmland historically has been a primary engine of economic opportunity.<sup>42</sup> Farm operations necessarily create spillover effects and require industries to provide the inputs, machinery, and the distribution and marketing of their products.<sup>43</sup> Although the farming sector is increasingly a smaller direct employer within the rural economy, it is diversifying and continues to play a role.<sup>44</sup> Even beyond the agricultural sector, both farms and farmers contribute to the continued economic vitality of rural communities.<sup>45</sup> To the extent that farmland preservation efforts can meaningfully contribute to the rural economy, this argument has been used to support further investment.<sup>46</sup>

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40. *Working Farm Conservation*, VT. LAND TR., <https://www.vlt.org/farm/> (last visited Aug. 8, 2017) (indicating the importance of prime soil in the selection of conservation easements).

41. Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 419 n.1 (2002) (including food security as one of the primary rationales for farmland preservation efforts). Critics of farmland preservation efforts, however, point to the fact that within the U.S. at least, food scarcity, to date, has not been an issue of concern for this sector; rather the reverse, overproduction, has been the relative concern given commodity prices. *See* Bunce, *supra* note 10, at 235–39 (noting these scarcity arguments in the abstract and also how scarcity arguments fit into resource management issues, such as the environmental effects of farming marginal lands); *see also* Jerome G. Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591, 594–97 (1984) (summarizing critiques of the food scarcity arguments in favor of farmland preservation).

42. Meredith Redlin & Brad Redlin, *Amendment E, Rural Communities and the Family Farm*, 38 S.D. L. REV. 787, 787–80 (2004) (noting the economic impact associated with the loss of small to mid-scale farms on rural towns and efforts to blunt this loss). *But see* Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WISC. L. REV. 969, 977–79 (profiling the changes in the rural economy over the twentieth century and the fact that most rural residents are no longer directly involved in agricultural activity); Kristofor Husted, *How Rural Farming Communities Are Fighting Economic Decline*, NPR (Aug. 11, 2016, 1:25 PM), <http://www.npr.org/sections/thesalt/2016/08/11/488837960/how-rural-farming-communities-are-fighting-economic-decline> (noting the nearly 15 percent drop in on-farm employment from 2000–2010 due to increasing efficiencies within this sector and the correlated impact on rural economies).

43. *See, e.g.*, David Gilbertson, *Reflections on the Rural Practice of Law in South Dakota: Past, Present, and Future*, 59 S.D. L. REV. 433, 434–37 (2014) (exploring the loss of farms and its impacts); *see also* DANIELS & BOWERS, *supra* note 39, at 17–18 (profiling the benefits of farmland preservation for rural economic development).

44. Jamie Baxter, *Legal Institutions of Farmland Succession: Implications for Sustainable Food Systems*, 65 ME. L. REV. 381, 384–86 (2013) (profiling the evolving nature of the farm economy).

45. Stephen R. Miller, *A Coordinated Approach to Food Safety and Land Use at the Urban Fringe*, 41 AM. J.L. & MED. 422, 424–25 (2015); *see also* Jerrold A. Long, *Private Lands, Conflict, and Institutional Evolution in the Post-Public-Lands West*, 28 PACE ENVTL. L. REV. 670, 683 (2011) (noting recent trends within relatively amenity-rich rural areas and the impacts on smaller-scale rural communities).

46. Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 DRAKE L. REV. 311, 324–26 (1997) (noting the appeal of the plight of family farmers and rural development).

### C. Conservation-Related Considerations

Last, environmental and conservation values also play an important role in this arena—particularly for much of the public supporting these initiatives.<sup>47</sup> Four primary motivating factors will be addressed in this Subpart: (1) preventing urban sprawl, (2) providing scenic viewshed protection, (3) promoting environmental performance, and (4) securing habitat-related conservation objectives.

#### 1. Preventing Urban Sprawl

Farmland protection efforts can serve as a check against urban sprawl and can impose a sort of market discipline against rash or otherwise unregulated development.<sup>48</sup> Many areas with active planning regimes seek to protect farmland that would otherwise be open to development.<sup>49</sup> In some areas, this trend is exacerbated because agricultural land is “desirable for building because it tends to be flat, well drained and generally is more affordable to developers than to farmers and ranchers. . . . [Research data] shows that the best agricultural soils are being developed fastest.”<sup>50</sup> This has also become a point of emphasis for some communities as they seek to avoid the often-considerable additional infrastructure costs (water, sewerage, roads, etc.) associated with exurban development, to reorient investment towards areas with existing services, and to encourage density more generally.<sup>51</sup> Given the practical and political limitations associated with land-use planning within the rural countryside, farmland preservation efforts can serve as a tool for accomplishing

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47. AM. FARMLAND TR., *supra* note 3, at 92 (describing the public perception regarding the role of agricultural conservation easements in advancing environmental objectives); *see also* Joshua M. Duke, *Estimating Amenity Values: Will It Improve Farmland Preservation Policy?*, 23 CHOICES 11, 11 (2008) (profiling the role of PACE programs in creating a de facto market for rural amenities). Within the land conservation and environmental community, the potential of this tool was quickly recognized. *See, e.g.*, Justin R. Ward & F. Kaid Benfield, *Conservation Easements: Prospects for Sustainable Agriculture*, 8 VA. ENVTL. L.J. 271, 275–78 (1989) (exploring the potential environmental benefits of this form of action).

48. Douglas R. Appler, *America's Converging Open Space Protection Policies: Evidence from New Hampshire, Virginia, and Oregon*, 36 URB. LAW. 341, 355–58 (2004) (discussing farmland preservation as an open-space protection strategy in Virginia); *see also* Neil D. Hamilton, *Plowing New Ground: Emerging Policy Issues in a Changing Agriculture*, 2 DRAKE J. AGRIC. L. 181, 192–94 (1997) (noting the challenges that urban sprawl presents in areas with relatively abundant agricultural land where many planners and urban leaders may see it as simply “land waiting for someone to improve it”).

49. *See, e.g.*, *Supporting Local Agriculture*, SONOMA CTY. AGRIC. PRES. & OPEN SPACE DIST., [http://www.sonomaopenspace.org/people\\_and\\_places/supporting-local-agriculture/](http://www.sonomaopenspace.org/people_and_places/supporting-local-agriculture/) (last visited Aug. 8, 2017) (explaining the values associated with agricultural conservation).

50. AM. FARMLAND TR., *supra* note 15, at 1.

51. William W. Buzbee, *Sprawl's Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 367, 370–72 (2000); *see also* Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 260–61 (2000).

at least some of these objectives.<sup>52</sup> Thus, to the extent that farmland protection can be used to cabin or channel development pressures, this is an important motivating factor.<sup>53</sup>

## 2. Scenic Viewshed Preservation

Agricultural production can create a visually appealing and unique landscape.<sup>54</sup> It perhaps goes without saying that much of the American landscape has been transformed and shaped by both farmers and farms.<sup>55</sup> Relatively naturalistic and iconic working landscapes, such as the New England countryside, have been formed as a result of considerable human intervention.<sup>56</sup> For example, consider Vermont, the state that has best marketed its agrarian brand.<sup>57</sup>

Many important components of the Vermont countryside persist only through active management and continued agricultural—and particularly dairy—production.<sup>58</sup> Vermont demonstrates that without continued use and operation, the landscape can change relatively quickly.<sup>59</sup> In the early 1800s, a Merino sheep bubble supported a vast infrastructure and market, which led to

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52. Jesse J. Richardson, Jr., *Downzoning, Fairness and Farmland Protection*, 19 J. LAND USE & ENVTL. L. 59, 75–80 (2003); see generally Mark Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. LAND USE & ENVTL. L. 371 (2005) (debating the merits, realities, and fairness of using more traditional zoning approaches).

53. Ruhl, *supra* note 4, at 439–41. One early article focused on open-space preservation summarized the problem as “[l]ooking ten years into the future, what do you anticipate for your community? If the present trend continues unchecked, what is it *likely* to become? A vacationer will wind his way through a gaudy, seemingly endless jungle of neon-lit honkytonks.” Peter Ames Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559, 559 (1964) (quoting L. Judson Morehouse, Chairman, New York Republican State Committee, Address to Members of the Lake George Chamber of Commerce (Sept. 23, 1962)). Although not directly focused on farmland preservation, this sentiment effectively conveys the early concerns.

54. Barton H. Thompson, Jr., *Ecofarming: A Realistic Vision for the Future of Agriculture?*, 1 U.C. IRVINE L. REV. 1167, 1167–70 (2011) (profiling the noneconomic values that agriculture can provide, including landscape-based amenities, as potentially providing an economic platform for a more sustainable agriculture future).

55. See, e.g., WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 127–56 (1983) (exploring agricultural impacts on the early American landscape).

56. *Landscape History of Central New England*, HARVARD FOREST, <http://harvardforest.fas.harvard.edu/diorama-series/landscape-history-central-new-england> (last visited Aug. 8, 2017) (profiling land-use changes and evolving impacts); see also BRIAN DONAHUE, *THE GREAT MEADOW: FARMERS AND THE LAND IN COLONIAL CONCORD* 34–42, 54–74 (2004) (profiling the evolution of this landscape before and during the colonial period).

57. Todd W. Daloz, *Farmland Preservation: A Vermont Land-Use Perspective*, 12 VT. J. ENVTL. L. 427, 430–31 (2011) (discussing the role of the Vermont “brand”).

58. VT. DAIRY PROMOTION COUNCIL, VT. AGENCY OF AGRIC., FOOD, & MKT.S., & VT. AGENCY OF COMMERCE & CMTY. DEV., *MILK MATTERS: THE ROLE OF DAIRY IN VERMONT* 12–15 (2015) (highlighting the role of dairy farms in shaping the landscape and promoting tourism in Vermont).

59. CHRISTOPHER MCGRORY KLYZA & STEPHEN C. TROMBULAK, *THE STORY OF VERMONT: A NATURAL AND CULTURAL HISTORY* 73–103 (2d ed. 2015); see also Thomas D. Visser, *Vermont’s Changing Rural Landscape: Paradise Lost?*, 70 VT. HIST. 40, 40–46 (2002) (discussing this brand and the challenges it faces).

the opening of farms in areas with sub-marginal soils.<sup>60</sup> Reports of thousands of sheep grazing on the countryside suggest levels of livestock concentration that are today difficult to imagine within the context of that specific working landscape.<sup>61</sup> This market would eventually collapse, as production in other areas drove revenues down below the state's cost of production.<sup>62</sup> As a result, much of this former pastureland returned to forest cover, and eventually became part of the Vermont landscape that is now so familiar to both residents and tourists.<sup>63</sup> To the extent that an area's land-use pattern has been shaped by farming and is valued by the public, farmland preservation can help to facilitate the degree of management to ensure its continued visual aesthetic, including the maintenance of significant historic structures associated with the landscape such as barns, silos, and farmhouses.<sup>64</sup>

### 3. Addressing the Environmental Impacts of Working Lands

Despite substantial losses of productive land, agricultural working lands still constitute a large part of the American countryside, and these lands have environmental impacts simply by virtue of the nature of their dedicated use.<sup>65</sup> Although environmental laws exempt agricultural production from a variety of regulatory requirements, it is not for lack of impact.<sup>66</sup> The pollution from this

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60. Mark B. Lapping, *Stone Walls, Woodlands and Farm Buildings: Artifacts of New England's Agrarian Past*, in A LANDSCAPE HISTORY OF NEW ENGLAND, *supra* note 12, at 129–31 (profiling the creation of the New England landscape and its agrarian origins).

61. PAUL S. GILLIES, UNCOMMON LAW, ANCIENT ROADS, AND OTHER RUMINATIONS ON VERMONT LEGAL HISTORY 92–102 (2013).

62. Bill McKibben, *An Explosion of Green*, THE ATLANTIC (Apr. 1995), <https://www.theatlantic.com/magazine/archive/1995/04/an-explosion-of-green/305864/> (discussing the explosion in sheep production (one for every six people) and the collapse post-1870 as railroad expansion and western production undercut the Vermont market).

63. JAN ALBERS, HANDS ON THE LAND: A HISTORY OF THE VERMONT LANDSCAPE 145–48, 274 (2000) (exploring this boom and its impacts on Vermont's agricultural landscape); *see also* GLENN M. ANDRES & CURTIS B. JOHNSON, BUILDINGS OF VERMONT 12–14 (2014) (profiling the further evolution of agricultural practices within the state).

64. Wendell Berry, *Farmland Without Farmers*, ATLANTIC (Mar. 19, 2015), <http://www.theatlantic.com/national/archive/2015/03/farmland-without-farmers/388282/> (exploring the loss of landscape features associated with more active management regimes); *see also* Cheryl E. Morse et al., *Performing a New England Landscape: Viewing, Engaging, and Belonging*, 36 J. RURAL STUD. 226 (2014) (exploring place attachment within Vermont). It should be noted, however, that farmland preservation generally only provides a base layer of protection, and affirmative farming requirements are not overly common. *See* Kendra Johnson, *Conserving Farmland in California: For What and For Whom?: How Agricultural Conservation Can Keep Farmland Farmed*, SUSTAINABLE DEV. L. & POL'Y, Fall 2010, at 45, 47 (“Standard agricultural easements give up or restrict development rights; few require that the land be actively farmed.”).

65. *Working Landscapes: The Future of Land Use Policy?*, 45 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 10,833, 10,837–39 (2015); *see also* Marc Ribaud, *The Limits of Voluntary Conservation Programs*, 30 CHOICES 1, 1–5 (2015) (profiling these impacts and the focus on voluntary efforts to address this form of typically nonpoint source pollution).

66. Neil D. Hamilton, *Essay—Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9, 11–12 (2004); *see also* Chuck Ross & Marli Rupe, *Agricultural Sources of Water*

sector has traditionally been diffuse and has come from nonpoint sources, which differs from more traditional industrialized activities with primarily point source pollution; consequently, the sector is more difficult for environmental laws to address.<sup>67</sup> This fact, coupled with the political power of the agricultural sector, has led to considerable and lasting durability of agricultural exemptions.<sup>68</sup> Despite these exemptions, the farm community is increasingly aware of the environmental externalities associated with its production, and does actively work—in its preference through voluntary initiatives—to improve the efficiency of their operations.<sup>69</sup> This awareness has been driven in part by litigation under a variety of environmental laws that have started to target certain forms of agricultural production that, in the view of the litigants, are beyond the land uses the agricultural exemptions were designed to address.<sup>70</sup> Voluntary efforts by farmers and farm organizations have had some limited success in addressing these challenges, but the public is also increasingly aware of the impacts of production agriculture.<sup>71</sup> To the extent that farmland preservation can help to encourage or facilitate good stewardship, this

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*Pollution: How Our History Informs Current Debate*, 17 VT. J. ENVTL. L. 811 (2016) (exploring this issue within the Vermont/Lake Champlain context).

67. Ruhl, *supra* note 4, at 425 (“[A]griculture has long been the Rubik’s Cube of environmental policy. Although agriculture is a leading cause of pollution and other environmental harms, it has been resistant to regulation . . .”); J. B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263, 328–33 (2000) (exploring the practical and political reasons why environmental law has not addressed this sector).

68. See, e.g., MEGAN STUBBS, CONG. RESEARCH SERV., R41622, ENVIRONMENTAL REGULATION AND AGRICULTURE 16–18 (2014) (discussing the EPA and the Clean Water Act as applied to large confined animal feeding operations (CAFOs)); John H. Davidson, *The New Public Lands: Competing Models for Protecting Public Conservation Values on Privately Owned Lands*, 39 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,368, 10,371–72 (2009) (profiling the difficulties associated with addressing the incremental nature of this form of pollution).

69. See, e.g., *Nutrient Stewardship*, IOWA AGRIC. WATER ALLIANCE, <http://www.iowawateralliance.com/nutrient-stewardship/> (last visited Aug. 8, 2017). *But see* Laurie Ristino & Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 *COLUM. J. ENVTL. L.* 59, 110 (2016) (“The largely voluntary approach to addressing environmental harms caused by agricultural production is simply not working. Soil and water degradation persist, undermining the nation’s overall ecological health and foreclosing a food secure future . . .”).

70. Martha Neil, *Dairies Settle Landmark Cow-Manure Case After Federal Judge Rules Solid-Waste Law Applies*, AM. BAR ASS’N J. (May 11, 2015, 3:25 PM), [http://www.abajournal.com/news/article/dairies\\_settle\\_landmark\\_cow\\_manure\\_case\\_after\\_federal\\_judge\\_rules\\_that\\_rcra](http://www.abajournal.com/news/article/dairies_settle_landmark_cow_manure_case_after_federal_judge_rules_that_rcra) (discussing the *Cow Palace* decision and the subsequent settlement between an environmental NGO and large dairy producers in Washington state related to RCRA’s application to these facilities); Neil Hamilton, *Sixteen Things to Know About the Des Moines Water Works Proposed Lawsuit*, AGRIC. LAW BLOG (Mar. 5, 2015), <http://aglaw.blogspot.com/2015/03/sixteen-things-to-know-about-des-moines.html?m=0> (profiling the litigation between the municipal entity and drainage districts over the cost of addressing nitrate runoff within the city’s water supply).

71. See, e.g., Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 *OHIO ST. L.J.* 1195, 1199–1204 (2016) (discussing the issues regarding environmental law and the agricultural exemptions to, in this case, the Safe Water Drinking Act).

is a goal that some advocates within the farmland preservation movement are increasingly beginning to articulate.<sup>72</sup>

#### 4. *Securing Conservation/Wildlife and Biodiversity Objectives*

Farmland preservation also serves conservation, biodiversity, and other wildlife habitat-related objectives.<sup>73</sup> For example, New York City has utilized easements to secure the protection of its water supply by using a purchase program to prevent further subdivision, ungoverned development, and installation of septic systems within critical watersheds.<sup>74</sup> Similarly, the state of Florida is using easements to “protect[] the scarce supplies of fresh water that lie beneath low-intensity cattle farms” that are critical for the continued environmental function of the state’s Green Swamp.<sup>75</sup>

With respect to habitat and biodiversity objectives, these efforts can prevent habitat fragmentation for certain target species.<sup>76</sup> One current example is the effort to protect the greater sage grouse across the Western United States.<sup>77</sup> The Natural Resources Conservation Service (NRCS) and its partners are targeting private lands, as this contains critical habitat for many of the few remaining leeks; a significant goal is to reduce the pressure for potential ESA listings.<sup>78</sup> Other species have similarly benefited from farmland protection efforts, and habitat conservation objectives have played a role in garnering support for farmland preservation efforts.<sup>79</sup> To the extent that farmland preservation can advance correlated conservation and wildlife protection goals,

72. Jacob Cremer, *Tractors versus Bulldozers: Integrating Growth Management and Ecosystems Services*, 39 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,541–42 (2009).

73. See WILD FARM ALL., *FARMING WITH THE WILD FOREVER: USING AGRICULTURAL EASEMENTS TO SUPPORT BIODIVERSITY*, (2006), [https://d3n8a8pro7vnm.cloudfront.net/wildfarmalliance/pages/34/attachments/original/1441666578/Farming\\_With\\_The\\_Wild\\_Forever\\_Briefing\\_Paper.pdf?1441666578](https://d3n8a8pro7vnm.cloudfront.net/wildfarmalliance/pages/34/attachments/original/1441666578/Farming_With_The_Wild_Forever_Briefing_Paper.pdf?1441666578).

74. *Agricultural Conservation Easements in the New York City Watershed*, WATERSHED AGRIC. COUNCIL, <http://www.nycwatershed.org/conservation-easements/acquisitions/> (last visited Jan. 15, 2017) (explaining the use of targeted conservation easements to limit the form, location, and density of additional development); see also Michael C. Finnegan, *New York City’s Watershed Agreement: A Lesson in Sharing Responsibility*, 14 *PACE ENVTL. L. REV.* 577, 626–28 (1997) (providing a summary of the program’s design to accomplish its water quality goals).

75. AM. FARMLAND TR., *supra* note 3, at 94 (profiling this project).

76. Janice C. Griffith, *Green Infrastructure: The Imperative of Open Space Preservation*, 42 *URB. LAW.* 259, 260–61 (2011).

77. SAGE GROUSE INITIATIVE, <http://www.sagegrouseinitiative.com> (last visited Aug. 8, 2017).

78. *Working Lands for Wildlife: Sage Grouse Initiative in Colorado*, U.S. DEP’T OF AGRIC., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/co/programs/landscape/?cid=nrcs144p2\\_062766](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/co/programs/landscape/?cid=nrcs144p2_062766) (last visited Aug. 8, 2017).

79. *WRP Success Story: WRP Sustaining Valuable Resources - Louisiana Black Bear Makes a Comeback*, U.S. DEP’T OF AGRIC., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/la/newsroom/?cid=nrcs141p2\\_015749](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/la/newsroom/?cid=nrcs141p2_015749) (last visited Aug. 8, 2017) (profiling the recovery of the Louisiana Black Bear).



this is an important priority for the many conservation organizations engaged in this work.<sup>80</sup>

Farmland protection advocates engage in this work for a variety of reasons, which often are well aligned.<sup>81</sup> For example, a project primarily designed to secure land for the continued production of food and fiber can still protect open space; this demonstrates the potential multifunctionality of the working landscape and, in turn, of farmland preservation as a societal goal.<sup>82</sup> This functional hybridity explains perhaps some of its paradigmatic appeal as well as its future challenge. Although the various articulated goals do often link, there remains the potential for conflict,<sup>83</sup> as some forms of agricultural production can significantly impair scenic attributes<sup>84</sup> and can similarly interfere with important conservation or habitat objectives.<sup>85</sup> Ultimately, each easement reflects the policy choices and value judgments of both the easement holder and landowner, which will influence the future management of the protected resources and the working landscape.<sup>86</sup> Reconciling the actual and perceived conflicts amongst these competing priorities is critically important to ensuring that the underlying effort actually accomplishes its intended purpose.

## II. A WORKING HISTORY OF AGRICULTURAL POLICY AND THE ROLE OF AGRICULTURAL CONSERVATION EASEMENTS

To understand the current landscape of farmland preservation efforts and what these efforts are seeking to accomplish, a working understanding of the evolution of American agricultural policy is necessary. This Part will also explore both the historic development and current role of agricultural conservation easements as the preferred tool for accomplishing many of these objectives.

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80. RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 252 (2013) (discussing the types of conservation values agricultural easements protect).

81. See, e.g., *Nicewicz and Schartner Farms Protected (MA)*, TR. FOR PUB. LAND (Mar. 21, 2006), <https://www.tpl.org/media-room/nicewicz-and-schartner-farms-protected-ma> (profiling a successful multifunctional project).

82. Thompson, *supra* note 54, at 1167–69 (profiling this multifunctionality).

83. See, e.g., *Equus Assocs. Ltd. v. Town of Southampton*, 37 F. Supp. 2d 582, 599 (E.D.N.Y. 1999) (rejecting plaintiff's section 1983 claim against the community and various individuals for not approving a proposed polo facility, which was found to be in conflict with a farmland preservation covenant).

84. See, e.g., *Long Green Valley Ass'n v. Bellevalle Farms, Inc.*, 432 Md. 292, 296 (2013) (describing third party's challenge to an easement holder's approval of a creamery within protected land as impacting protected views).

85. See, e.g., *In re Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 88 Va. Cir. 341, 375 (2014) (rejecting easement holder's attempt to enforce easement terms as not restricting expansion to an agricultural operation despite correlated conservation impact).

86. Adina M. Merenlander, *Land Trusts and Conservation Easements: Who is Conserving What for Whom?*, 18 *CONSERVATION BIOLOGY* 65, 72–73 (2004) (profiling some of the unknowns regarding what these agreements are actually protecting and how they will be stewarded over time).

*A. Agricultural Policy: From New Deal to Farmland Preservation*

Agricultural policy has expanded from its early roots to take on additional goals and objectives beyond financial support of the farm sector.<sup>87</sup> In the conservation arena, this is represented by a gradual expansion from voluntary cost-share assistance designed to address the most significant environmental harms to more recent, proactive efforts to protect the working landscape.<sup>88</sup> This Subpart explores the development of agricultural policy from the 1930s to include farmland preservation efforts as an important prong of the overall agricultural policy mix at the federal, state, and local levels.

*1. The Origins of Agricultural Policy and Conservation*

The nexus between agricultural and conservation policy, at least at the federal level, largely begins in the 1930s out of concerns associated with many questionable farming practices that would eventually lead to the Dust Bowl.<sup>89</sup> Throughout the early New Deal era, farm policy continued to evolve to try to address concerns resulting from the extreme economic and societal stress.<sup>90</sup> Out of this policy environment came efforts designed to assist the rural sector,<sup>91</sup> specifically programs to blunt soil erosion.<sup>92</sup> As a direct outgrowth,

87. CAROLYN DIMITRI ET AL., U.S. DEP'T OF AGRIC., *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY* 9–11 (2005) (charting this evolution); see also Carl Zualaf & David Orden, *80 Years of Farm Bills – Evolutionary Reform*, 31 CHOICES 1, 1–5 (2016) (same). While increasing conservation awareness has played a role, it is certainly not the only motivating factor. See William J. Even, *Green Payments: The Next Generation of U.S. Farm Programs?*, 10 DRAKE J. AGRIC. L. 173, 194 (2005) (discussing the incentives under WTO agreements to shift farm support away from direct subsidies into environmental payments for services).

88. Christopher R. Kelley & James A. Lodoen, *Federal Farm Program Conservation Initiatives: Past, Present, and Future*, NAT. RESOURCES & ENV'T, Winter 1995, at 17 (charting the role of conservation within U.S. agricultural policy); see also David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 328–40 (1995).

89. See, e.g., SARAH T. PHILLIPS, *THIS LAND, THIS NATION: CONSERVATION, RURAL AMERICA, AND THE NEW DEAL* 46–62 (2007) (discussing the growth of conservation policies up to and into the New Deal years); see also DAVID E. HAMILTON, *FROM NEW DAY TO NEW DEAL: AMERICAN FARM POLICY FROM HOOVER TO ROOSEVELT, 1928–33*, at 1–10 (2d ed. 2011) (charting the general shift in agricultural policy). For an example of some of the resource challenges that conservation advocates faced, see PAUL S. SUTTER, *LET US NOW PRAISE FAMOUS GULLIES: PROVIDENCE CANYON AND THE SOILS OF THE SOUTH* 83–108 (2015) (profiling the park that developed out of adverse agricultural practices as a lens into the impacts of soil erosion during this period).

90. Theodore Saloutos, *New Deal Agricultural Policy: An Evaluation*, 61 J. AM. HIST. 394, 394–95 (1974); see also Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333 (1983) (discussing this policy environment and its impacts on the agricultural sector); Philip M. Glick, *The Federal Subsistence Homesteads Program*, 44 YALE L.J. 1324 (1935) (profiling one program, the Subsistence Homesteads Program).

91. Todd A. Wildermuth, *National Land Use Planning in America, Briefly*, 26 J. LAND RESOURCES & ENVTL. L. 73, 74–76 (2005) (noting this within the context of land-use planning efforts during this period); see also Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEM. L. REV. 1265, 1265–68 (1995) (profiling federal efforts to ameliorate adverse economic conditions within the farm economy).

the Soil Conservation Service was created with a focus on encouraging productive agri-environmental practices and working through voluntary soil and water conservation districts to achieve the desired environmental gains.<sup>93</sup> While important, these efforts were primarily centered on technical and cost-share assistance to facilitate conservation efforts on the ground; essentially, the idea was to demonstrate or model the environmental and economic gains that could be achieved through certain agricultural practices—such as terracing and contour plowing—to promote wider adoption.<sup>94</sup> To a meaningful extent, then, conservation objectives have long played a role in agricultural policy, and even early federal policy can be described as being multifunctional in at least outlook—attempting to blunt environmental harms while restoring on-farm income.<sup>95</sup>

## 2. *The Rise of Farmland Preservation*

To a large extent, World War II ended further policy development, as did a growing reluctance towards additional experimentation in the so-called Second New Deal.<sup>96</sup> After the war's conclusion, economic growth was paramount, as was addressing the severe backlog of housing for returning veterans and their families.<sup>97</sup> Relatedly, the development of massive public works projects and direct and indirect subsidies—such as the Interstate Highway System—made suburban development a highly appealing option to address the pressing demand for housing.<sup>98</sup> As a result, throughout the late 1940s through 1960s, prime soils and productive farmland were being

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92. See, e.g., JESS GILBERT, *PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL* 80–82, 93–96 (2015).

93. *More Than 80 Years Helping People Help the Land: A Brief History of NRCS*, U.S. DEP'T OF AGRIC., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143\\_021392](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392) [hereinafter *A Brief History*] (last visited Aug. 8, 2016) (profiling the origin story of this agency during the Dust Bowl era).

94. Robert T. Hiatt, *The SCS and Soil Erosion*, 31 S.D. L. REV. 435, 436–48 (1986) (charting the early development of the Soil Conservation Service); Craig L. Williams, *Soil Conservation and Water Pollution Control: The Muddy Record of the United States Department of Agriculture*, 7 B.C. ENVTL. AFF. L. REV. 365, 369–80 (1979) (profiling the agency's role in addressing soil erosion and other environmental issues).

95. Douglas Helms, *Coon Valley, Wisconsin: A Conservation Success Story*, in READINGS IN THE HISTORY OF THE SOIL CONSERVATION SERVICE 51 (1992) (discussing the goals and thought that conservation would also have positive economic impacts); see also Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659, 659–61 (1994) (profiling the financial component of early farm programming); Wayne D. Rasmussen, *New Deal Agricultural Policies after Fifty Years*, 68 MINN. L. REV. 353, 358 (1983) (discussing this linkage).

96. See *Franklin D. Roosevelt: Domestic Affairs*, MILLER CTR., UNIV. OF VA., <http://millercenter.org/president/biography/fdroosevelt-domestic-affairs> (last visited Jan. 15, 2017).

97. BENJAMIN ROSS, *DEAD END: SUBURBAN SPRAWL AND THE REBIRTH OF AMERICAN URBANISM* 39–57 (2014) (charting the policies that contributed to this land-use pattern).

98. ADAM ROME, *THE BULLDOZER IN THE COUNTRYSIDE: SUBURBAN SPRAWL AND THE RISE OF AMERICAN ENVIRONMENTALISM* 205–06 (2001) (discussing the loss of farmland due to post-war development pressures generally).

developed at an alarming rate, marking the beginning of the phenomenon of so-called suburban or urban sprawl.<sup>99</sup> A few began to recognize the irreversible environmental and social costs associated with this loss of farmland and started advocating for efforts to limit some of the adverse effects associated with this emerging land-use trend.<sup>100</sup> In advocating for farmland preservation, advocates recognized that the tools available were largely not capable of achieving their objectives, and that new tools and policy would be needed to address the rising challenges associated with the loss of vitally important working lands.<sup>101</sup>

To address this gap, a few states, local governments, and nongovernmental entities began establishing conservation programs designed to actually protect these lands through market-based mechanisms.<sup>102</sup> One of the most prominent early efforts was the development of a pioneering purchase of development rights (PDR) program in Suffolk County on Long Island.<sup>103</sup> In the early 1970s, Suffolk County began experimenting with this mechanism in order to protect what remained of its rapidly dwindling farmland base, which was threatened by “urbanization as well as from the construction of second homes.”<sup>104</sup> Through this model, the county, as authorized under state enabling law, dedicated substantial funds to purchasing development rights from agricultural

99. Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 304–10 (2000) (profiling some of the policy reasons why sprawl typified post-WWII development planning).

100. See, e.g., WILLIAM H. WHYTE, JR., *THE LAST LANDSCAPE* 1–14 (1968) (profiling the impacts of this trend and advocating for new tools to blunt these effects); see also FAIRFAX ET AL., *supra* note 12, at 156–57 (placing the emphasis on farmland preservation within the larger context of post-WWII conservation programming).

101. WILLIAM H. WHYTE, JR., *URBAN LAND INST., SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS* 7–10 (1959) (detailing the challenges faced by advocates in this space and offering up a relatively new concept and new term—conservation easements); see also Julian Conrad Juergensmeyer, *Implementing Agricultural Preservation Programs: A Time to Consider Some Radical Approaches?*, 20 GONZ. L. REV. 701, 707 (1985) (noting the difficulty associated with the potential loss of value associated with restricting development rights). During this period, states began experimenting with enabling legislation to allow for the acquisition of conservation easements, and by 1981, the National Conference of Commissioners on Uniform State Laws (NCCUSL) developed the Uniform Conservation Easement Act. See Mary A. King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 71–88 (2006) (discussing the origins of this model legislation).

102. Jeffrey G. Buckland, *The History and Use of Purchase of Development Rights Programs in the United States*, 14 LANDSCAPE & URB. PLAN. 237, 245–51 (1987); see also H.E. Conklin & W.R. Bryant, *Agricultural Districts: A Compromise Approach to Agricultural Preservation*, 56 AM. J. AGRIC. ECON. 607, 610–11 (1974).

103. Craig A. Peterson & Claire McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447, 452–533 n.17 (1977) (profiling the significance of this early effort and noting other early initiatives). This area includes the Hamptons, so it has a tax base able to support a broad-based farmland preservation campaign; development pressure is also particularly acute, making the case for this type of initiative being both politically and financially feasible. See *Farmland Preservation*, SUFFOLK COUNTY GOV'T, <http://www.suffolkcountyny.gov/Departments/Planning/Divisions/OpenSpaceandFarmland/FarmlandPreservation.aspx> (last visited Jan. 15, 2017).

104. Mark R. Rielly, Comment, *Evaluating Farmland Preservation Through Suffolk County, New York's Purchase of Development Rights Program*, 18 PACE ENVTL. L. REV. 197, 202–03 (2000).

producers—requiring a willing seller (who would be compensated for the margin between the land as appraised at highest and best use and at agricultural value).<sup>105</sup> This protection was permanently secured through the use of a recorded covenant.<sup>106</sup> Suffolk County's efforts served as a compelling early model for those interested in advancing the cause of farmland preservation.<sup>107</sup>

Other state and local governments and conservation nongovernmental organizations, primarily in areas in the Northeast and along the West Coast that faced similar development threats, built upon these efforts and pioneered additional new tools.<sup>108</sup> For example, by the early 1980s, the Vermont legislature enacted legislation designed to deter insensitive development of agricultural lands, to provide property tax incentives to keep working lands in production, and to begin to dedicate funding for acquiring protection; in short, the state created a comprehensive program focused on farmland preservation.<sup>109</sup> As a result of and directly building upon these early local and state efforts, the American Farmland Trust was formed to build a larger movement and to advocate for policy solutions and funding for agricultural conservation efforts nationwide.<sup>110</sup> As development pressure continued to intensify, additional local and state governments began efforts to protect farmland, including through agricultural zoning, transfer of development right (TDR) programs, preferential use tax valuation to encourage continued agricultural operation, and the expanded use of agricultural conservation easements.<sup>111</sup> It is perhaps not a surprise, then, given the nature of the tools

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105. David F. Newton & Molly Boast, *Preservation by Contract: Public Purchase of Development Rights in Farmland*, 4 COLUM. J. ENVTL. L. 189, 189–91 & n.4 (1978).

106. Peterson & McCarthy, *supra* note 103, at 458–61.

107. Rodegerdts, *supra* note 2, at 337 (discussing this program's first purchases and modeling effect). This does not mean, however, that the program was without its share of challenges. See Dwight H. Merriam, *Making TDR Work*, 56 N.C. L. REV. 77, 111–12 n.216 (1978) (discussing the origins of and controversies over this pioneering program).

108. See Buckland, *supra* note 102, at 246 (summarizing early PDR/PACE programs and their degree of funding/success). As of January 2017, twenty-eight states now have some form of purchase of agricultural conservation easement (PACE) program. See FARMLAND INFO. CTR., *supra* note 33. Part of this movement would result in the creation of the modern nongovernmental land trust structure, which has been responsible for the protection of millions of acres nationally. See Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 128–29 (2010) (discussing the origins of this movement).

109. Rebecca Rice-Osterhoudt, *Farmland Preservation in Vermont and the Creative Use of Land Trusts*, 11 VT. L. REV. 603, 606 (1986) (discussing these efforts by the Vermont legislature).

110. *Mission and History*, AM. FARMLAND TR., <https://www.farmland.org/mission-history> (last visited Jan. 15, 2017).

111. John C. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119, 129–43 (1979); Edward Thompson, Jr., "Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management?, 23 WM. & MARY ENVTL. L. & POL'Y REV. 831, 834–35 (1999) (profiling common approaches to farmland preservation); see also Craig A. Nielsen, *Preservation of Maryland Farmland: A Current Assessment*, 8 U. BALT. L. REV. 429, 432–34 (1979) (discussing Maryland's first farmland preservation effort—differential taxation—which allowed farmland to be taxed below its highest and best use to reduce development pressure).

available, that the majority of this early policy innovation was primarily at the local and state level rather than at the federal level.

### 3. *Farmland Preservation's Incorporation into Federal Agricultural Policy*

During this same period, conservation goals became further integrated into federal agricultural policy, but these efforts were initially less focused on farmland protection than on achieving or advancing conservation goals within the farm sector more generally.<sup>112</sup> To explore this ongoing policy adaptation, this Subpart profiles the early incorporation of farmland preservation efforts, the expansion of these efforts through successive farm bills, and the current role of farmland preservation within the latest farm bill.

#### a. *The National Agricultural Lands Survey and the Farmland Protection Policy Act*

Within the agricultural policy community, farmland preservation was a controversial subject during the late 1970s and early 1980s as environmental considerations became increasingly prominent.<sup>113</sup> In 1981, an interagency task force assigned to investigate issued a report on the future of working lands—the National Agricultural Lands Survey—that identified profound losses of productive farmland and profiled a host of substantial future challenges that might result.<sup>114</sup> Based in part upon this report, Congress adopted the Farmland Protection Policy Act within the 1981 Farm Bill, creating the requirement that federal agencies evaluate the impacts of federally funded projects that might convert prime or important farmlands to other land uses.<sup>115</sup> Although the Farmland Protection Policy Act likely underperformed against advocates'

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112. Tim Lehman, *Public Values, Private Lands: Origins and Ironies of Farmland Preservation in Congress*, 66 AGRIC. HIST., Spring 1992, at 257, 257–58.

113. See, e.g., R.W. Dunford, *The Evolution of Federal Farmland Protection Policy*, 37 J. SOIL & WATER CONSERVATION 133–36 (1982) (profiling early concerns/debate in this area); Quinn, *supra* note 11, at 235 (“In the 1980s, the preservation of agricultural lands became one of the most scrutinized national agricultural issues.”). For more information on even earlier efforts to promote soil preservation, in particular, as a policy goal, see Michael Eitel, *The Farm and Ranchlands Protection Program: An Analysis of the Federal Policy on United States Farmland Loss*, 8 DRAKE J. AGRIC. L. 591, 596–99 (2003) (profiling 1970s and 1980s policy making in this area).

114. U.S. DEP'T OF AGRIC. & COUNCIL ON ENVTL. QUALITY, NATIONAL AGRICULTURAL LANDS STUDY: EXECUTIVE SUMMARY OF FINAL REPORT (1981); Corwin W. Johnson & Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy?*, 1986 U. ILL. L. REV. 563, 563–66 (exploring the complicated context behind the Act's enactment). The National Agricultural Land Study came out as a failed attempt to create national policy, which was attacked for having insufficient information to establish the need for such an initiative. See 1 ENVTL. REG. OF LAND USE § 6.6, *History of the Farmland Protection Policy Act* (2016) (citing R. NEIL SAMPSON, FARMLAND OR WASTELAND: A TIME TO CHOOSE (1981)).

115. 7 U.S.C. §§ 4201–4209 (2016); 7 C.F.R. § 658.1–7 (2016); see also Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 99–100 (1998) (detailing the requirements under the Act); Johnson & Fogleman, *supra* note 114, at 567–71 (discussing this program and the challenges for implementation).

expectations, it did establish farmland preservation as a national policy priority, and it marked the beginning of a shift towards more meaningful consideration of these issues.<sup>116</sup>

*b. The Farm Bill Expands to Incorporate Additional Objectives*

As indicated, the 1981 Farm Bill's efforts on farmland preservation issues marked the beginning of a multi-decade effort to address farmland preservation through this omnibus legislation, which fit within a parallel trend with regard to expanding the reach of federal conservation programming.<sup>117</sup> In the next farm bill in 1985, Congress established the sodbuster and swampbuster conservation compliance requirements, conditioning continued eligibility for farm program payments on a farmer's compliance with a base level of environmental practice (focused on protecting highly erodible lands and preventing the draining of wetlands—the “sod” and the “swamp” in these program's common names).<sup>118</sup> These efforts provided a further platform for even greater incorporation of conservation efforts within the work of the United States Department of Agriculture (USDA), and additional layers of conservation-based programming would be adopted in successive farm bills.<sup>119</sup>

The 1990 Farm Bill included the first attempt to affirmatively protect working farmland through the acquisition of agricultural conservation

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116. 1 ENVTL. REG. OF LAND USE § 6.7, *Requirements of the Act* (2016) (profiling the Act's limitations); 1 ENVTL. REG. OF LAND USE § 6.13, *The Illusion of Protection in the FPPA* (same).

117. Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES, Winter 2004, at 37, 39–41 (exploring shifts in agricultural policy to address noneconomic considerations); see also John H. Davidson, *The Federal Farm Bill and the Environment*, NAT. RESOURCES & ENV'T, Summer 2003, at 3 (discussing the role of the farm bill generally).

118. Food Security Act of 1985, Pub. L. No. 98-199, 99 Stat. 1354 (1985); FAIRFAX ET AL., *supra* note 12, at 174–76 (noting the impact of the 1985 Farm Bill and exploring the motivations, including meeting trade obligations, behind the move from market support to permissible conservation payment); see also Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201 (1997) (exploring the evolution and role of this program); MEGAN STUBBS, CONG. RESEARCH SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY 1–3 (2012) (discussing the history and current role of conservation compliance). The Food Security Act also authorized the federal acquisition of conservation easements as part of debt restructuring efforts prompted by the 1980s farm crisis. See Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477, 522 (1986) (making the case for a greater federal role in this area and advocating for conservation easements to play a role in debt restructuring as a way to both obtain conservation benefits and keep farmers on the land, which was ultimately enacted).

119. In 1994, Congress reorganized the USDA and broadened the agency's mandate beyond just soil loss, renaming the agency as the Natural Resources Conservation Service. See *A Brief History*, *supra* note 93. Beyond NRCS, the Farm Services Administration (FSA) has an important role in delivering conservation programming, including being responsible for one of the Department's primary land retirement programs, the Conservation Reserve Program (CRP). See *Community Reserve Program*, U.S. DEP'T OF AGRIC., FARM SERV. ADMIN., <https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/> (last visited Jan. 15, 2017).

easements.<sup>120</sup> This legislation authorized loans and subsidized interest payments to state and local agricultural protection programs, piloting a greater federal role in assisting easement holders focused on the protection of farmland.<sup>121</sup> In the 1996 Farm Bill, Congress created the Farmland Protection Program, which provided matching funds to qualified holders to protect targeted agricultural lands.<sup>122</sup> The 2002 Farm Bill reauthorized and renamed the program as the Farm and Ranchlands Protection Program (FRPP), and expanded its scope to include the protection of historic and archaeological resources associated with these working lands.<sup>123</sup> The 2008 Farm Bill also made substantial programmatic revisions, but it kept the general structure of the FRPP operating as a hybrid partnership between the federal government and entities working in this area.<sup>124</sup> Before its repeal, the FRPP provided a significant source of funding for partners interested in protecting working lands, ultimately contributing to the protection of over one million acres of working farmland.<sup>125</sup>

*c. The 2014 Farm Bill and the Current Federal Role*

Most recently, Congress made further revisions in the 2014 Farm Bill and consolidated many of NRCS's easement programs within the new Agricultural Conservation Easement Program (ACEP).<sup>126</sup> The "new" Agricultural Land

120. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990). Beyond the lending program for agricultural conservation easements, the 1990 Farm Bill also introduced the Wetlands Reserve Program (WRP), which was focused on the restoration and protection of former wetlands. See Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. L. REV. 401, 404 (1993) (discussing the role of this program).

121. DANIELS & BOWERS, *supra* note 39, at 80–82 (noting that under the 1990 Farm Bill, only one "pilot" project, in Vermont, was actually carried out).

122. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996); see also Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Non-agricultural Uses*, 28 ENVTL. L. 113, 115–18 (1998).

123. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002); see also Jesse Ratcliffe, *A Small Step Forward: Environmental Protection Provisions in the 2002 Farm Bill*, 30 ECOLOGY L.Q. 637, 646 (2003) (profiling the conservation impacts of this legislation).

124. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008); see also TADLOCK COWAN ET AL., CONG. RESEARCH SERV., RL34557, CONSERVATION PROVISIONS OF THE 2008 FARM BILL 6 (2009).

125. See, e.g., RENEE JOHNSON, CONG. RESEARCH SERV., RS22565, FARM PROTECTION PROGRAM: STATUS AND CURRENT ISSUES 1–6 (2007) (discussing the impact of the program and the challenges of administration); Davidson, *supra* note 65, at 10,368; see also Jason J. Czarnecki & Katherine Fiedler, *The Neoliberal Turn in Environmental Regulation*, 2016 UTAH L. REV. 1, 10–11 (placing the 2002 Farm Bill and subsequent acts within their evolutionary context).

126. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014). The 2014 Farm Bill repealed the Farm and Ranch Lands Protection Program, the Wetlands Reserve Program, and the Grasslands Reserve Program, and largely consolidated these programs within the new Agricultural Conservation Easement Program (ACEP). See *Farm Bill Conservation Programs*, LAND TR. ALLIANCE, <http://www.landtrustalliance.org/topics/federal-programs/farm-bill-conservation-programs> (last visited Jan. 15, 2017). The 2014 Farm Bill also established a new program, the Regional Conservation Partnership Program, which focused on building partnerships to leverage resources and which provides



Easement (ALE) component of the ACEP is quite similar to the former FRPP.<sup>127</sup> The USDA continues to provide assistance to entities through this funding mechanism in order to facilitate the protection of farmlands that are threatened with conversion to nonagricultural use.<sup>128</sup> Although the NRCS does not hold these easements, the United States retains a third-party right of enforcement—allowing the agency to step in and monitor and enforce the terms of an easement if the holder fails to fulfill its obligations.<sup>129</sup> This focus on transactional conservation, along with the agency's other easement programs, has had the practical effect of moving the agency into more of a land management role—which goes beyond the agency's traditional assistance-based focus and demonstrates a continuing commitment to the goal of farmland preservation.<sup>130</sup>

To summarize, the general trend in farm policy has been towards the development of an established set of institutions specifically focused on farmland protection.<sup>131</sup> While the move towards multifunctionality began at the federal level, the shift to include farmland preservation within these efforts began at the local and state levels, with projects in areas facing intense development pressure.<sup>132</sup> The introduction of a federal role and funding stream through successive farm bills has contributed to further expansion of these

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additional funding and flexibilities to eligible entities through covered programs, such as ACEP and the Healthy Forest Reserve Program (HFRP). See Bryan David, *The Regional Conservation Partnership Program: What's in It for Land Trusts*, SAVING LAND (Winter 2016), <https://www.landtrustalliance.org/news/regional-conservation-partnership-program-whats-it-land-trusts> (profiling land-trust use of RCPP funds).

127. *Farm and Ranch Lands Protection Program*, U.S. DEP'T OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/farmranch> (last visited Aug. 9, 2017); see also Agricultural Conservation Easement Program, 80 Fed. Reg. 11,031, 11,039–40 (Feb. 27, 2015) (laying out the national ranking criteria for evaluating eligible parcels, which are largely focused on ensuring agricultural viability).

128. Agricultural Act of 2014 § 1265A; STUBBS, *supra* note 118, at 10–12 (discussing these shifts); see generally Neil D. Hamilton, *The 2014 Farm Bill: Lessons in Patience, Politics and Persuasion*, 19 DRAKE AGRIC. L.J. 1 (2014) (exploring the complicated development of the 2014 Farm Bill and the competing interests it represents).

129. 7 C.F.R. § 1468.25(f)(1) (2016) (including this requirement within the minimum deed terms).

130. Under the current ACEP-ALE program, NRCS generally provides up to 50 percent of the funding for a parcel targeted for an agricultural conservation program. NRCS provides, through a cooperative agreement, funding to the governmental or nonprofit partner to protect the parcel in its own capacity. Agricultural Act of 2014 § 1265B (defining cost-share assistance for ALE easements). The U.S. government, through USDA, does not serve as the holder of these interests, but retains a right of enforcement to act should a holder fail to fulfill its obligations and enforce the terms of the easement. *Id.* § 1265B(a)(4)(C)(iii). This right of enforcement was the source of many comments from eligible entities in response to the final ACEP rule, but was retained by the agency as a statutory requirement. See Agricultural Conservation Easement Program, Final Rule, 81 Fed. Reg. 71,818, 71,824–25 (Oct. 16, 2016) (to be codified at 7 C.F.R. pt. 1468) (responding to these comments).

131. AM. FARMLAND TR., *supra* note 3, at 14–18.

132. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 376–78 (2001).

efforts and fits squarely within the general trend towards viewing agricultural policy through a wider lens.<sup>133</sup>

### *B. The Development of Agricultural Conservation Easements*

As explored above, farmland preservation has become a major point of focus for advocates in some regions of the country. These organizations have developed a variety of tools, including regulation, market intervention, and voluntary approaches.<sup>134</sup> All of these approaches have merit and a variety of tools are needed, working in concert in order for a farmland preservation program to be effective.<sup>135</sup> Currently, one of the primary methods for protecting agricultural lands is through the use of agricultural conservation easements, a form of easement designed to protect working lands.<sup>136</sup> This Subpart will provide an overview of this tool and explore some of the typical transactional models through which this important form of protection is secured.

#### *1. Overview*

At a very general level, conservation easements can be generally defined as agreements between a landowner and an easement holder (typically a nongovernmental entity or state agency) whereby the landowner agrees to forego certain rights associated with their ownership; here, chiefly their ability to develop the property.<sup>137</sup> To summarize, “[u]sing the traditional ‘bundle of sticks’ metaphor for property, we can describe the landowner as losing one of the sticks in her bundle. A[n] . . . easement is in essence taking a stick out of the bundle and giving it to someone else”—in this case, an entity focused on

133. AM. FARMLAND TR., *supra* note 3, at 19–21.

134. See, e.g., Geoff A. Wilson, *From “Weak” to “Strong” Multifunctionality: Conceptualising Farm-Level Multifunctional Transitional Pathways*, 24 J. RURAL STUD. 367, 367–69 (2008); see also Nelson Bills & David Gross, *Sustaining Multifunctional Agricultural Landscapes: Comparing Stakeholder Perspectives in New York (U.S.) and England (U.K.)*, 22 LAND USE POL’Y 313, 313–21 (2005) (profiling some of this policy shift).

135. Cordes, *supra* note 52, at 398–99 (exploring the need for multiple tools in this area).

136. David M. Stoms et al., *Strategic Targeting of Agricultural Conservation Easements as a Growth Management Tool*, 26 LAND USE POL’Y, 1149, 1149–61 (2009) (discussing the use of this tool). There has been ongoing debate over whether these voluntary methods undercut regulatory efforts, which will likely continue as the balance between regulation and acquisition ebbs and flows. See, e.g., Edward Thompson, Jr., *Reconciling Property Rights and Land Conservation: The Hybrid Paradigm*, 26 J. LAND RESOURCES & ENVTL. L. 57, 58–60 (2005) (exploring this issue within the farmland preservation context).

137. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 741–42 (2002); see also STOKES, *supra* note 9, at 226–29 (discussing easement holders generally); Neil D. Hamilton, *Essay: Agricultural Production and Environmental Policy: How Should Producers Respond?*, 1 DRAKE J. AGRIC. L. 141, 147 (1996) (discussing the role of easements in balancing private and public interests through voluntary transactions).

protecting agricultural lands.<sup>138</sup> Once the agreement is executed, certain changes to the protected property will require the approval of the easement holder to ensure that the proposed actions are consistent with the easement's terms.<sup>139</sup> For example, an easement may require the express approval of the holder in order to construct additional structures on the protected parcel as one way of shaping its future use.<sup>140</sup> Larger changes, either not allowed or not addressed under the terms of the easement, may require an amendment, which may or may not be possible and should be avoided given the numerous risks associated with this process from both a legal and practical perspective.<sup>141</sup>

The easement will also provide the easement holder the right to access the property to ensure that its terms are being met and to fulfill its continuing obligation to enforce the terms of the restriction.<sup>142</sup> As a result of entering into this agreement, the easement holder will be on the proverbial hook for stewarding any lands that it elects to protect, which should lead to some degree of caution when deciding to protect a specific farm given the associated liability.<sup>143</sup> From a landowner's perspective, this transaction allows the owner to protect the property beyond their lifetime or ownership, while also potentially obtaining a financial benefit.<sup>144</sup>

At their core, conservation easements require a degree of flexibility to address the unknown future.<sup>145</sup> For example, what best ensures agricultural

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138. Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).

139. STOKES, *supra* note 9, at 224–25 (detailing the impact of conservation easements).

140. *Conservation Easements: All About Easements*, NATURE CONSERVANCY, <http://www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml> (last visited Aug. 9, 2017).

141. Jay, *supra* note 6, at 6–7; Jessica E. Jay, *Understanding When Perpetual is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing*, 37 HARV. ENVTL. L. REV. 247 (2013); Ann Taylor Schwing, *Perpetuity is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 235–36 (2013).

142. BYERS & PONTE, *supra* note 4, at 143–44, 196.

143. See Elia Machado et al., *Prioritizing Farmland Preservation Cost-Effectively for Multiple Objectives*, 61 J. SOIL & WATER CONSERVATION 250, 250–56 (2006) (discussing ranking factors for determining which properties should be targeted). Beyond the acquisition cost, the permanent liabilities associated with holding perpetual conservation easements is not lost upon easement holders. In fact, most easement-holding entities work to carefully define their selection criteria to prioritize tracts they want to protect. Additionally, many easement-holding entities require or request an additional financial contribution to endow ongoing monitoring and enforcement activities. See BYERS & PONTE, *supra* note 4, at 116–17.

144. Nancy A. McLaughlin, *Conservation Easements; Perpetuity and Beyond*, 34 ECOLOGY. L.Q. 673, 704–08 (2007) (exploring the benefits and challenges associated with perpetual easements); see also Nicholas Carson, Note, *Easier Easements: A New Path for Conservation Easement Deduction Valuation*, 109 NW. U. L. REV. 739, 743–44 (2014) (same).

145. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1080 (1996); see also Federico Cheever & Jessica Owley, *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*, 40 HARV. ENVTL. L.J. 1, 40

viability now might differ substantially in the future (as what agricultural production actually looks like over the long-term horizon is admittedly a significant unknown), and enabling farmland to remain in active use is a critical aspect of project design.<sup>146</sup> Additionally, as operations transition from generation to generation and from owner to owner, the land use may also shift—from, for example, a more commodity-driven focus to a more value-added approach, or from row-crop to livestock production.<sup>147</sup> A need for flexibility within a document that imposes perpetual limitations is generally true of all conservation easements, but agricultural conservation easements—by virtue of their multifunctional nature—perhaps make this task more complex.<sup>148</sup> Given, however, the societal value of working agricultural lands, there is no shortage of effort towards making this balance work.<sup>149</sup>

However, “[t]he real work with conservation easements begins after the signature ink is dry. Even the best written easements are only as good as the holder’s resolve and capacity over the long term to monitor, enforce, and defend them.”<sup>150</sup> Particularly as properties change hands from their original owners, the ongoing work to maintain an easement portfolio can be complicated and can represent substantial risk.<sup>151</sup> As commentators have also noted, the relationships involved in negotiating and stewarding protected parcels have profound impacts on the monitoring, enforcement, and performance of all parties.<sup>152</sup>

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n.217 (2016) (exploring the long-running concerns regarding the function of conservation easements generally).

146. See, e.g., AM. FARMLAND TR., 25 YEARS OF PROTECTING FARMLAND: AN EVALUATION OF THE MARYLAND AGRICULTURAL LAND PRESERVATION FOUNDATION 23–25 (2003) (exploring the challenges and possible tools for addressing this gap).

147. For example, consider the relatively recent trend to organic production, which only several decades ago was largely considered a fad or outside of the economic mainstream. See Jason J. Czarnecki, *The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis*, 30 STAN. ENVTL. L.J. 3, 14–16 (2011) (profiling this shift within the labeling context).

148. Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 607–09 (2004) (profiling the need for flexibility); see also BYERS & PONTE, *supra* note 4, at 199–206 (discussing working lands issues).

149. Adena R. Rissman, *Designing Perpetual Conservation Agreements for Land Management*, 63 RANGELAND ECOLOGY & MGMT. 167, 173–74 (2010); see also Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005) (discussing possible alterations to the conservation easement framework to protect conservation easements for the future).

150. JEFF PIDOT, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* 18 (2005).

151. One of the ways that land trusts have mitigated this risk, at least to a degree, is through a common-pool defense/insurance network—TerraFirma—which was established in 2011. To date, nearly 500 land trusts have enrolled in this insurance network. See, e.g., *About TerraFirma Risk Retention Group*, TERRAFIRMA RRG LLC, <http://terrafirma.org/about> (last visited Aug. 9, 2017).

152. Adena R. Rissman & Nathan F. Sayre, *Conservation Outcomes and Social Relations: A Comparative Study of Private Ranchland Conservation Easements*, 25 SOC’Y & NAT. RESOURCES 523, 523–38 (2012) (profiling the complex relationships involved with stewardship of protected lands).

Despite certain structural limitations, agricultural conservation easements fill a meaningful gap for securing the protection of important parcels.<sup>153</sup> This tool can also supplement or augment other forms of farmland preservation as a part of a comprehensive strategy.<sup>154</sup> Most significantly, conservation easements have been politically acceptable and expedient where compulsory mechanisms have been impractical or impossible.<sup>155</sup>

## 2. *A Survey of Transactional Models*

To provide a sense of how agricultural conservation easements actually function as a protective mechanism, it is important to understand the funding and acquisition models that typically underwrite these efforts. There are a few primary ways that these transactions are facilitated, which are addressed in turn.<sup>156</sup>

### a. *Voluntary Donations*

Perhaps the simplest mechanism is through a voluntary donation to an entity or agency focused on farmland protection. Some property owners are simply deeply committed to seeing their properties protected and may choose to do this without compensation or other financial incentives. This is not very common, given the often-high value of this asset, the potential economic effects, and the relatively robust interest in seeing these lands preserved.<sup>157</sup> It is, however, a frequent enough occurrence to at least merit inclusion in a list of transactional forms and to also identify that financial motivations are often not the exclusive driver of these efforts.

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153. Elizabeth Brabec & Chip Smith, *Agricultural Land Fragmentation: The Spatial Effects of Three Land Protection Strategies in the Eastern United States*, 58 *LANDSCAPE & URB. PLAN.* 255, 266–67 (2002) (profiling common strategies for comprehensive farmland protection). Despite this ability to have a widespread impact, the majority of agricultural conservation easements are clustered in certain areas—primarily the Mid-Atlantic, Northeast and along West Coast. *See, e.g.*, FARMLAND INFO. CTR., *supra* note 33.

154. *See, e.g.*, WILLIAM H. WHYTE, JR., *supra* note 101, at 7–10 (discussing the need for a comprehensive strategy for open-space protection); *see also* AM. FARMLAND TR., *PICKING UP THE PACE: A ROAD MAP FOR ACCELERATING FARMLAND PROTECTION IN NEW YORK* 13–22 (2007) (profiling the state's efforts and providing recommendations for further policy innovation).

155. Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 *YALE L.J. POCKET PART* 218, 221 (2008). *But see* Joseph L. Sax & Robert B. Keiter, *The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited*, 33 *ECOLOGY L.Q.* 233, 263 (2006) (noting that in some areas, even conservation easements are viewed with strong skepticism).

156. Lippman, *supra* note 138, at 298 (surveying the various mechanisms for acquiring this form of resource).

157. *Income Tax Incentives for Land Conservation*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation> (last visited Aug. 9, 2017) [hereinafter *Income Tax Incentives*] (noting that this can be a “major financial decision”).

*b. Federal Tax Incentives*

A much more common method for facilitating this activity is through the donation of tax-subsidized conservation easements—through either outright donation or facilitated through a bargain sale.<sup>158</sup> Through the federal tax code, at least since the early 1970s, agricultural producers have been able to potentially claim a charitable donation for the appraised loss in value associated with their donation.<sup>159</sup> Under the Internal Revenue Code (I.R.C.), an owner of land may claim a charitable deduction for this gift of a partial interest in real estate if the gift is (1) of a qualified property interest (perpetual), (2) made to a qualified easement holder (an agency or nongovernmental organization dedicated to this type of charitable activity), and (3) made exclusively for conservation purposes.<sup>160</sup>

As far as donations made “exclusively for conservation purposes,” the four recognized conservation values under the I.R.C. are (1) lands for outdoor recreation, (2) relatively natural habitats, (3) preservation of open space (including farmland and forest land), and (4) certain qualifying historic properties.<sup>161</sup> Farmland preservation is not one of the recognized four conservation values, so donations have to fit within one of the other defined categories—generally open-space preservation.<sup>162</sup> Under the open-space prong, this form of donation can qualify if it is (1) being protected for scenic enjoyment of the public or is pursuant to a clearly delineated federal, state, or local policy; and (2) will yield a significant public benefit.<sup>163</sup> Given the presence of many federal, state, and local laws advocating farmland

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158. I.R.C. § 170 (2012). Beyond income tax benefits, conservation easements can be utilized to offset estate taxes. *See Estate Tax Incentives for Land Conservation*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/topics/taxes/estate-tax-incentives-land-conservation> (last visited Jan. 15, 2017) (summarizing the potential estate tax consequences); *see also* C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 6 (2d ed. 2008) (discussing bargain sales).

159. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 10–17 (2004) (charting the development of this incentive structure); *see also* Dominic P. Parker, *Land Trusts and The Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 *NAT. RES. J.* 483, 494–95 (2004) (profiling the move towards recognition of this form of charitable donation). Some commenters increasingly question the reality of a perpetual land-use restriction and have advocated a shift to other protective forms. *See generally*, Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 *STAN. ENVTL. L.J.* 121 (2011).

160. I.R.C. § 170(h)(1).

161. *Id.* § 170(h)(4)(A).

162. *Id.*; *see also* TREAS. REG. § 1.170A-14(f), ex. 2 (2008) (providing an illustration of where a state policy would meet the “clearly delineated governmental policy of preserving open space” and allowing a deduction to potentially be claimed); *see also* Paige Madeline Gentry, Note, *Applying the Private Benefit Doctrine to Farmland Conservation Easements*, 62 *DUKE L.J.* 1387, 1394-95 (2013) (discussing the tax deduction and agricultural conservation easements generally); Richardson, *supra* note 26, at 811–13 (same). For more information regarding the history of the tax deductibility of agricultural conservation easements, *see* STEPHEN J. SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS* 6-1–6 (3d ed. 1994).

163. I.R.C. § 170(h)(4)(A)(iii).

preservation, this “clearly delineated” requirement can likely be met for many transactions.<sup>164</sup> Of the two open-space options, this is the more common rationale, as it ostensibly allows for greater flexibility than the scenic option.<sup>165</sup> Beyond fitting within a clearly delineated policy, the transaction must also yield a substantial public benefit.<sup>166</sup> For open-space easements, the Treasury Regulations provide a non-exhaustive list of factors for determining if this requirement is met; they generally focus on the degree of risk as far as development, the uniqueness of the resource, and how this project fits within the larger context of other planning in the area.<sup>167</sup>

If the Internal Revenue Service (IRS) requirements are met, the tax benefits can provide a strong financial incentive. For a simplified example, consider a farm property worth \$300,000 before the donation of an agricultural conservation easement. If the property is only worth \$125,000 after the easement transaction because of lost developmental value, the farmer would potentially be able to claim a donation of \$175,000, provided all of the requirements have been fulfilled.<sup>168</sup> Recently, the tax incentives for farmers

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164. Gentry, *supra* note 162, at 1395; *see also* LINDSTROM, *supra* note 158, at 48–49 (noting the “safe harbor” under Treas. Reg. § 1.170A-14(d)(4)(iii)(A) that potentially applies when a local government has issued a resolution expressing its approval of the protection of a specific parcel of open space).

165. Jesse J. Richardson, Jr., *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans*, 48 OKLA. L. REV. 449, 451–52 (1995). Additionally, “the donor is not required to allow public access to the property subject to a donation under the clearly delineated conservation policy provision to receive treatment as a charitable contribution (unless the conservation purpose of the donation would be undermined or frustrated without public access).” *Id.* at 452. Although visual public access would likely suffice for a donation relying on the scenic provision, this might not be possible for all parcels or desirable to all property owners, and have additional operational impacts. *Id.*

166. *See* TREAS. REG. § 1.170A-14(d)(4)(iv)(A) (listing some considerations of whether a donation provides the required significant public benefit, which include: “(1) The uniqueness of the property to the area; (2) [t]he intensity of land development in the vicinity of the property to the area; (3) [t]he consistency of the proposed open space use with public programs (whether Federal, state or local) for conservation in the region . . . ; (4) [t]he consistency of the proposed open space use with existing private conservation programs in the area as evidenced by other land, protected by easement or fee ownership by organizations referred to in § 1.170A-14(c)(1), in close proximity to the property; (5) [t]he likelihood that development of the property would lead to or contribute to degradation of the scenic, natural or historic character of the area; (6) [t]he opportunity for the general public to use the property or appreciate its scenic values; (7) [t]he importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area; (8) [t]he likelihood that the donee will acquire equally desirable and valuable substitute property or property rights; (9) [t]he costs to the donee of enforcing the terms of the conservation restriction; (10) [t]he population density in the area of the property; and, (11) [t]he consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection”).

167. LINDSTROM, *supra* note 158, at 50–51 (discussing this requirement and providing contextual examples of how IRS might view the degree of public benefit for an otherwise qualifying transaction); *see also* Quinn, *supra* note 11, at 252–54 (profiling early IRS letter rulings on agricultural conservation easements).

168. *See* TREAS. REG. § 1.170A-14, ex. 7; *see also* Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225, 227–48 (2016) (profiling the financial impact of the charitable deduction and the challenges associated with valuing this donative form).

and ranchers have been enhanced to allow for a greater period over which the tax deduction can be utilized, in recognition of the fact that many farmers and ranchers do not have sufficient taxable income to otherwise fully benefit from the deduction under a narrower timeframe.<sup>169</sup>

Although the tax incentives remain a potent factor, an issue with tax-incentivized conservation easements in recent years has been increasing IRS scrutiny.<sup>170</sup> The reason for this attention is a number of high profile tax abuses that have drawn substantial public and congressional criticism.<sup>171</sup> Given the public investment made in protecting these resources, it makes sense that the IRS has devoted considerable attention to this area.<sup>172</sup> It may, however, have a chilling effect on some donors worried about audit risk and their donations potentially being rejected.<sup>173</sup> This concern is heightened by the fact that a donor could also be subject to substantial accuracy-related penalties (which compounds the impact of having a conservation easement donation denied in whole or in part).<sup>174</sup> To date, the majority of the IRS attention has largely not centered or focused on agricultural conservation easements, but many of the arguments and challenges that have been raised potentially apply and shape normative practice.<sup>175</sup> Even with this degree of relative uncertainty, federally subsidized agricultural conservation easements continue to play a leading role in securing important tracts of agricultural land nationwide.<sup>176</sup>

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169. See *Income Tax Incentives*, *supra* note 157 (summarizing the changes in tax law to give permanence to the enhanced incentive).

170. See, e.g., NANCY A. McLAUGHLIN & STEVEN SMALL, TRYING TIMES: IMPORTANT LESSONS TO BE LEARNED FROM FEDERAL TAX CASES INVOLVING CONSERVATION EASEMENT DONATIONS 1–13 (2016) (providing overview of IRS attention in this area).

171. See, e.g., Fred A. Bernstein, *Rushing for Tax Breaks on Historic Houses*, N.Y. TIMES (Dec. 12, 2004), [http://www.nytimes.com/2004/12/12/realestate/rushing-for-tax-breaks-on-historic-houses.html?\\_r=1](http://www.nytimes.com/2004/12/12/realestate/rushing-for-tax-breaks-on-historic-houses.html?_r=1) (noting the IRS's formation of a special group to focus on façade easement deductions in particular). Certain forms of conservation transactions have again garnered attention, and the land trust community has played an important role in working with the IRS to address these issues. See, e.g., *An Important First Step*, LAND TR. ALLIANCE, <http://www.landtrustalliance.org/blog/important-first-step> (last visited Aug. 9, 2017) (discussing the IRS's position to make some forms of syndications a listed transaction).

172. See Jason A. Richardson, *Increased Scrutiny on Conservation Easement Donations: How a Crackdown on Tax Fraud by the IRS Could Impact Environmental Protection*, 1 ENVTL. & ENERGY L. & POL'Y J. 273, 274–77 (2005); see also Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 LAW & CONTEMP. PROBS. 29, 29–32 (2011) (exploring this issue from its historical context).

173. Martha W. Jordan, *Missed Opportunities and More Questions: The Tax Court's Most Recent Decisions Regarding Preservation Easements*, TAXES, Sept. 2010, at 129, 130–33.

174. Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 33 UTAH ENVTL. L. REV. 1, 18–19 (2013) (profiling the impact of the Pension Protection Act and IRS scrutiny and enforcement more generally).

175. See generally *Conservation Easement Audit Techniques Guide*, INTERNAL REVENUE SERV. (Nov. 4, 2012), <https://www.irs.gov/businesses/small-businesses-self-employed/conservation-easement-audit-techniques-guide> (noting the issues associated with some of these transactions and flagging potential issues for audit).

176. McLaughlin, *supra* note 168, at 228–30; see also Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 5–8 (2012)



*c. State Tax Incentives*

Beyond the federal tax incentives, some states have added their own tax incentives to further encourage the owners of working land.<sup>177</sup> A prominent example of state tax credit is Virginia's program.<sup>178</sup> Since 2000, Virginia's Land Preservation Credit has allowed property owners to claim an income tax credit for up to 40 percent of the land's value.<sup>179</sup> The state's expenditure under this program is \$100 million annually, and is first come, first served; there is not a prioritization of the funds amongst eligible landowners.<sup>180</sup> In 2002, interestingly, these credits were made transferable, allowing this funding stream to be utilized by landowners without sufficient income to otherwise utilize credits or deductions.<sup>181</sup> Data "strongly suggests that the state income tax credit has played a significant role in stimulating easement donations in [the state]."<sup>182</sup> State tax incentives are not widespread, but sixteen states currently offer some form of program—which range from transferable tax credits to nontransferable credits or deductions to New York's program, which applies against a landowner's property tax liability.<sup>183</sup> Where present, state tax credits and deductions serve as an important additional funding stream to support farmland protection efforts.

*d. PDR/PACE Programs*<sup>184</sup>

Within the world of agricultural conservation easements, one of the most common paths is through PDR and purchase of agricultural conservation easement (PACE) programs.<sup>185</sup> Some landowners are willing to sell an

(profiling the current structure and many of the challenges associated with the nature of the charitable donation process).

177. Nancy A. McLaughlin & Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 3 UTAH L. REV. 811, 846–48 (2013) (noting these incentives and debating the relative merits of this approach).

178. See VA. CODE ANN. §§ 58.1-510–513 (2013); see also Philip M. Hocker, *Transferrable State Tax Credits as a Land Conservation Incentive*, in FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE, at 124, 124–28 (2005) (discussing the creation and impact of Virginia's state tax credit).

179. *Land Preservation Tax Credit*, VA. DEP'T OF TAX'N, <http://www.tax.virginia.gov/content/land-preservation-tax-credit> (last visited Aug. 9, 2017); see also McLaughlin, *supra* note 159, at 21–22 (noting the likely impact of this incentive in increasing donation activity across the state).

180. *Land Preservation Tax Credit*, *supra* note 179 (summarizing the current status of state tax credit and funding levels); see also W. Eugene Seago, *The Effects of the Virginia Land Preservation Credit on Federal Taxable Income: Should the Right Hand Take from What the Left Hand Gave?*, 32 WM. & MARY ENVTL L. & POL'Y REV. 1, 1–5 (2007).

181. McLaughlin, *supra* note 159, at 23.

182. *Id.* at 24.

183. *Income Tax Incentives*, *supra* note 157.

184. AM. FARMLAND TR., *supra* note 3, at 83–85 (explaining that there is no functional difference between PDR and PACE programs).

185. Buckland, *supra* note 102, at 237–52; Thomas L. Daniels, *Saving Agricultural Land with Conservation Easements in Lancaster County, Pennsylvania*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE, *supra* note 2, at 166–69 (profiling these

easement to an easement holder through a market-level acquisition, and can then use the income from the sale to retire debt or accomplish other objectives.<sup>186</sup> This acquisition-focused model retires the development rights on the targeted parcel and provides the level of protection that is agreed to and required by the various entities involved in this collective effort.<sup>187</sup> A prominent state-level example is the Maryland Agricultural Land Protection Fund.<sup>188</sup> Formed in 1977, it was the first state-level program of its kind; at the end of Fiscal Year 2016, it had purchased 2218 easements, protecting over 300,000 acres of farmland at a cost of over \$682 million.<sup>189</sup> As of 2016, over twenty-eight states have established programs akin to Maryland's state efforts and have protected thousands of farms and acres across the nation.<sup>190</sup> In addition to state efforts, there are also locally driven PACE programs; currently, at least ninety-five such programs exist.<sup>191</sup> For example, Boulder has an agricultural protection program, which to date has protected nearly 2500 acres of open space at cost of over \$21 million.<sup>192</sup> Other counties and local governments have had similar success in protecting their agricultural base and use a variety of funding streams to facilitate this work.<sup>193</sup>

PACE/PDR programs, at both the state and local levels, are one of the most important funding mechanisms used by those states that focus on securing affirmative protection of their working lands.<sup>194</sup>

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efforts generally); FARMLAND INFO. CTR., FACT SHEET: PURCHASE OF AGRICULTURAL CONSERVATION EASEMENTS: SOURCES OF FUNDING (2006) [hereinafter SOURCES OF FUNDING] (providing a survey of important sources of funding in this area).

186. See, e.g., Chellie Pingree, *The Local Food Movement: From Maine to Washington, D.C.*, 8 J. FOOD L. & POL'Y 203, 205 (2012) (profiling the work of the Maine Farmland Trust in facilitating access to land).

187. Lara DuMond Geurico, *Local and Watershed Land Use Controls: A Turning Point for Agriculture and Water Quality*, PLAN. & ENVTL. L., Feb. 2010, at 2, 6–7 (discussing the role of PACE/PDR programs).

188. *Overview*, MD. AGRIC. LAND PRES. FOUND., <http://mda.maryland.gov/malpf/Pages/Overview.aspx> (last visited Aug. 9, 2017).

189. SOURCES OF FUNDING, *supra* note 185; see also *Welcome to MALPF*, MD. AGRIC. LAND PRES. FOUND., <http://mda.maryland.gov/malpf/pages/default.aspx> (last visited Aug. 9, 2017).

190. FARMLAND INFO. CTR., STATUS OF STATE PACE PROGRAMS 1 (2016), [http://www.farmlandinfo.org/sites/default/files/State\\_Purchase\\_of\\_Agricultural\\_Conservation\\_Easement\\_Programs\\_2016\\_AFT\\_FIC\\_09-16.pdf](http://www.farmlandinfo.org/sites/default/files/State_Purchase_of_Agricultural_Conservation_Easement_Programs_2016_AFT_FIC_09-16.pdf) (last visited Sept. 4, 2017).

191. FARMLAND INFO. CTR., STATUS OF LOCAL PACE PROGRAMS 1 (2016), [http://www.farmlandinfo.org/sites/default/files/Local\\_Purchase\\_of\\_Agricultural\\_Conservation\\_Easement\\_Programs\\_2016\\_AFT\\_FIC\\_0.pdf](http://www.farmlandinfo.org/sites/default/files/Local_Purchase_of_Agricultural_Conservation_Easement_Programs_2016_AFT_FIC_0.pdf) (last visited Sept. 4, 2017).

192. *Id.* at 2–3; see also *Agricultural Lands on Open Space*, BOULDER COUNTY, <http://www.bouldercounty.org/os/openspace/pages/agriculture.aspx> (last visited Aug. 9, 2017).

193. STATUS OF LOCAL PACE PROGRAMS, *supra* note 191, at 2–7.

194. PATRICK J. ROHAN & ERICK DAMIAN KELLY, ZONING AND LAND USE CONTROLS § 56.04(2) (2016) (noting the role and limitations of this tool); see also Bruce R. Huber, *Transition Policy in Environmental Law*, 35 HARV. ENVTL. L. REV. 91, 102 (2011) (placing PACE programs within their appropriate context). For a full discussion of the benefits/drawbacks of PACE/PDR programs, see AM. FARMLAND TR., *supra* note 3, at 84.

e. *TDR Programs*

Transfer of development rights (TDR) programs also use agricultural conservation easements to secure the protection of targeted parcels.<sup>195</sup> TDR programs function somewhat similarly to PACE/PDR programs, but instead of the agency purchasing the development rights, the farmland owner receives a transferrable interest that can be conveyed to another owner, which allows increased development in another area of the community where development pressure is being channeled.<sup>196</sup> TDR programs consist of both “transferring” and “receiving” parcels, and are theoretically a way to use a market mechanism to compensate a property owner for the loss in value from the rezoning effort while avoiding the need for direct financial compensation.<sup>197</sup> Some, although not all, TDR programs use agricultural conservation easements to permanently secure the transferring agricultural parcel against future development activity, while others simply rely on zoning to accomplish this end.<sup>198</sup> TDR programs do protect some working lands, but their use is relatively limited given their comparative operational complexity.<sup>199</sup>

It should be evident that there are a wide variety of ways that agricultural conservation easements are acquired.<sup>200</sup> It is important, however, to also note that a single transaction frequently involves multiple funding vehicles.<sup>201</sup> For example, a project’s financing structure could involve 50 percent from NRCS’s ACEP-ALE program, 25 percent from a state PACE program or from a nonprofit, and 25 percent from a donation by the landowner (claimed as a bargain sale).<sup>202</sup> Given the value of the properties that are targeted for

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195. Theodore A. Feitshans, *PDRs and TDRs: Land Preservation Tools in a Universe of Voluntary and Compulsory Land Use Planning Tools*, 7 *DRAKE J. AGRIC. L.* 305, 329–32 (2002) (discussing this tool generally); see also Thompson, *supra* note 111, at 840–42 (profiling Montgomery County, Maryland’s use of TDRs as part of its overall farmland preservation strategy).

196. See John R. Nolon, *The Stable Door is Open: New York’s Statutes to Protect Farmland*, 67 *N.Y. ST. B.J.* 36, 37 (1995); see also *AM. FARMLAND TR.*, *supra* note 3, at 119–40 (providing overview of the role of TDR programs within the farmland preservation movement).

197. JOHN R. NOLON & PATRICIA E. SALKIN, *LAND USE AND SUSTAINABLE DEVELOPMENT LAW* 714–15 (8th ed. 2012) (summarizing the basic elements of a TDR program and how it functions); see also Rick Pruetz & Erica Pruetz, *Transfer of Development Rights Turns 40*, *PLAN. & ENVTL. L.*, June 2007, at 3 (exploring the evolution of the tool over its history and use).

198. PATRICK SALKIN, 4 *AMERICAN LAW ZONING* § 34.12 (5th ed. 2016).

199. Jesse J. Richardson, Jr., *Goldilocks, The Three Bears and Transfer of Development Rights*, *AGRIC. L. UPDATE*, Dec. 2006, at 4 (noting the lack of scale involved in these programs, typically, given their complexities); Ruhl, *supra* note 4, at 448–50 (discussing the appeal of TDR programs in concept and the practical challenges that these programs face in practice).

200. This is necessarily a limited survey of the most common transactional forms as other methods, including easements obtained as exactions or buy/hold/sell models with a conservation buyer, can also serve to facilitate farmland preservation efforts. See, e.g., Lippman, *supra* note 138, at 298 (profiling the use and limitations of exacted easements).

201. *Shelburne’s Barr Farm Conserved and Sold to New Farmer*, *supra* note 26 (indicating the importance of prime soil in the selection of conservation easements).

202. *AM. FARMLAND TR. & CONN. FARMLAND TR.*, *supra* note 34, at 7 (explaining that in recent years at least 50 percent of the properties protected by the state’s program included donations of over 25 percent of the property’s value).

protection, this layered financing is perhaps not surprising, but it can lead to potential issues. For example, the holders of agricultural conservation easements are generally either agricultural land trusts or state and local agencies focused on this area of endeavor.<sup>203</sup> Some of these entities may be more environmentally focused, while others may target specific types of agricultural operations, such as ranching or row-crop production, or a specific geographic footprint.<sup>204</sup> An entity's role in a project ultimately influences project design, the terms of the easement, and how the easement is monitored and enforced.<sup>205</sup> For larger projects, it may be necessary to expressly address how to reconcile these competing objectives.<sup>206</sup> Thus, understanding the transactional forms is important for considering how to navigate potential and actual conflicts between the varied interests. Despite the associated challenges, this diversity of advocates allows for additional work to occur within this space, as it certainly helps to channel resources towards the protection of working land.<sup>207</sup>

To quickly summarize, the use of conservation easements began in the mid-twentieth century and represents a comparatively recent legal development.<sup>208</sup> Originally, these easements were designed to protect conservation land and open space,<sup>209</sup> but proponents of farmland preservation quickly recognized that the tool could also advance many of their objectives on

203. RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 241–47 (2003) (profiling three prominent agricultural land trusts and their missions/priorities).

204. James M. Connor & Douglas R. Horne, *Evaluating Agricultural Land for Preservation*, in *PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION*, at 17, 17–21 (1982); see also BYERS & PONTE, *supra* note 4, at 198; see also *Who*, WORKING LANDS ALLIANCE, <http://workinglandsalliance.org/who/> (last visited Aug. 9, 2017) (providing a list of organizations partnering to protect farmland, which ranges from conservation to food advocacy to the state's farm bureau chapter).

205. *Find a Land Trust Near You*, LAND TR. ALLIANCE, <http://www.landtrustalliance.org/find-land-trust> (last visited Aug. 9, 2017) (explaining that “[e]very land trust is different, guided by its own mission, values, and community”).

206. See, e.g., U.S. NAVY, *NSY PORTSMOUTH SERE SCHOOL: MAINE* (2016), <http://www.repi.mil/Portals/44/Documents/Current%20Year%20Fact%20Sheets/NSYPortsmouth.pdf> (providing project overview and list of partners in landscape scale initiative to protect open space around a prominent military training area in Maine).

207. Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Protection on Private Lands*, 38 *IDAHO L. REV.* 453, 453 (2002) (“Over the past two decades there has been an explosion in both the use of conservation easements as a private land conservation tool and the number of private nonprofit organizations, typically referred to as ‘land trusts,’ that acquire easements.”).

208. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 *STAN. ENVTL. L.J.* 2, 3–5 (1989) (exploring the issues with the easements under common law principles and the growth of the land trust movement); see also John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 *ENVTL. LAW.* 319, 333–34 (1997) (discussing the challenges associated with early conservation easements).

209. See, e.g., RUSSELL BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND* 4 (1967) (profiling the potential conservation goals easements could secure); Jan Z. Krasnowiecki & James C.N. Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 *U. PA. L. REV.* 179 (1961); Note, *Preservation of Open Spaces through Scenic Easements and Greenbelt Zoning*, 12 *STAN. L. REV.* 638, 642–45 (1960).

the working landscape.<sup>210</sup> As a result, agricultural conservation easements have grown in both use and complexity, as advocates have become more experienced with the tool and have started to protect a multitude of land-use objectives through this mechanism.<sup>211</sup>

### III. A GROWING TENSION?: POINTS OF POTENTIAL AGRICULTURAL AND CONSERVATION CONFLICT

Agricultural conservation easements have been utilized as a way of protecting important resources against insensitive development or outright conversion to nonagricultural use.<sup>212</sup> This tool has been generally viewed as successful; there are now millions of acres of land that have been protected by various federal, state, and local governments as well as by nonprofit land trusts.<sup>213</sup> As noted, these entities often have different reasons or rationales for engaging in this work, and there are growing or perhaps still latent tensions that will likely need to be addressed—preferably before litigation.<sup>214</sup> As our goals change in this arena, the “traditional” role of the agricultural conservation easement will also continue to evolve.<sup>215</sup> To explore areas of growing and, perhaps, potential tension, this Part will first provide the necessary context, and then examine a recent decision that illustrates some of the issues that can be encountered when conservation, cultural, and economic values are placed in relative juxtaposition.

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210. Duane Sand, *Conservation Easements and the Conservation Movement*, 40 J. SOIL & WATER CONSERVATION 337, 337 (1985) (arguing that this tool used by “wildlife managers, land preservationists, water control officers, and recreation planners” should be used to promote good farming practices); see also BREWER *supra* note 203, at 227 (attributing some of the urgency associated to working lands efforts to their comparatively recent entrance to the field).

211. Owley & Rissman, *supra* note 5, at 76–84 (exploring the increasing complexity of this agreements and the evolving nature of these easements based upon organizational learning and the increasing desire to accommodate multiple use objectives).

212. Dan Carey & Pradyumna P. Karan, *From Horse Farms to Wal-Mart: The Citizens' Movement to Protect Farmland in the Central Bluegrass Region of Kentucky*, in LOCAL ENVIRONMENTAL MOVEMENTS 145–64 (2008) (profiling the local effort to protect working lands in an area without extensive regional planning and land-use controls).

213. BYERS & PONTE, *supra* note 4, at 7–13 (profiling the success and growth of private land trusts and conservation easements since the early 1980s). *But see* Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145, 145–46 (2011) (noting that the actual “value of perpetual conservation easements is widely debated” given the challenges associated with the use of this private land-use mechanism).

214. FAIRFAX ET AL., *supra* note 12, at 152–53 (profiling the strong variability in land trusts generally).

215. Hamilton, *supra* note 29 (“Land trusts realize that preserving land for agriculture does not ensure that it will be used to produce food or fiber, and that to do so, land trusts will have to move beyond traditional agricultural conservation easements.”); see also LAND TR. ALLIANCE, 2015 NATIONAL LAND TRUST CENSUS REPORT 19 (2016) (placing the protection of working farms and ranchlands in the top three conservation priorities across all land trusts, with over half of all of these entities working or interested in working in this area).

*A. Defining the Potential Limits of Multifunctionalism*

Within agricultural conservation easements, the primary purpose is to ensure the continued viability of a protected parcel, while a secondary focus is often to protect the correlated conservation and open-space values.<sup>216</sup> Again, while securing agricultural production is often the overarching objective, securing other rural amenities certainly motivates conservation advocates, open-space advocates, and the general public, whose continued support underwrites many of these efforts.<sup>217</sup> These goals can be compatible. For instance, both purposes ostensibly seek to protect a property from development pressure, which might be appreciably better from a conservation standpoint than the more developed alternative.<sup>218</sup> However, there are growing tensions within farmland preservation that have made it more difficult to achieve balance.<sup>219</sup>

A major source of tension is that during the period in which this tool has become more prevalent, the nation's agricultural economy has undergone substantial change.<sup>220</sup> To generalize at an aggregate level, U.S. agriculture has moved in two substantially different—and even potentially competing—directions.<sup>221</sup> On the one hand, conventional agriculture has continued to consolidate, which has resulted in larger operations and fewer farmers as technological advances and the economies of scale associated with commoditized production continue to transform our system of agricultural production.<sup>222</sup> Conventional agricultural production can involve large inputs

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216. BYERS & PONTE, *supra* note 4, at 199; *see also* Dan Hellerstein & Cindy Nickerson, *Farmland Protection Programs: What Does the Public Want?*, AGRIC. OUTLOOK, May 2002, at 27, 27–28 (placing this agricultural viability focus within a larger context of public demand for rural amenities).

217. AM. FARMLAND TR., *supra* note 3, at 92 (noting that “[t]hrough environmental, cultural and scenic qualities of farms are not necessarily vital to farm survival, these features are often of foremost importance to the general public that pays for PACE programs”); *see also* U.S. DEP’T OF AGRIC., AER-815, FARMLAND PROTECTION: THE ROLE OF PUBLIC PREFERENCES FOR RURAL AMENITIES 15–17 (2002) (surveying public interest and motivations for funding these efforts).

218. AM. FARMLAND TR., *supra* note 3, at 92; *see also* Judy Anderson & Jerry Cosgrove, *Drafting Conservation Easements for Agriculture*, AGRIC. L. UPDATE, Apr. 2004, at 4–7 (2004) (explaining that “[a] basic tension [within conservation easements] is how to balance the inevitable trade-off between economics and the environment” and discussing ways to draft easements to increase flexibility and accommodate competing goals).

219. Anderson & Cosgrove, *supra* note 218, at 4 (profiling the tensions, both express and latent, contained within many multipurpose easements).

220. Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN. ST. ENVTL. L. REV. 175, 175 (2002) (profiling sectoral change); *see also* Sally McMurry, *Preserving Agricultural History Through Land and Buildings*, 90 AGRIC. HIST. 4, 9–20 (profiling the impact of a changing agriculture on the landscape and the field of agricultural history).

221. Shannon L. Ferrell et al., *The Future of Agricultural Law: A Generational Shift*, 18 DRAKE J. AGRIC. L. 107, 112–15 (2013) (profiling this divergence); *see also* Neil D. Hamilton, *Keeping the Farm and Farmer in Food Policy and Law*, 11 J. FOOD L. & POL’Y 9, 11–12 (2015) (profiling both ends of the current production spectrum).

222. PAUL K. CONKIN, A REVOLUTION DOWN ON THE FARM: THE TRANSFORMATION OF AMERICAN AGRICULTURE SINCE 1929, at 123–47 (2008) (discussing the post-WWII industrialization of

and outputs and has the potential to create considerable concentrated environmental impacts and drastic changes in the working landscape.<sup>223</sup> Large, purpose-built structures designed to facilitate concentrated livestock production are potentially economically viable, but this use may not conform to the normative concept of agriculture within both the popular imagination and the minds of conservation-focused funding entities seeking to protect working lands.<sup>224</sup>

On the end of this spectrum lies the movement towards smaller-scale farms focused on more specialized production, or towards meeting the emerging market need for local, organic crops that has rapidly expanded over the past two decades.<sup>225</sup> This newer strand of production activity is more diversified and includes a focus on farm-to-table food systems and on-farm agritourism.<sup>226</sup> While seemingly more benign from an environmental perspective, this trend is not without its own potential impacts on the working landscape.<sup>227</sup> Smaller-scale agriculture often involves more and different types of structures than operations may have traditionally required.<sup>228</sup> For example,

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the agricultural sector); Neil D. Hamilton, *Feeding our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 211–14 (1993); see also Stephanie Tai, *Food Systems Law from Farm to Fork and Beyond*, 45 SETON HALL L. REV. 109, 114–15 (2015) (discussing the integration of traditional agricultural law with the emerging area of food law).

223. Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 602–14 (2010); Linda Breggin & D. Bruce Myers, Jr., *Subsidies with Responsibilities: Placing Stewardship and Disclosure Conditions on Government Payments to Large-Scale Commodity Crop Operations*, 37 HARV. ENVTL. L. REV. 487, 491–506 (2013) (profiling many of the environmental impacts associated with larger scale agricultural options); Linda A. Malone, *Recent Developments Concerning Environmental Law and Agriculture*, 7 DRAKE J. AGRIC. 341 (2002) (same); see also William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213 (2009) (placing these potential impacts within a larger frame).

224. Robert L. Ryan & Amanda J. Walker, *Place Attachment and Landscape Preservation in Rural New England: A Maine Case Study*, 86 LANDSCAPE & URB. PLAN. 141, 144–50 (2006) (studying rural viewsheds and which amenities are valued by local residents). The views, however, of these conservation entities can also be criticized as having not properly accounted for the needs of those living and interacting within the landscape. WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE* 28–29 (3d ed. 1996) (expressing agrarian frustration with conservation organizations failing to account for rural traditions and expectations).

225. Mary Jane Angelo, *Small, Slow, and Local: Essays on Building a More Sustainable and Local Food System*, 12 VT. J. ENVTL. L. 353, 354–56 (2011) (charting the shifts within the overall food economy/movement).

226. Hamilton, *supra* note 14, at 192–97.

227. See, e.g., Jane Black, *The Churning Point: A Farm Debate in Baltimore County*, WASH. POST (Oct. 1, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/30/AR2008093000487.html> (profiling a dispute between an agricultural property owner's desire to install a creamery on protected acreage and those concerned about landscape/viewshed impacts).

228. Patricia E. Salkin & Amy Lavine, *Regional Foodsheds: Are Our Local Zoning and Land Use Regulations Healthy?*, 22 FORDHAM ENVTL. L. REV. 599, 626 (2011) (noting the disconnect between zoning and the need to accommodate the “new” agriculture). Relatedly, as urban agriculture continues to grow and expand, a similar issue is being faced in these communities as well. See generally Jamie Bouvier, *How Cities Are Responding to the Urban Agriculture Movement with Micro-Livestock Ordinances*, 47 URB. LAW. 85 (2015) (addressing this issue from the ordinance and local land-use

processing food or fiber on location may be part of the operation, and it may also be desirable to have retail space to promote the sale of the farm products and to facilitate direct marketing or agritourism.<sup>229</sup> This form of agriculture, while often smaller in scale and “local” in scope or aspect, can also have significant impacts on working lands that are important to consider as this movement continues to expand.<sup>230</sup>

The divergence between conventional and smaller-scale, localized agricultural forms is one that some farmland protection advocates have tracked and have actively worked to recognize, address, and, particularly in the latter case, align their practices to accommodate and affirmatively support.<sup>231</sup> As noted, both of these strands within contemporary agriculture present similar but materially different potential concerns from a resource-protection perspective. Conventional agricultural enterprises may require infrastructure that exceeds what would ideally be included within the rural landscape, at least from the perspective of some open-space advocates.<sup>232</sup> This form of agriculture may also have substantial environmental impacts, which the easement may or may not attempt to address.<sup>233</sup> Similarly, the smaller-scale, locally focused enterprises may require parking, retail and event space, and other associated infrastructure in order to allow for these properties to cater to their market segments.<sup>234</sup> Thus, both of these agricultural forms can interfere with the holder’s intent and present challenges to the open-space or conservation amenities that are targeted for protection.<sup>235</sup>

#### B. Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.

For a representative example of how this form of conflict between competing economic and noneconomic rural amenities plays out, *Wetlands*

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perspective); Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231 (2012).

229. See, e.g., *Forster v. Town of Henniker*, 118 A.3d 1016 (N.H. 2015) (upholding zoning board’s decision that a landowner’s decision to start a wedding venue on her tree farm would require approval as it was not “agriculture” as defined under the town’s right to farm ordinance).

230. Salkin & Lavine, *supra* note 228, at 626.

231. Hamilton, *supra* note 29 (discussing the PCC Farmland Trust’s focus on organic production as being driven by the concerns of the local community).

232. Gentry, *supra* note 162, at 16 (providing as an example, within the amendment context, of a farm potentially outgrowing its permitted infrastructure and desiring further expansion within a protected footprint).

233. See, e.g., Ristino & Steier, *supra* note 69, at 63–79 (providing overview of the state of conventional agriculture).

234. Richardson, *supra* note 26, at 820–21 (discussing some potential future issues in this arena at the intersection of conservation easements and sustainable agriculture).

235. Both forms of agriculture certainly have presented challenges to either nuisance or zoning regulations at the local level. See Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 713–18 (2013) (providing an overview of how state right to farm legislation has attempted to address or intervene in this conflict).



*America Trust, Inc. v. White Cloud Nine Ventures, L.P.* is instructive.<sup>236</sup> *Wetlands America Trust* involves an easement protecting working land in rural Virginia.<sup>237</sup> In 2001, the property's owner conveyed a conservation easement protecting over 400 acres to the Wetlands America Trust (WAT), a subsidiary of Ducks Unlimited, the prominent national nonprofit conservation organization.<sup>238</sup> This easement was intended to protect the property's general agricultural setting as well as the significant conservation values associated with its open-space and wildlife-habitat characteristics.<sup>239</sup> Subdivision was allowed under the easement, and soon after conveying the easement, the owner sold off about half of his acreage to a neighboring landowner, White Cloud Nine Ventures, L.P. ("White Cloud"), which intended to rent the land to Chrysalis Vineyards LLP ("Chrysalis"), a vineyard operator on the landowner's adjacent property.<sup>240</sup> After the lease was signed, Chrysalis began preparing to use the protected land for expanded vineyard use, as pasture for cattle and for raising wheat.<sup>241</sup> In addition, Chrysalis built a large structure for use as a creamery and bakery, for barrel storage for its vineyards (both on and off the parcel), and as a tasting room.<sup>242</sup> In addition, Chrysalis also proposed to build additional roads, a parking lot, and a bridge to provide greater commercial access to those visiting the vineyard and farms.<sup>243</sup> In short, Chrysalis's operations, while remaining agricultural, drastically changed in both their nature and relative degree of intensity, which presented substantial potential for adversely impacting the property's conservation values.<sup>244</sup>

### 1. *The Circuit Court Ruling*

After attempting to resolve its issues with the owner, WAT brought an enforcement action and also requested injunctive relief against further

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236. *Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 88 Va. Cir. 341, 356 (2014) (discussing the disconnect between the donor and the holder's vision for the property's future).

237. Wetlands America Trust is a land trust affiliated with Ducks Unlimited, a 501(c)(3) nonprofit organization, and it operates and has responsibility for the organization's endowment and real estate holdings. See *Wetlands American Trust*, DUCKS UNLIMITED, <http://www.ducks.org/Get-Involved/Major-Sponsors/Wetlands-America-Trust> (last visited Aug. 9, 2017). Ducks Unlimited, formed in 1937, has long played a leadership role in advocating for the protection of wetlands. See Robert E. Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, 34 NAT. RESOURCES J. 781, 784–85 (1994) (profiling the organization's role in the conservation movement).

238. *Wetlands Am. Tr.*, 88 Va. Cir. at 341–42.

239. *Id.* at 348 (citing the purpose of the easement as "to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition, as evidenced by [the baseline documentation], for conservation purposes as well as permitted agricultural pursuits, and to prevent any use of the Protected Property which will impair significantly or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem ('Purpose')").

240. *Id.* at 341–44.

241. *Id.* at 349–50.

242. *Id.*

243. *Id.* at 342, 349–50.

244. *Id.* at 349–50.

construction—in all alleging fourteen violations of the easement’s terms.<sup>245</sup> As holder, WAT was specifically concerned about the size and scale of the proposed structures and the “commercial” uses that it viewed as violating the easement.<sup>246</sup> Two of the alleged violations merit further exploration: (1) farm buildings and (2) the impact on conservation values more generally.

*a. Farm Buildings*

Section 3.3(A)(iv) of the WAT easement provided that “[n]o permanent or temporary . . . structure shall be built . . . [on] the Protected Property other than . . . farm buildings or structures.”<sup>247</sup> The term, “farm buildings or structures,” however, was not defined, which led to conflict over the agricultural character of the new structure. It was undisputed that this new building was substantial.<sup>248</sup> According to Chrysalis,

[t]he farm building . . . include[d] a tasting room for [on-farm] products, along with a retail component for the sale of these products. The retail component may include souvenirs and goods not produced on the farm . . . [and] may also host events, such as music festivals and weddings . . .<sup>249</sup>

WAT argued that the proposed use did not comply with the easement, as, in its view, a farm building needs to directly relate to “the growing of crops or raising of animals.”<sup>250</sup>

The circuit court originally agreed with WAT that the farm building language was unambiguous and did not cover this new structure, but revisited its earlier ruling and concluded that, when read in whole with the rest of the easement and applicable state law, this term was not clearly defined and was, in fact, ambiguous.<sup>251</sup> Given the broad definition, and the existence of a nexus between the proposed construction and agricultural activities generally, the court determined that the construction of this new structure was not prohibited by the easement.<sup>252</sup>

*b. The Impact on Conservation Values Generally*

Section 3.19 of the WAT easement stated:

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245. *Id.* at 342.

246. *Id.* at 350–51.

247. *Id.* at 349. Relatedly, the easement also expressly allowed industrial and commercial agricultural services—which were also not defined—and noted that “changes in agricultural technologies, including accepted farm and forest management practices may result in an evolution of agricultural activities on the Protected Property.” *Id.* at 355.

248. *See id.* at 342.

249. *Id.* at 350.

250. *Id.* The deposition testimony from Ducks Unlimited staff demonstrated the difficulty of interpreting and enforcing the term “farm building” as drafted. *Id.* at 352–53.

251. *Id.* at 353.

252. *Id.* at 353–58. The court, however, did not conclude that this was a limitless restriction. Some activities—even those that are not directly agricultural but could encourage on-farm sales—would not be allowed under the terms of the easement (for example, a t-shirt or corkscrew).

The parties recognize that this Easement cannot address every circumstance that may arise in the future. The parties agree upon the Purpose of this Easement as [sic] forth in Section 1.1: to retain the Protected Property *in perpetuity* predominately in its natural, scenic and open condition as evidenced by [the baseline documentation] for conservation purposes as well as permitted agricultural pursuits to prevent any use of the Protected Property which will significantly impair or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystems.<sup>253</sup>

WAT argued that this language prohibited Chrysalis's expansion and supported its claim with testimony from a field biologist regarding the environmental impacts associated with the expansion.<sup>254</sup> The court, however, noted that many of the activities alleged to impact the conservation values were expressly authorized elsewhere within the terms of the easement and that, to the extent that the landowner was exercising a permitted use, this was not barred, as some degree of environmental impact was expressly built into the easement.<sup>255</sup>

In the trial court's view, the WAT easement, when read in its totality, generally contemplated that agricultural production would be in a somewhat superior, although not completely predominant, position to the conservation objectives that the easement was also designed to secure.<sup>256</sup> The court denied WAT's request for declaratory and injunctive relief, thus allowing the expanded activity to continue.<sup>257</sup>

## 2. *The Virginia Supreme Court Decision*

This decision drew a fair amount of attention within the preservation and conservation community—not with regard to the interpretation of the easement language itself necessarily, but with regard to the trial court's determination that conservation easements should be interpreted the same as other easements (against the party seeking enforcement and in favor of the open and free use of land).<sup>258</sup> Several well-known nonprofit organizations within the land trust and

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253. *Id.* at 355.

254. *Id.* at 367–68.

255. *Id.* at 368.

256. *Id.* at 373.

257. An overarching issue in the case was how to interpret conservation easements under Virginia law. The trial court ruled against the Wetlands America Trust, holding that common law principles requiring construing restrictive covenants strictly against the party weighed against the land trust. In WAT's view, the enabling legislation authorizing conservation easements modified the common law and any ambiguities should be weighed in favor of conservation as an important state purpose. *See id.* at 375.

258. *See, e.g.*, Brief of the Nature Conservancy et al. as Amici Curiae in Support of Appellant at 9–10, *Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153 (2016) (No. 141577), 2015 WL 10478422; *see also* Nancy A. McLaughlin, *Interpreting Conservation Easements*, PROB. & PROP., Mar.–Apr. 2015, at 30, 30–35 (discussing the issues associated with interpreting conservation easements under “inapt” laws governing other forms of real property).

historic preservation community filed an amicus brief challenging this conclusion, arguing that Virginia's enabling act modified common law principles and that these agreements should be interpreted in light of the important public values that were protected by this agreement, not the open and free use of land.<sup>259</sup> On appeal, however, the trial court's decision was affirmed in its entirety, thereby allowing the expanded use to continue.<sup>260</sup>

Some of the merits of this decision can be debated, but the case points out in clear relief the issues that can be presented by agricultural conservation easements and the disputes that can subsequently arise. What type of agricultural use was WAT actually seeking to preserve? What environmental and conservation benefits was the easement also attempting to protect? Was there a way to better align and reconcile the conservation and habitat features with the agricultural character and economic viability of this property? At the end of the day, *Wetlands America Trust* perhaps serves as a reminder of the potential fragility of some multifunctional easements and the need to carefully consider what goals an organization is seeking to protect and advance.

#### IV. CONSERVATION AND ENVIRONMENTAL CONSIDERATIONS OF AGRICULTURAL CONSERVATION EASEMENTS

As demonstrated by the *Wetlands America Trust* decision, conflicts can and do arise between the various goals and objectives advanced by agricultural conservation easements. To the extent that an organization is seeking to better protect its conservation priorities, there are certainly methods for doing this. To explore these potential options, this Part will first evaluate and attempt to roughly categorize the different possible protective strategies as a lens for better understanding which and how conservation objectives are typically incorporated within these efforts. This Part explores several strategies for more clear and effective recognition of these important features within this overarching, multifunctional framework.

##### *A. Understanding the Conservation Tiers within Farmland Preservation Efforts*

While agricultural production and rural amenities are quite frequently aligned, there remains the strong possibility for conflict—particularly between conservation and economic considerations. There are a number of ways to address this tension. This analysis attempts to place these efforts on a relative spectrum (essentially three interrelated and progressively more protective tiers)

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259. Brief of the Nature Conservancy et al. as Amici Curiae in Support of Appellant, *supra* note 258, at 10–21.

260. *Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 175 (2016).

to provide a working framework for considering what these agreements can actually accomplish from a resource management perspective.<sup>261</sup>

### 1. Restricting Nonagricultural Development

The first tier constitutes a relatively permissive approach to the protection of agricultural land use.<sup>262</sup> Under this approach, conservation gains are protected through the agreement's restrictions against nonagricultural development.<sup>263</sup> Here, the theory is that the protected agricultural use will be better than the developed alternative, and therefore, some conservation value will be obtained by potentially avoiding habitat fragmentation and more urban-type development.<sup>264</sup> The relatively passive protection of the conservation attributes indicates that the easement has been negotiated to protect the continued viability of the agricultural operation, and that the property owner will retain considerable discretion with regard to on-the-ground operations.<sup>265</sup>

This type of approach is capable of securing important conservation objectives.<sup>266</sup> The benefit, however, is potentially limited by the fact that there can be considerable future agriculture-based development or intensification in agricultural activity or practices.<sup>267</sup> As one commentator noted:

The environmentalist critique . . . is strangely absent from the preservationist literature, except for the questionable insinuation that the

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261. This approach is similar to that utilized within a recent study of Canadian conservation easements, but is altered to reflect this Article's exclusive focus on working lands easements. See Kimberly Good & Sue Michalsky, *Agriculture and Agri-Food Canada, Summary of Canadian Experience with Conservation Easements and Their Potential Applications to Agri-Environmental Policy*, in A CHANGING LANDSCAPE: THE CONSERVATION EASEMENT READER 486, 498 (2016). It should also be noted that this framework is provided purely for discussion purposes as far as considering what the role of these agreements is with regard to obtaining conservation benefits. It is unlikely that an easement could be easily classified entirely into any of the three categories and a close review of the easement's language and purposes will be required to understand its actual effects on the protected landscape. Additionally, the structure of the financial model will impact the protective scope, as can evolutionary development and learning within the holder's practice. See Rissman, *supra* note 149, at 170–72 (charting this process).

262. See, e.g., Peggy Kirk Hall, *Agricultural Conservation Easements Help Protect Farmland*, OHIO ST. BAR ASS'N (Nov. 20, 2015), <https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-267.aspx> (noting the general flexibility of permitted agricultural practices within agricultural easements in Ohio as long as those practices fall within the state law definition of "agriculture").

263. BYERS & PONTE, *supra* note 4, at 199.

264. Adriana Sulak et al., *A Strategy for Oak Woodland Conservation: The Conservation Easement in California*, 37 *ADVANCES IN GEOECOLOGY* 353, 357–60 (2004) (discussing the use of agricultural conservation easements by the Nature Conservancy and others to protect oak woodlands with this tool).

265. AM. FARMLAND TR., *supra* note 3, at 96–97 (explaining that "[m]any programs permit commercial development related to the farming operation on protected land").

266. See, e.g., MD. AGRIC. LAND PRES. FOUND., FY 2015 ANNUAL REPORT 4–5 (profiling a protected farm protected by the state's program).

267. BYERS & PONTE, *supra* note 4, at 203 (noting that most easements do not restrict agricultural practices given the need for flexibility and the difficulty of enforcement).

continued existence of farmland is an invariable good for nature. . . . One would certainly not accuse the farmland preservation movement of condoning an environmentally degrading agriculture, but given that the vast majority of farming is in the conventional mode, preservationists cannot tackle the environmental question without undermining their own platform.<sup>268</sup>

While this criticism may seem harsh, it forces one to consider farmland preservation from the perspective of what objectives are actually being pursued or protected. Understanding what is—and what is not—being protected enables more meaningful assessment of the relative conservation benefits of such initiatives. This generally permissive approach may make sense with regard to a large working ranch where more intensive forms of agricultural activity are unlikely, but may make less sense for a small farm in the New England countryside where the organization is trying to prioritize rural amenity values.<sup>269</sup> A community's expectations can also factor into which approach will be pursued.<sup>270</sup> From a farmer's perspective, however, a strong case can be made for this type of arrangement, particularly given the need to allow for sufficient flexibility for addressing future business needs.<sup>271</sup> Protecting a parcel in such a fashion essentially gives a relative priority to economic and food security objectives. It may be the most effective, pragmatic, and tailored approach for a given project, land trust, geographic area, or even type of working landscape.

## 2. *Preserving the Relative Functional Status Quo*

A second layer of effort functions to extend the restrictive scope to the property's agricultural infrastructure. This layer does more than restrict nonagricultural development; it also restricts future agricultural-based change to roughly its current configuration, or at least roughly in keeping with the landscape as it currently appears. The theory is that as there is the potential for additional agricultural-based development that could be incompatible with the general goals of the project, and while some future change is acceptable, this would ideally be cabined within acceptable standard deviations.<sup>272</sup> For example, additional agricultural structures might be confined to a designated area, limited with regard to size or massing, or areas could be left outside the

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268. Mariola, *supra* note 18, at 218–19.

269. BYERS & PONTE, *supra* note 4, at 199–200 (profiling the regional differences in these efforts).

270. Hamilton, *supra* note 29, at 9 (discussing this interaction).

271. See, e.g., COLO. CATTLEMAN'S AGRIC. LAND TR., CONSERVATION EASEMENTS FREQUENTLY ASKED QUESTIONS, <https://ccalt.org/assets/files/FAQs.pdf> (last visited Aug. 9, 2017) (noting the flexibility within the organization's easements and that “the only rights transferred are often rights that the property owner had no intention on exercising, such as the right to build a subdivision or shopping mall”).

272. AM. FARMLAND TR., *supra* note 3, at 97–98.

easement entirely to accommodate this future development.<sup>273</sup> Additionally, the easement could set outer bounds on impervious surfaces, subdivision, or any number of quantitative restrictions on future expanded agricultural production to strike an appropriate balance between the competing purposes being advanced by the agreement.<sup>274</sup>

While this type of approach is still relatively permissive, it serves to eliminate some of the downside risk that the future of the parcel may change in ways that are not anticipated by either the land trust or the relevant governmental agency.<sup>275</sup> To that extent, this form is certainly more weighed towards securing many of the conservation values associated with the working lands, but it still lacks any affirmative requirements regarding incorporation of environmentally sensitive practices. To think of this another way, this approach is focused more on structural land use rather than on operational practice, and it still allows wide discretion for the landowner to pursue the production of food and fiber within the development limitations agreed upon by the parties.<sup>276</sup>

Generally, agricultural conservation easements will fall somewhere within this portion of the protective spectrum. Again, agricultural practices change, and there may be need for additional structures to meet changing agricultural demands in order to keep the farm viable over the long term. An easement that is unduly restrictive can be difficult to overcome as securing approval, to the extent that it could be allowed, is not a certainty from the farmer's perspective, and amendment raises a veritable host of complications, both practical and legal.<sup>277</sup> On the other hand, as *Wetlands America Trust* demonstrates, a lack of specificity or precision in this regard can lead to unintended or undesired land-use conversion, so attempts are made to cabin this discretion. Balancing this fundamental need for flexibility with the desire to protect the environmental benefits associated with a parcel is the real challenge; thus, the majority of the effort happens within the context of setting parameters on what could be called agricultural-related development, or, for the purposes of this analytical framework, second-tier conservation efforts.

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273. This needs to be done with caution, however, as separating on-farm infrastructure from the property could have unintended consequences for its future viability. *See, e.g.,* Anderson & Cosgrove, *supra* note 218, at 4 (discussing the need for realistic building envelopes and the importance of including space for future expansion or operational change).

274. BYERS & PONTE, *supra* note 4, at 202–03.

275. AM. FARMLAND TR., *supra* note 3, at 97 (noting that “[i]f commercial uses are permitted on protected land, programs must be careful that the location, size and appearance of agricultural structures do not undermine public support of the PACE program by marring the beauty of the countryside or posing a nuisance to neighbors” and noting the harm caused to the public support for Connecticut’s PACE program by the construction of a highly visible poultry house on a protected property).

276. Thomas L. Daniels, *The Purchase of Development Rights: Preserving Agricultural Land and Open Space*, 57 J. AM. PLAN. ASS’N 421, 422 (1991) (“Normal agricultural practices are permitted if they comply with state and federal statutes.”).

277. Gentry, *supra* note 162, at 1388 (noting the tension between the IRC and evolving agricultural practices).

### 3. Addressing Additional Conservation and Environmental Objectives

A potential third tier extends an easement's protection to the actual habitat and environmental values contained within a working landscape—or moving beyond more structural/configuration attributes to address actual farming practices on the ground. The goal of this type of effort is to obtain conservation protection beyond the status quo and to address management decisions in a more meaningful way.<sup>278</sup> This level of protection can be accomplished through a variety of mechanisms, but usually operates through either a conservation plan or performance-based requirements, which will be explored in more depth below.<sup>279</sup>

Addressing the environmental performance of working lands is a difficult issue given the degree of intrusion that this requires, and, as always, the challenge of addressing the unknown future. This approach requires close consideration of realities on the ground and sufficient staff expertise to craft, monitor, and enforce the terms of these restrictions.<sup>280</sup> When one considers the degree of investment being made for acquiring this protection, however, a desirable option may be to increase the conservation performance of these lands.<sup>281</sup>

Thinking of agricultural conservation easement provisions through these various protective lenses provides a framework for considering the available protective options utilized in the field. This approach also provides some context for the current manner in which agricultural conservation easements typically work to protect the landscape. Generally, these efforts are focused more on protecting the undeveloped status quo (restricting either traditional or agricultural-based development) rather than addressing the actual conservation performance of these working lands. This focus directly relates to the types of conservation gains that are or are not achieved through these initiatives.

#### B. Surveying Options for Addressing Conservation Concerns within Agricultural Conservation Easements

If the goal of an easement holder is to ensure the protection of significant conservation and environmental values, there are a few potential strategies that can be employed. These options, ranging from adjusting organizational and

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278. See, e.g., HANNAH PHILLIPS, RAPID ECOLOGICAL ASSESSMENT OF THE NEWBURY TOWN FOREST, WEST NEWBURY, VT FOR THE VERMONT LAND TRUST 8–15 (2016), <https://www.vt.org/wp-content/uploads/2017/07/T-TuckerMountain.pdf> (last visited Aug. 9, 2017) (highlighting the ecological features of the land and using that information to make recommendations for management of the site).

279. Adena R. Rissman et al., *Conservation Easements: Biodiversity Protection and Private Use*, 21 CONSERVATION BIOLOGY 709, 717 (2007).

280. Rissman, *supra* note 149, at 174.

281. Ruhl, *supra* note 4, at 440–43 (placing possible options for addressing ecosystems services within a spectrum of operations—ranging from the status quo to conservation to nonagricultural use as open space and the relative costs/benefits).



ranking-based priorities to including affirmative management requirements, will be discussed in turn.

### 1. Clarifying Organizational Priorities and Ranking

An organization can adjust its selection priorities to more meaningfully target multifunctional performance within the working landscape.<sup>282</sup> Most straightforwardly, consideration of whether to evaluate a parcel's conservation attributes within an overall ranking process could be a potential first step. For instance, in Pennsylvania, additional points are awarded based upon a farmer's environmental performance.<sup>283</sup> California considers "the extent to which each proposal meets 'multiple natural resource conservation objectives, including, but not limited to, wetland protection, wildlife habitat conservation and scenic open-space preservation.'"<sup>284</sup> At the national level, under NRCS's ACEP-ALE program, the national ranking criteria do not directly include consideration of a parcel's multifunctional benefits, but state ranking factors allow consideration of a wide variety of conservation attributes, allowing them be targeted to specific, state-level resource concerns.<sup>285</sup> As program resources become increasingly scarce, agencies and nonprofit actors will likely need to improve their targeting to obtain the greatest benefit for their programs, including considering a parcel's relative multifunctional attributes.<sup>286</sup>

### 2. Avoiding Preemption of Conservation Practices

Another factor is including language to avoid potential preemption of future conservation practices or efforts. If the language in an easement is too strongly in favor of ongoing agricultural practice, this could conceivably preempt or bar some forms of conservation activities in the future. Given the strong interplay between conservation and agricultural production, this may seem unlikely, but express language addressing the nature of this interrelationship might help to address future arguments. This is particularly true for structural conservation practices related to limited land retirement. As it is already recognized that there is a need for flexibility for future changes in

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282. AM. FARMLAND TR., *supra* note 3, at 90–92 ("All other factors being equal, superior natural or cultural resources on a farm, such as wetlands or a historic cemetery (which an easement could protect), could make the difference in acquisition priority."); *see also* BYERS & PONTE, *supra* note 4, at 200–01 (noting the American Farmland Trust's evaluative criteria, which includes "environmental, cultural, or scenic qualities" and that "[i]f a property with agricultural significance has multiple conservation values, it is a stronger candidate for protection.").

283. AM. FARMLAND TR., *supra* note 3, at 95–96 (profiling state ranking criteria generally); *see also* *Easement Purchase*, PA DEP'T OF AGRIC., <http://www.agriculture.pa.gov/Encourage/Farmland/Easement/Pages/default.aspx> (last visited Aug. 9, 2017).

284. AM. FARMLAND TR., *supra* note 3, at 92.

285. NAT'L RES. CONSERVATION SERV., 440 CONSERVATION PROGRAMS MANUAL § 528.41 (2015) (providing additional information about NRCS's ranking process for ACEP-ALE applications).

286. AM. FARMLAND TRUST, *supra* note 3, at 90–94.

agricultural practice, perhaps there is a similar need with regard to changing environmental values and practices.

### 3. *Defining the Conservation Values*

Defining the purposes for which land is being protected is a critical consideration within the drafting process. Many, if not most, agricultural conservation easements that are conveyed nationally are motivated or at least shaped in significant part by the I.R.C. requirements.<sup>287</sup> As discussed above, under the I.R.C., there is not a specific conservation value that outright addresses the preservation of agricultural land, which requires a donation to qualify under one of the four defined categories.<sup>288</sup> It is not uncommon for easements to list multiple purposes and objectives that they are seeking to protect. Given the multifunctionality of agricultural conservation easements, this is perhaps not a surprise, but it can lead to issues of interpretation and conflict as this type of easement “will [often] use a ‘shotgun’ approach that lists ‘open space’, ‘natural’, ‘scenic’ and ‘agricultural’ values of the property as multiple purposes. This approach presumes that all of the above values are somehow compatible and reconcilable” when it is increasingly clear that they are not.<sup>289</sup>

To address this issue, additional attention should be given within the “purposes” section to better align, balance, and prioritize between the various agricultural production and conservation values being advanced.<sup>290</sup> If, as is commonly the case, the project is tailored to meet a clearly delineated governmental purpose, the purposes section could be tiered to the state or local policy that best supports multifunctional agriculture. In turn, this ensures that the purposes for which the easement has been conveyed are being met.<sup>291</sup> Defining the purposes in such a way can ensure that these values remain appropriately protected.

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287. Janet E. Milne, *Watersheds: Runoff from the Tax Code*, 34 VT. L. REV. 883, 888–89 (2010) (profiling the interplay between the I.R.C. conservation purposes and management of working lands for tax incentivized easements); see also Richardson, *supra* note 26, at 813–14 (discussing this interplay and its effects on landowners).

288. Richardson, *supra* note 165, at 450–51.

289. Anderson & Cosgrove, *supra* note 218, at 5.

290. Rissman, *supra* note 213, at 153–54 (noting the inclusion of multiple purposes and that “[f]ew conservation easements with multiple purposes indicate a prioritization among purposes”); see also Jesse J. Richardson, Jr., *Conservation Easements and Adaptive Management*, SEA GRANT L. & POL’Y J., Summer 2010, at 31, 42 (noting that “[i]f more than one purpose supports the easement, each purpose should be stated and a standard for resolving conflict between the purposes should be included”).

291. Milne, *supra* note 287, at 888–89; see also Owley & Rissman, *supra* note 5, at 81 (noting the issues in balancing multiple purposes).

#### 4. Incorporating Management Plans

One of the fundamental tensions within these agreements is the balance between the need for operational flexibility to address future conditions and conservation objectives. Some organizations attempt to bridge this gap through the use of a conservation or management plan.<sup>292</sup> “Because easement holders typically avoid prescribing management standards in the agricultural easement document, they sometimes use conservation plans for this purpose.”<sup>293</sup> In such cases, the language of the easement requires the parties to create a management plan, and once implemented, the plan sets conditions or proscriptions and requires a farmer to comply with its terms.<sup>294</sup> In short, the management plan allows for some degree of ongoing flexibility, as it lives outside the perpetual terms of the easement and can be adjusted to fit changed conditions.<sup>295</sup>

Within the agricultural context, for easements funded under the Farm Bill, producers have long been required to have a conservation plan to address highly erodible lands and wetlands compliance, and this requirement has recently been expanded under the 2014 Farm Bill to require the inclusion of a more comprehensive ALE plan.<sup>296</sup> Many holders have used this plan to address a range of conservation objectives, including the “protection of soils by minimizing erosion; protection of wetlands, riparian areas, and water quality; and encouragement of grazing practices that maintain plant diversity and health.”<sup>297</sup>

While management plans are a way to incorporate additional consideration of environmental concerns into the easement, there are limits to the effectiveness of this approach.<sup>298</sup> After the initial plan has been established, additional management restrictions may require consent by the property

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292. Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 *LAW & CONTEMP. PROBS.* 199, 225–26 (2011) (discussing the move towards planning as way to address changing conditions on the ground, but also noting the drawbacks to this approach from the land trust perspective); see also Richardson, *supra* note 290, at 43–44 (discussing the ability of management plans to potentially address evolving performance standards external to the easement).

293. BYERS & PONTE, *supra* note 4, at 203–04.

294. Johnson, *supra* note 64, at 47–48 (discussing the Marin Agricultural Land Trust’s use of conservation plans for its protected lands). This type of planning requirement is fairly typical with working land easements, for example, within the forestry context. See Jessica Owley & Stephen J. Tulowiecki, *Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program*, 33 *PUB. LAND & RESOURCES L. REV.* 47, 62 (2012) (discussing the role of planning within working forest easements).

295. Some degree of flexibility can also be given through discretionary consent language for certain activities/uses, which have their own potential challenges. See Rissman, *supra* note 213, at 156.

296. AM. FARMLAND TR., *supra* note 3, at 97 (profiling the role of conservation plans generally within Farm Bill-funded easements); see Agricultural Act of 2014 § 1265B(b)(4)(C)(iv); 7 C.F.R. § 1468.26(a); NAT. RES. CONSERVATION SERV., 440 CONSERVATION PROGRAMS MANUAL § 528.63 (providing the statutory requirement and implementation of the agricultural conservation plan requirement). This plan is not required to be to the level of a Resource Management System (RMS) plan, but doing such a comprehensive effort can result in more favorable ranking.

297. BYERS & PONTE, *supra* note 4, at 204.

298. Rissman, *supra* note 149, at 171–72.

owner.<sup>299</sup> Despite these significant limitations, a conservation plan can, at the very least, focus additional attention on the environmental baseline of the protected property and provide a platform for ongoing discussion and for improving conservation practice more generally.

##### 5. *Addressing On-Farm Management Practices*

Beyond incorporating planning requirements, many holders make a limited effort to address on-farm management.<sup>300</sup> Generally, these easements reference the continuing use of best management practices through the use of a standard “that the agricultural community trusts,” which is likely tiered to NRCS or state-adopted practice standards.<sup>301</sup> Other holders are “silent about standards for farming practices, relying on other ongoing farm/conservation management programs,” such as federal conservation compliance requirements, which address a limited and defined set of activities relating to highly erodible soils and wetlands as a condition of continued eligibility for program benefits.<sup>302</sup> Although an outlier, PCC Farmland Trust actually “requires certified organic farming practices on every parcel of land on which it acquires a conservation easement.”<sup>303</sup> Drafting affirmative, management-based restrictions can be an insurmountable challenge, given the uncertainty regarding how to meet management objectives over the life of the easement. There must also be sufficient staff expertise to be able to establish and enforce these restrictions, as well as a willingness to enforce any practice-based requirements from an ongoing stewardship perspective.<sup>304</sup> To summarize, while some land trusts do attempt to place a limited emphasis on farm management, this is typically done through reference to ongoing third party standards or best management practices, or by tiering to an external conservation plan as discussed above. This measured approach, despite also having challenges, goes the furthest in its attempt to address environmental

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299. BYERS & PONTE, *supra* note 4, at 78; *see also* Rissman, *supra* note 149, at 172 (profiling the Nature Conservancy’s experience within management plans and some of the benefits and very real limitations associated with this approach).

300. Rissman, *supra* note 149, at 172 (exploring the Nature Conservancy’s use of management provisions within their easement efforts).

301. Anderson & Cosgrove, *supra* note 218, at 4 (profiling normative land trust approaches to addressing farming practices and noting that “[b]y utilizing state-defined or federal standards, the easement holder may avoid difficult discussions with farmers or ranchers about ‘who knows best’ how to farm”); *see also* Milne, *supra* note 287, at 889 (discussing the management standards utilized by the Vermont Land Trust).

302. Anderson & Cosgrove, *supra* note 218, at 4. *But see* Ristino & Steier, *supra* note 69, at 110 (discussing the limits of conservation compliance as an enforcement vehicle).

303. Hamilton, *supra* note 29 (discussing this land trust’s operations within the context of its overall mission) (“In addition to requiring only certified organic agriculture on its protected properties, the land trust prohibits use of the land for growing fuel, sod or nursery plants and prohibits use of the land as dog kennels, feed lots or equestrian estates in order to affirm working (commercial) food, forage and fiber production.”).

304. Rissman, *supra* note 149, at 174.

performance of working farmland, and it may become increasingly important within farmland preservation efforts as organizational and community goals continue to evolve.

#### 6. *Creating Areas of Heightened Conservation Concern*

As discussed, conservationists have increasingly focused on the environmental protections associated with working lands. A primary way that these concerns are typically addressed is through provisions attempting to protect the working status quo. These restrictions may “range from limits on large structures and impervious surface areas to no buildings or structures to limited cultivation to no cultivation to active management for a particular resource management purpose (like maintenance of grass buffer strips or annual mowing of grassland bird habitat or burning for prairie grasses).”<sup>305</sup> Beyond these use and form restrictions, another option within multipurpose easements is to establish zones or areas within the protected land to vary the level of restrictions based upon an area’s identifiable environmental attributes.<sup>306</sup> “Because the other natural resources issues are usually only relevant to, or located on, a part of the entire property that is protected, many easement drafters will create specific ‘resource protection areas’ that outline the particular resource . . . and impose additional use restrictions . . . .”<sup>307</sup> When the conservation objectives are specific, rather than diffuse across an entire farm, a balance of productivity and conservation can be struck. While it may seem unlikely that a farmer might agree to this higher level of conservation protection or restriction, it should not be forgotten that many farmers are conservation-minded, and specific conservation commitments might fit well within their overall management philosophy. Additionally,

the type and degree of restrictions imposed by a PACE easement are likely to be reflected in the purchase price. Any permitted nonfarm development should reduce the price paid for the easement, while limitations on agricultural use and permission for public access can be expected to increase the purchase price.<sup>308</sup>

In short, the compensation for these additional requirements may make it financially palatable—or even preferable—as, again, this is almost always a voluntary, at least partially market-driven transaction.

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305. Anderson & Cosgrove, *supra* note 218, at 7; *see also* Richardson, *supra* note 290, at 42–43 (profiling typical restrictions contained within agricultural conservation easements).

306. Even this is not a simple task as excluding structures could render the property less viable in the future if the unprotected property is conveyed. *See, e.g.*, N.Y. STATE DEP’T OF AG. & MARKETS, DEVELOPING A LAND PLAN FOR AN AGRICULTURAL CONSERVATION EASEMENT 2 (2008) (discussing this balance).

307. Anderson & Cosgrove, *supra* note 218, at 7.

308. AM. FARMLAND TR., *supra* note 3, at 98.

As evidenced by these varied drafting strategies, there are certainly a variety of ways that conservation and environmental benefits can be better protected within agricultural conservation easements, and the entities working in this area have experience with these approaches. The use of these strategies, however, is only a partial solution; without targeted attention, important conservation values may continue to be overridden in the interest of operational flexibility. Striking an appropriate balance is necessarily context-, transaction-, area-, and resource-specific, but there should be a balance. Consideration and utilization of these approaches may assist in ensuring this ultimate result.

#### CONCLUSION

Pressure to convert agricultural lands to nonagricultural use is not going to disappear. Advocates should think strategically about how they can best protect working farmland for future generations. As entities working in this area have learned over time, protecting agricultural viability is necessarily a moving target that requires close consideration of the financial and economic realities of farming operations. At the same time, advocates should not lose sight of the environmental and conservation values driving their work.

Appropriately balancing these competing interests is going to be increasingly important, given diminishing resources for agricultural conservation. Although no single solution exists to this challenge, it is essential that easement holders are aware of the conservation consequences that flow from these private agreements. This Article discussed several ways to ensure that conservation and environmental functions are not lost in these agreements. A failure to do so will leave important agricultural lands less protected, and worse off for future generations.