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ON HEDGING

Edward Eigen

*“Riches, like insects, when concealed they lie,
Wait but for wings, and in their season fly.”*

—Alexander Pope, *Of the Use of Riches, An Epistle to the Right Honorable Allen Lord Bathurst*

What debt does the High Line, the endlessly written-about public park built on a (as of this writing) 1.45-mile-long elevated freight viaduct on Manhattan’s West Side, owe to the legacy of enclosure? In a narrow but nonetheless widely expansive historical sense, enclosure refers to the consolidation of common land and open fields for the proprietary benefit of landholders. The attendant realities of dispossession were transfigured in the eighteenth-century concept of the picturesque, with its promotion of an autonomous subject receptive to a multiform experience of a landscape carefully parceled into pictorial foreground and distance. What lies in between? It is not a question of aesthetic conceit; to be considered are hedges, including emergent and abandoned infrastructure and the patterns of interference they produce. The Inclosure (Consolidation) Act of 1801 provided an expedient and cost-effective “mode of proving the several facts,” each and always locally contingent, required by the legislative procedure that was enclosure itself. It called for the “survey, admeasurement, plan, and valuation” of land to be “divided, allotted, and inclosed,” expressed in “acres and decimal parts of an acre, in statute measure.” Surveying the plan, the plot, the ploy of the High Line requires a perspective from a remote orbit and unfiltered attention to whispering satellites that provide earthbound receivers with [their own] terrestrial coordinates. It means to uncover a system of allocation and assignment verging on potential collapse.

Here are the facts as represented by Joshua David and Robert Hammond in *High Line: The Inside Story of New York’s Park in the Sky* (2011), its perfume of self-elation faintly nauseating. Lisa Falcone was scheduled to visit the construction site for the first time in March 2008, even though she and her husband Philip Falcone had already made a “very generous gift” to help build the stairs at Fourteenth Street. Evidently, she was not immediately taken by the site’s unlikely “capacities.” She just walked along, looking around, taking it all in, David notes: “I had the impression she was underwhelmed.” A founder of Friends of the

High Line, David persisted in his effort to cultivate the Falcones. He would never “explicitly beg,” he explains, but Lisa Falcone could “read a kind of pleading in my eyes.”

His efforts were consummated on June 1, 2009, at a gala dinner hosted by Barry Diller and Diane von Furstenberg, one week before the High Line was opened to the public. To comprehend what follows it is useful to recall Lancelot ‘Capability’ Brown’s discourse at Hampton Court on the grading of land as a “grammatical,” indeed a communicative, medium: “Now *there*, said he, pointing his finger, I make a comma, and there pointing to another spot where a more decided turn is proper, I make a colon: at another part (where an interruption is desirable to break the view) a parenthesis—now a full stop, and then I begin another subject.” The evening began “just as we’d planned it,” David writes. He took the microphone and announced the \$10 million challenge grant made by Diller and von Furstenberg. The applause and cheering were thunderous. At this moment Lisa Falcone rose from her seat and stepped forward. She approached David, whispered in his ear, and the microphone passed from his hands to hers. Falcone announced that she and her husband would match the \$10 million challenge. “There was an instant of stunned silence, followed by even more thunderous applause.” *Exeunt*.

A Chronology

In his *Sylva, or A Discourse of Forest-Trees and the Propagation of Timber* (1664), John Evelyn recommended the English Yew for use in hedges, both for its beauty and its offer of “stiff defence.” He insisted, either sincerely or with feigned modesty, that he “may, upon that account, without vanity, be said to have been the first who brought it into fashion.” The current use of “hedge,” to describe an investment instrument that safeguards against potential loss by taking counterbalanced positions, can be traced to the article “Fashion in Forecasting,” written by Alfred Winslow Jones, who in 1949 formed a “hedged fund” to use “speculative techniques for conservative ends.” In many respects the Falcones were typical of the alpha-driven creatures stalked by the Friends of the High Line. Falcone founded Harbinger Capital Partners in 2001 to capitalize on “significant opportunities within the distressed marketplace.” In 2006, he

began to detect signals in the underperformance of his bond holdings in small homebuilding suppliers. Despite rising home prices, builders were reporting decreased orders and weak earnings. Falcone divested his housing-related holdings and aggressively shorted bonds backed by subprime mortgages, yielding him a personal one-year return in 2007 of \$1.7 billion; a fortune secured by imminent mass foreclosures.

On October 15, 1929, two weeks before Black Tuesday, the New York Central Railroad Company sought authorization from the Interstate Commerce Commission (ICC) to abandon approximately five miles of track, citing intractable difficulties of operations in streets congested by vehicular and pedestrian traffic. The ICC approved a mayoral engineering committee's plan for a freight line without grade crossings, citing "present and future convenience and necessity." The "consummation" of this "long-desired improvement," it was supposed, would also doubtlessly result in "large increases in the values of adjoining real estate."¹ Adjacency, right-of-way, communication, convenience and necessity—in all, good hedges make good neighbors and even better Friends of the High Line.

At the June 28, 1934 ceremony to open the West Side Improvement, as the High Line was then called, Mayor Fiorello La Guardia stepped up to the microphone on the flag-and-bunting-festooned platform. "Amen!" he exclaimed to the Donnean toast proposed by Transit Commissioner Leon G. Godley: "Death to Death Avenue." With the opening of this freight viaduct, *The New York Times* reported, a "picturesque phase" in the collective life of the city passed away. The West Side Cowboys, who rode in front of approaching locomotives waving a red warning flag or swinging a lantern, were no longer needed. The Cowboys' urgent signals were not contemplated in the Communications Act of 1934, signed into law nine days earlier on June 19, 1934 by President Franklin Delano Roosevelt, who, like La Guardia, was a master of the intimate radio address.² Among the Act's central provision was the establishment of the Federal Communication Commission (FCC), to regulate interstate and foreign commerce by wire and airwaves.

¹ "Abandonment and Construction by the New York Central Railroad Company in New York City," Finance Docket no. 7753, I.C.C. Reports 158 (1929), 309–314.

² Communications Act of 1934, Pub. L. 73–416, 48 Stat. 1064 (June 19 1934).

The High Line ceased operation in November 1980, truck carriage having supplanted rail traffic to and from Manhattan. The architect Steven Holl, then a resident of the neighborhood, later recalled having seen the last freight car go by: a load of frozen turkeys. In *Pamphlet Architecture 7* (1981), Holl proposed a visionary plan for redeploying the viaduct as a “Bridge of Houses.” In 2004, he reconsidered the site’s capabilities, collaborating with George Hargreaves Associates on the design competition sponsored by the Friends of the High Line. Engaging in what he calls “landscape alchemy,” George Hargreaves has written that, “distressed sites, whether abandoned, polluted, neglected, are the dross from which 21st century dreams are woven.”³ Like distressed debt they yield unlikely returns. But a great distance had been travelled from Robert Moses’s ambition to “weave together the loose strands and frayed edges of New York’s metropolitan arterial tapestry.” The new vocation of landscape architecture, or, as it has recently been redesignated, “landscape urbanism,” with its focused interest in infrastructure, is to make designs for things that are coming undone.

Following the provisions of the Northeast Rail Services Act of 1981 for disposing of unwanted assets, in 1983 the Consolidated Rail Corporation (Conrail), successor to the New York Central Railroad (NYC), determined that the High Line was not worth salvaging and published a statutory “notice of insufficient revenues.” Fashioning himself a consultant to the Metropolitan Transit Authority, Peter Obletz, a visionary mechanic and restorer of Pullman rolling stock, organized the West Side Rail Foundation (WSR) to acquire the line. Built at a cost of 150 million 1930s dollars, he offered a nominal consideration of \$10 to acquire the rusting liability. Yet the eventual status of the High Line emerged from the “railbanking” clause of the National Trail Systems Act, amendments of 1983. The so-called Rails-to-Trails Act made provisions for abandoned rights-of-way to be designated for interim recreational use, while preserving rail corridors in the event of potential (but entirely unlikely) resumption of service. The cultural, as opposed to developmental, work of the Friends of the High Line arguably consisted in designating the abandoned viaduct a “high potential route segment,” one

3 George Hargreaves, in his presentation to the Forum for Urban Design Spring Conference, *The*

21st Century Park and the Contemporary City (Modern Museum of Art, 2009).

that had “greater than average scenic values or affording an opportunity to vicariously share the experience of the original users of a historic route.” What is the relevant history of the High Line?

To answer this question, it must be noted that 1983, the year of Yve-Alain Bois’s enduringly compelling essay “Picturesque Stroll around Clara-Clara,” saw the initial opening to the civilian aviation community of the Department of Defense’s Navigation Satellite Timing and Ranging (NAVSTAR) Global Positioning System (GPS), then still in its development stage. As described in a classified National Security Decision Directive signed by then-President Ronald Reagan, the action was taken in response to the shooting down of Korean Air Lines Flight 007 (KE007). The Boeing 747-230B departed New York’s John F. Kennedy International Airport on August 30, 1983 en route to Gimpo International Airport in Seoul, Republic of Korea with a scheduled stop at Anchorage International Airport. Soon after departing Anchorage, KE007 began deviating to the right (north) of its assigned course (R-20), the northernmost of the North Pacific composite route system. The deviation resulted in its “penetration” of adjoining sovereign USSR airspace. KE007 was intercepted by a Sukhoi Su-15 of the IA-PVO, which fired two missiles at 1826:20 hours, September 1. At 1838 hours the plane and its 269 passengers and crew disappeared from radar screens. GPS was sought to remedy fatal boundary errors by providing pilots with instantaneous “three-dimensional positional information.”

On June 21, 1989, Chelsea Property Owners (CPO), a group formed by Jerry Gottesman, founder and chairman of Edison Properties, an operator of parking lots and storage facilities, a retailer of empty space, sought a ruling from the ICC requiring Conrail to involuntarily abandon and demolish the High Line, citing “public convenience and necessity.”⁴ Earlier, CPO had succeeded in discrediting Obletz, which involved a punitive form of forensic accounting. It was no longer the mixed traffic of Death Avenue that represented a “public hazard,” but rather the continued deterioration of the High Line, a “costly blight” on adjoining properties and an impediment to redevelopment. CPO argued that

⁴ 49 Code of Federal Regulation, Sec. 1152.28, Public Use Procedures (October 1, 2014), 227–228.

Conrail owned none of the properties over which the viaduct was constructed and operated the right-of-way only under an easement. Conrail responded that this “valuable resource,” the High Line, should not be sacrificed to the “parochial interests of a few real estate developers.”⁵

Six weeks later, on August 4, 1989, the FCC authorized the American Mobile Satellite Company (AMSC) to construct, launch and operate a system to provide a variety of communications services, including land, aeronautical and maritime mobile-satellite service (MSS). The FCC assigned AMSC three orbital locations—62° W.L. (Western Latitude); 101° W.L.; 139° W.L.—and spectrum in the gigahertz (GHz) band for telemetry, tracking and control (TT&C) functions: The cowboys of yore were corralled into remote tracking stations. The crucial component of the FCC’s ruling was the allocation of spectrum in frequencies in the L-band (1545–1559 MHz and 1646.5–1660.5 MHz), pursuant to Section 309 of the Communications Act of 1934 stipulating “public interest, convenience and necessity.”⁶

On Thursday, July 24, 2003, the Surface Transportation Board (STB), successor to the ICC, held public hearings to determine the still-unsettled status of the unreclaimed High Line following the exhaustion of all the CPO’s appeals. Two and a half weeks later, on August 10, 1993, the passage of the Omnibus Budget Reconciliation Act (Deficit Reduction Act) of 1993 called for renewed attention to “spectrum allocation planning.”⁷ As the regulator of radio frequency, the FCC was authorized to segment the spectrum into bands that were allocated for particular uses serving the public interest. These bands were then assigned to commercial entities or government agencies by license or authorization. The FCC was entrusted with considering how to increase federal revenues by more efficient exploitation of this “natural resource.” Thus it initiated the Radio Spectrum Auction Program. According to a Congressional Budget Office study, “‘spectrum’ is a conceptual tool used to organize and map

5 “Chelsea Property Owners-Abandonment-Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track in New York, NY” (Decided on January 11, 1991), no. AB-167 (sub-no. 1094), Interstate Commerce Commission Reports

ser. 2, vol. 7 (1990–1991), 991–1025. Paul J. Clerman, Administrative Law Judge.

6 47 U.S.C. Sec. 309.

7 United States Statutes at Large, vol. 107, 103rd Congress, 1st Session, 1993.

a set of physical phenomena.”⁸ The first strips of this electromagnetic field—ten nationwide Narrowband Personal Communications Service licenses—were assigned during a five-day auction beginning on July 25, in the Blue Room of the Omni, Shoreham Hotel, Washington, D.C., overlooking Frederick Law Olmsted, Jr.’s Rock Creek Parkway system.⁹

Philip Falcone possessed an orienteer’s understanding of the new terrain of bandwidth, identifying the latent value in licenses held by two satellite operators, Inmarsat and SkyTerra Communications, a corporate descendent of AMSC. In July 2008, Harbinger Capital Partners Funds provided \$500 million of debt financing for SkyTerra for its satellite operations. SkyTerra-1, a Boeing 702HP with an outsized 20-meter L-band reflector-based antenna, was launched from the Baikonur Cosmodrome in Kazakhstan on November 14, 2010 at 2329 hours local time. In March 2010, Harbinger acquired SkyTerra, or more particularly its “valuable high quality spectrum assets, including 59 MHz of nationwide ubiquitous spectrum in an advantageous frequency position.”

Renamed LightSquared, the new company was licensed to operate MSS and provide wholesale fourth-generation Long-Term Evolution (LTE) wireless broadband service. The FCC adopted rules in February 2003 that allowed MSS operators to construct and operate ancillary terrestrial components (ATCs) in their licensed spectrum. Although satellites provide nationwide coverage, making them particularly valuable to remote rural customers, their links require line-of-sight transmissions, that are often obstructed in urban areas. On January 26, 2011, FCC granted LightSquared’s request for a modification of its ATC authorization. Instead of being conditional on offering service primarily by satellite, with ground stations filling in only where satellite coverage was inadequate, the revised license applied to a network of 40,000 high-powered base stations. The response was quick and aggressive. On March 10, 2011, the equipment manufacturer John Deere launched the Coalition to Save Our GPS—the populist “our” suggesting that, like radio frequencies were once considered, GPS was a natural [and shared] resource.

8 “Where Do We Go From Here?” *The FCC Auctions and the Future of Radio Spectrum Management*, Congressional Budget Office, Congress of the United States (April 1997), 2–4 (CBO Study).

9 “Our Investor,” “About Us,” LightSquared’s website; lightsquared.com

In the congested L-band, MSS spectrum is adjacent to GPS, which occupies 1559–1610 MHz. In its initial allocations, the FCC erected defensive hedges, so-called “guard bands” between spectrum allocations. Yet the ground-based transmissions contemplated by LightSquared were shown to be more than a billion times more powerful than the weak GPS signal. The report of a Technical Working Group mandated by the Federal Communications Commission and conducted jointly by LightSquared and the GPS community showed that LightSquared’s proposed network would cause “devastating interference to all kinds of GPS receivers tested including those used in Aviation, Cellular phones, General Location and Navigation (including Automotive, Public Safety, Personal and Marine Navigation), High Precision and Networks (including Agriculture, Surveying, Construction and Monitoring of Dams, Structures, Earthquakes and Volcanoes), and GPS Timing.”¹⁰

According to Deere’s website, the company, while it has seen many changes in its business, its products and its services, remains “dedicated to those who are linked to the land—farmers and ranchers, landowners, builders, and loggers.” These links were mediated by precision instruments and computer controls. “These days, equipment systems collect readings on just about everything,” explains the promotional copy for Deere’s WorkSight equipment systems. The pervasive role of GPS service in aviation, car rental, logistics, transportation, agriculture is represented by the seventy-eight members of the coalition, including Caterpillar, Case New Holland, Association of American Geographers, UPS, FedEx and the manufactures of GPS receivers and information technologies, notably Garmin, Magellan GPS, Trimble, Tom Tom and Leica Geosystems.

Aggressive lobbying on the part of the Deere-led coalition, along with aerospace and governmental agencies, ultimately resulted in the revocation of the FCC’s provisional exception. LightSquared subsequently sought a declaratory ruling to resolve the regulatory status of unlicensed commercial GPS receivers with regard to its own licensed operations in the 1525–1559 MHz band. It argued that the GPS industry had sold poorly-designed receivers to “unsuspecting consumers.” These

¹⁰ “LightSquared Application for Modification,” F.C.C.
File no. SAT-MOD-20101118-00239.

devices, it was alleged, “listen” for radio signals both in the assigned GPS spectrum and “across the adjacent MSS frequency band that is not intended for GPS use.”¹¹ LightSquared’s planned operations, it was further held, were consistent not only with the terms of its license, but also with the U.S. Table of Frequency Allocations and service rules regarding “out-of-band” emissions. It was incumbent upon the GPS industry, then, to employ better filters in their devices to shield their users from unwelcome transmissions; it would cost but pennies per unit, LightSquared estimated, to erect electromagnetic hedges internal to the devices.

Prospective Observations

Proceed through the algorithmic gatekeeper of your preferred search engine, that machine in the [hypertextual] garden of forking paths; search online and you will find, or, if you are lucky, stumble upon at least a few keenly intuitive comparisons of the Claude Glass to the iPhone, their superficially similar, black mirror surfaces best appreciated, as the architectural podcaster Mark Morris has observed, when the data transmission device is switched off. The High Line needs to be seen in a similar way—as falsely reflected—when veritably capturing designedly misplaced cultural values; though perhaps *ambitions* is the better word for it. The abandoned and reoccupied right-of-way is a mistakenly “new” medium for delivering an antiquated experience that comes into view because of hedging instruments that espy future and/or unrecognized value in bandwidth. “Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks,” advertises the FCC, its steward and regulatory custodian, in a white paper entitled “Connecting America: The National Broadband Plan” (2010). Mobile devices, which quasi-selectively tap into the data stream, might replace the compass, the level, the dowsing rod, birdsong, etc. But the form of awareness that now needs to be cultivated is not how such and similar apps orient us to what is taking place far and near, which are themselves antiquated categories, but what is going on “up there,” if that is, in fact, where bandwidth properly resides.

¹¹ In the Matter of LightSquared, Inc., “Petition for Declaratory Ruling,” F.C.C. IB Docket no. 11-109

ET Docket no. 10-142 (Accepted January 30, 2012).

LightSquared’s entry into the wholesale market for bandwidth, selling satellite “air time,” depended on a January 25, 2005 decision (FCC 05–30) that afforded “flexibility” in the interpretation and enforcement of “gating requirements,” as specified in 47 C.F.R. § 25.149(b)(4)(i). The regulatory change permitted providers to integrate ATCs into their MSS networks in three sets or radio frequency bands: the 2 GHz band, the L-band and the Big Leo band. According to the Glossary of Telecommunication Terms (Federal Standard 1037C), “gating” can specify several actions or entitles: 1) the process of selecting only those portions of a wave between specified time intervals or between specified amplitude limits, 2) the controlling of signals by means of combinational logic elements, and 3) a process in which a predetermined set of conditions, when established, permit a second process to occur. In terms of hardware, instruments in their most ostensible form, the gating requirements were technically met by LightSquared’s investment of “tens of millions of dollars in a dual-mode device ecosystem,” even though as a wholesale provider of integrated capacity, it did not propose to offer the “device itself.”¹² Yet in conclusion, let us adopt the broadest condition of gating as specifying an authentically new means of communicating between and/or statutorily separating the earth and the sky. What kind of ecosystem ensues when terrestrial components become *de jure* ancillary?

The rationale articulated for FCC 05–30, Flexibility for Delivery of Communications by Mobile-Satellite Service Providers, was attuned to the potentially highly unruly nature of the playing field: “While it is impossible to anticipate or imagine every possible way in which it might be possible to ‘game’ our rules by providing ATC without also simultaneously providing MSS and while we do not expect our licensees to make such attempts, we do not intend to allow such ‘gaming.’”¹³ Like the definition offered by Simonides of Ceos, “Painting is mute poetry, poetry a speaking picture,” or the Horatian simile “*ut pictura poesis*” (“as is painting, so is poetry”), ever so familiar to students of landscape, the FCC stipulation frames a perfect tautology.¹⁴ There is always an opening

¹² Jeffrey J. Carlisle, Executive Vice President, Regulatory Affairs and Public Policy, LightSquared Subsidiary LLC to Marlene H. Dortch, Secretary, F.C.C. (November 18, 2010), 2. Filed Electronically.

¹³ F.C.C. 03–15, 4, fn. 5.

¹⁴ Leonard Barkan, *Mute Poetry, Speaking Pictures* (Princeton: Princeton University Press, 2013), 29.

In the so-called “hedge fund world,” advanced knowing of events or outcomes—the completion of a seemingly restricted gating scenario—is known as “edge.” In extreme instances, which by some accounts is the prevailing norm in this world, edge is acquired by means that contradict Rule 10b-5 of the Securities Exchange Act, concerning the Employment of Manipulative and Deceptive devices: “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national security exchange, (a) To employ any device, scheme, or artifice to defraud.” Edge is a margin, a verge, an early arrival at a point of actionable certainty.

But what if the if/then structure of gating itself, its limiting and separating function, is only apparent, at least to one party in the purchase or sale of risk-exchange instruments. The FCC cautiously (fearfully) adopted the stance that it was impossible to anticipate the “possible way[s] in which it might be possible to ‘game’ our rules.”¹⁵ The best it could do was to limit its exposure. The purpose in granting flexibility was to marshal bandwidth resources by stimulated satellite service, especially in underserved areas, and not rather “to allow licensees to profit by selling access to their spectrum for a terrestrial-only service.”¹⁶ It is open to speculation whether this form of hedging reverses or instead reaffirms the message of that late-modern *locus classicus* “Earthrise” (Image AS8-14-2383), the photograph taken December 24, 1968 by William Anders during the Apollo 8 mission; the moment is commemorated on a six-cent U.S. Postal Service stamp (Scott #1371), accompanied by words from the crew’s Christmas Eve radio broadcast: “In the beginning [God created the heaven and the earth]” (Gen. 1:1).

Licensees of integrated MSS/ATC promised to produce value, to exploit the natural resources of bandwidth by providing, according to stated gating criteria, geographic coverage, coverage continuity and commercial availability. But once flexibility had been granted and the gates opened, interference occurred—the encroachment of the ATC frequency component into GPS operations. What the controversy over bandwidth allocation revealed is the extent to which commerce,

¹⁵ F.C.C. 03–15, 4, fn. 5.

¹⁶ F.C.C. 03–15, 4, fn. 5.

communication, avionics, agriculture, logistics, transportation, construction, social media, etc. depend (or so industry, military and public service spokespersons claim) on the inviolate preservation of GPS's operational range—an electromagnetic *hortus conclusus*. According to John Claudius Loudon, in his *An Immediate, and Effectual Mode, of Raising the Rental of the Landed Property of England*, hedging was among those labors (like “ditching, leveling, draining, building, etc.”) that maximize the potential of underproductive lots, especially small ones.¹⁷ Hedging has since become an instrument for intervening on an imperceptible landscape that supplies our cherished handheld devices and more pervasive positioning systems with the data constantly and continuously used to shape and interpret what is done on the ground.

On the High Line, a weekender's brownfield Eden, the creatively selective act of defining patterns of bandwidth use translates into elevated local property values. Raise the rent high. Antoine Picon, a student of the engineered picturesque, astutely notes the robust and/or opportunistic variety of nature that “quite literally returns in the midst of our urban sprawl using infrastructures as its channels much like a radio broadcast is carried by a given wavelength.”¹⁸ The need remains, however, to distinguish between what is given and what is taken; what is hedged and that which interferes. What instruments are at our disposal to do so? The new park's considerable picturesque pleasures, even though they are not its advertised selling point, are no longer called on to perform what they were once designed to do without drawing undue attention to themselves—mask and dissimulate acts of appropriation. It is enough that the High Line still stands, allowed to gloriously go to weed, supported by pillars of the community. Idlers abound in idyllic detachment.

17 A Scotch Farmer [John Claudius Loudon], *An Immediate, and Effectual Mode, of Raising the Rental of the Landed Property of England* (London: Longman, Hurst, Rees and Orme, 1808), 56.

18 Antoine Picon, “Nature, Infrastructure, and Cities,” in *The Return of Nature*, eds. Preston Scott Cohen and Erika Naginski (New York: Routledge, 2014), 177.