Avoiding Constitutional Challenges to Farmland Preservation Legislation

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Burn down your cities and leave your farms . . . and your cities will spring up again as if by magic; but destroy our farms and the grass will grow in the streets of every city in the country.

—William Jennings Bryan

I. INTRODUCTION

America's farmland is being developed at an alarming rate. Between World War II and the mid-1970s an average of 1.4 million acres of agricultural land was developed each year—an area larger than the State of Delaware.[1]

In 1982 there were approximately 1.41 billion acres of nonfederal rural land in the United States, with 421 million acres regularly used as cropland; the remaining 993 million acres were primarily range, pasture, or forest land.[2] Some of these remaining 933 million acres are considered cropland reserve.[3] But in fact, only 153 million acres have high or medium potential for conversion. The rest have little or no suitability as farmland.[4] According to the National Agricultural Lands Study, by the

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1. *Suddenly an Alarm Over Vanishing Farms*, U.S. NEWS & WORLD REPORT, Sept. 15, 1975, at 67.

2. UNITED STATES DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE, STATISTICAL BULLETIN NO. 756, BASIC STATISTICS 1982 NATIONAL RESOURCES INVENTORY 4-5 (1982) [hereinafter BASIC STATISTICS] (according to the Soil Conservation Service, this report is the latest nationwide study on agricultural land use in the United States). *See generally* NATIONAL AGRICULTURAL LANDS STUDY: FINAL REPORT, 1981, at 21-22 (1981). Rangeland is land that is less than ten percent trees which produces predominantly native grasses, grass-like plants, herbs, or shrubs. Pastureland is land which produces forage for animals and is usually planted in grasses and legumes. Forest land (woodland) is land that has a twenty-five percent tree canopy cover or is covered by at least ten percent forest trees of any size. It also includes land which has been cleared by man or natural forces that is suitable for natural or artificial reforestation. *Id.*

3. W. FLETCHER & C. LITTLE, THE AMERICAN CROPLAND CRISIS: WHY U.S. FARMLAND IS BEING LOST AND HOW CITIZENS AND GOVERNMENT ARE TRYING TO SAVE WHAT IS LEFT 6 (1982) [hereinafter THE AMERICAN CROPLAND CRISIS] (reserve land is pasture, range, and woodland which has good potential for crop production).

4. BASIC STATISTICS, *supra* note 2, at 7.

year 2000 the country's cropland reserve will probably be in full production.[5] Those projections were made in the early 1980s. Today, the actual rate of development nationwide is not known, but by 1984 three million acres of agricultural land a year were already being developed and permanently lost for food production.[6]

Although high-tech farming has produced high-yield crops, there are two primary limitations as to what the soil of America can produce.[7] First, there is a limit on the amount of land that can be economically farmed. Not all of the reserve agricultural land is ideally suited for crop production. Some of the cropland reserve will require extensive and expensive preparation and erosion control in order to be cultivated.[8] Second, not all farmland can be in production all of the time because of the constraints of agricultural science and basic practicalities. Some land needs to be left fallow in order to replenish the soil. Economic conditions or illness may prevent a farmer from planting all of his arable ground. Even if all of the land is planted, there is no guarantee of a good yield. As any farmer can tell you, the one thing that is certain about farming is that farming is uncertain.

With America's surplus of grains and the dairy industry's surplus of milk, there seems to be little need to preserve farmland.[9] However, the United States is not isolated. Our agricultural land is disappearing at the same time world population is rising. The growth in global population will increase the need for continued agricultural production while American farmland is being taken out of production.[10] In addition, the domestic population is rising, increasing the requirement for housing, which in turn increases the demand for real estate.[11] Most good cropland is ideal for building because it is fairly flat and well drained. Consequently, it is often lost to development.[12] Land is a finite resource. Once it is built on, quality topsoil is gone forever; this developed land will not easily, if ever, be returned to crop production.[13] Responsible land use planning will help

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5. NATIONAL AGRICULTURAL LANDS STUDY: FINAL REPORT, 1981, *supra* note 2, at 8.

6. F. STEINER & J. THEILACKER, PROTECTING FARMLANDS 4 (1984).

7. Comment, *Agricultural Land Preservation: Can Pennsylvania Save the Family Farm?*, 87 DICK. L. REV. 595, 598 (1983).

8. THE AMERICAN CROPLAND CRISIS, *supra* note 3, at 169.

9. Rose, *Farmland Preservation Policy & Programs*, 24 NAT. RESOURCES J. 591, 596 (1984).

10. *Id.* at 639 (current predictions expect a world population increase of over 2 billion people by the year 2000).

11. *Id.* (current predictions expect 27 million more Americans by the year 2000).

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

13. *Id.*

preserve our agricultural heritage and help America to continue to be self sufficient by producing its own food supply.

Agricultural land preservation by the state takes many forms. There are state preferential tax programs which create incentives for farmers to stay in farming.[14] Although not a direct mode of land preservation, state right to farm acts help relieve one of the pressures that often forces farmers out of farming by limiting unwarranted nuisance suits.[15] Among the various programs for preserving farmland, agricultural zoning and transferable development rights (TDR's) are two of the most promising methods of protecting agriculture in the community. As promising as these methods are, they have also spawned the most litigation. They have been challenged as an unconstitutional taking and as a due process violation.

The rate at which agricultural land is being developed is cause for alarm. However, if legislation is drafted properly and governments are careful in applying that legislation, it is likely that agricultural zoning and TDR programs will withstand constitutional scrutiny and be successful. This comment attempts to establish guidelines for legislators to use in drafting and implementing land use regulations that will survive constitutional review.

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14. R. COUGHLIN, J. ESSKES, J. KEENE, W. TONER & L. ROSENBERG, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS: EXECUTIVE SUMMARY 15-16 (1980) [hereinafter R. COUGHLIN]. There are two major kinds of state tax relief: differential assessment laws and circuit breaker tax credits. Differential assessment includes preferential assessment laws which assess farmland for property tax purposes at its agricultural value rather than at its market value which is often much higher than its farm value. Deferred taxation, also known as "roll-back taxes," usually begins at the time the use changes from agriculture to development and it requires participating land owners, who developed their farms, to pay the taxes they had been excused from paying while the property was taxed at its farm use value. It also includes restrictive agreements which require that a landowner agree not to develop his land for a fixed period of time in exchange for preferential treatment. "Circuit breaker" tax programs allow a farmer to apply all or part of his local property taxes as credit against his state income tax. *Id. See also* N.J. STAT. ANN. § 54.4-23.1 to 23.20 (West 1986) (Farmland Assessment Act of 1964 codified); MD. TAX-PROP. CODE ANN. §§ 8-209, 9-206 (1986).

15. R. COUGHLIN, *supra* note 14, at 20-21 (state right to farm legislation helps protect farmers from nuisance suits in a variety of ways, such as prohibiting local governments from enacting laws that unreasonably restrict farming operations that do not endanger the public health or safety, or by exempting farmers from some of the state's antipollution laws). *See* Connecticut Right to Farm Act, ch. 226, 1981 Conn. Acts 320 (codified at CONN. GEN. STAT. ANN. § 19(a)-341 (West 1986)); DEL. CODE ANN. tit. 3, § 1401 (1985); MD. CTS. & JUD. PROC. CODE ANN. § 5-308 (Supp. 1984).

II. BACKGROUND ON AGRICULTURAL ZONING

The history of every nation is essentially written in the way it cares for its soil.

—Franklin D. Roosevelt

Agricultural zoning is the most common means that municipalities use to restrict development and preserve farmland.[16] It has advantages over other forms of land preservation because it is not voluntary, it does not rely on incentives, and there is no cost to the community.[17] Although a presumption of constitutionality applies to zoning, zoning schemes still have to comply with some judicial standards to be considered valid land use regulations.[18] First, zoning plans must be consistent with the state's enabling legislation.[19] Second, most states require that zoning be in accord with a comprehensive plan.[20] Third, in some states, zoning plans should also make provisions for all types of housing, otherwise a court could deem the plan to be exclusionary.[21]

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16. Rose, *supra* note 9, at 600.

17. Comment, *supra* note 7, at 626.

18. R. BOYER, SURVEY OF THE LAW OF PROPERTY 627 (3d ed. 1981) (if the validity of a statute is fairly debatable, the court will defer to the legislature and the enactment will be deemed constitutional). *See generally* R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS: CASES AND MATERIALS (1981). (When the presumption of constitutionality applies to a law, the challenger carries the burden of proof and must submit evidence to rebut the presumption. If the ordinance has a rational relationship to the achievement of a legitimate government interest, a court will have to defer to the legislature and uphold the validity of the ordinance.)

19. R. COUGHLIN, *supra* note 14, at 34. *See* C. BERGER, LAND OWNERSHIP AND USE 36 (3d ed. 1983) (enabling legislation is the power granted to municipalities by the state which empowers them to enact zoning regulations). *See also* West Montgomery County Citizens Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n, 309 Md. 183, 522 A.2d 1328 (1987) (zoning invalidated because decision was made through planning process rather than through zoning process as mandated by state enabling statute).

20. R. COUGHLIN, *supra* note 14, at 34. *See* R. COUGHLIN, *supra* note 14, at 13. (Comprehensive planning is a process used in adopting land use policies which takes into consideration transportation, housing, public utilities and facilities, as well as economic and social issues. Some states require that zoning must be consistent with comprehensive plans.)

21. R. COUGHLIN, *supra* note 14, at 34. *See also* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975). (Held that the township, by its land use regulations, must make available a variety and choice of housing. Specifically, the court held that the municipality could not use its zoning laws to exclude low and moderate income dwellings, and the township must provide its fair share of the regional need for this type of housing.) The concept of exclusionary zoning is not accepted in every state, but in those states which have followed New Jersey's lead, most notably Pennsylvania and New York, agricultural zoning may be challenged as exclusionary. C. BERGER, LAND OWNERSHIP AND USE 795-99 (3d ed. 1983). (Exclusionary zoning is zoning which completely prohibits certain types of housing in the community, such as

Even though zoning may surmount these judicial hurdles, ordinances might still have to face other constitutional challenges. Agricultural zoning that reduces the value of the land can instigate a taking claim brought by the owner of affected property.[22] Land use regulations that are administered arbitrarily and capriciously often provoke due process attacks.[23] However, in many cases where agricultural zoning schemes have been contested, courts have held that zoning plans designed to preserve natural resources such as farmland are not inherently unconstitutional.[24]

A. *Agricultural Zoning Plans*

There are conflicting interests at work regarding America's rural lands. There is a growing need for housing, while at the same time there is a growing need, both domestically and world wide, for our farm goods.[25] Unchecked development will result in the loss of valuable and irreplaceable prime farmland.[26] In order to ensure an adequate land base for food production, agricultural zoning attempts to limit commercial and residential development of farmland without stopping it entirely. Agricultural zoning reduces the two main factors which induce farmers to sell their land to real estate developers. One factor is the rising market value of the property.[27] By putting restrictions on the amount and type of development in agricultural zones, land prices are kept down and the pressure to sell for the higher development value is reduced.[28] Farmers are also induced to sell by a general dissatisfaction with their profession caused by farming in urban settings. Neighbors are offended by farm odors and chemical spraying and often bring nuisance suits to stop these necessary farming activities.[29] High volumes of traffic make it difficult to move large, slow-moving farm equipment from one section of land to another.[30] Agricultural zoning helps eliminate some of these problems by maintain-

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apartments or mobile homes. The most common type of exclusionary zoning requires large lot sizes. By requiring large lots, for example a four acre minimum, municipalities attempt to keep out undesirable types of residential building.)

22. Comment, *supra* note 7, at 620.

23. R. BOYER, *supra* note 18, at 626.

24. *See, e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); MacLeod v. Santa Clara County, 749 F.2d 541 (9th Cir. 1984); Boundary Drive Assoc. v. Shrewsbury Township Bd. of Supervisors, 507 Pa. 481, 491 A.2d 86 (1985).

25. Rose, *supra* note 9, at 596.

26. *Id.*

27. F. STEINER & J. THEILACKER, *supra* note 6, at 85.

28. *Id.* at 85-86.

29. W. TONER, ZONING TO PROTECT FARMING: A CITIZENS GUIDEBOOK 7 (1981).

30. *Id.*

ing the rural character of the community, yet allowing residential building where it will not conflict with agricultural activities.[31]

B. *Forms of Agricultural Zoning*

There are two forms of agricultural zoning: non-exclusive and exclusive.[32] Non-exclusive zoning allows agricultural use in the zoned area, but discourages development that will conflict with farming operations by requiring large lot sizes and conditional use requirements.[33] Lot sizes may range from 5 to 640 acres for a single family dwelling.[34] In addition to complying with the minimum lot size provision, non-farm users must apply for a conditional use permit for non-agricultural purposes within the zone and show that the proposed use is compatible with the surrounding agriculture.[35] In contrast, exclusive zoning prohibits all non-agricultural use and requires that each request to build a farm dwelling be reviewed.[36] Exclusive zoning helps to minimize conflicts between residential and farm users by prohibiting non-farm dwellings.[37]

Quarter/quarter zoning is another method that attempts to retain the agricultural character of an area while allowing limited commercial development. This scheme allows farmers to benefit from rising land values without disrupting their farming operation.[38] Under this plan one non-farm building is allowed per each forty acres.[39] In order to be approved, lots must also meet several other standards, such as having one acre minimums and access to public roads.[40] Sliding scale zoning is a slightly different approach which allows each landowner to develop a set number of lots depending on the size of the original tract being subdivided.[41] Another technique places a single limit on all subdivisions in the agricultural zone. This allows an owner to create a certain number of lots regardless of

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31. Rose, *supra* note 9, at 600.

32. *Id.*

33. *Id. See generally* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 9.8 (1984). (A conditional use permit or special exception allows property to be used in a manner that is expressly allowed by an ordinance, but certain conditions must be met before the special exception will be granted. For example, a church may be permitted in a residential zone provided there is sufficient on-site parking.)

34. Rose, *supra* note 9, at 600.

35. *Id.*

36. R. COUGHLIN, *supra* note 14, at 22.

37. *Id.*

38. Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621, 626 (1980).

39. F. STEINER & J. THEILACKER, *supra* note 6, at 74-75 (quarter/quarter zoning requires a 40 acre tract of land).

40. *Id.*

41. *Id.* at 75.

the original tract size, provided that other local requirements for building lots are met.[42] In addition to meeting the standard requirements for subdivisions, lots must be located on soils marginal for farming and be buffered from farm activities.[43]

III. The Taking Challenge: An Historic Overview

The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation."[44] The power of eminent domain allows the government to appropriate property through condemnation.[45] There does not always have to be a physical possession for the Constitution to require remuneration.[46] A statute may effect a taking when it leaves an owner with little or no economic use of his property, although he still retains ownership. Inverse condemnation is the result of such regulation.[47]

There is no bright line test for determining when "justice and fairness" require compensation for economic injuries that result from a taking caused by government regulation.[48] That is determined on an ad hoc basis.[49] The United States Supreme Court, however, has established some criteria by which a regulatory taking can be judged. The following cases establish the major principles that state and federal courts will use in their review.

In *Pennsylvania Coal Co. v. Mahon*,[50] the Supreme Court established the precept that the regulation of property could constitute a taking under the fifth amendment. In *Mahon*, plaintiffs claimed that in spite of express provisions in their deed which permitted them to mine their

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42. *Id.*

43. *Id.*

44. U.S. Const. amend. V. The Constitution does not prohibit property from being taken at all, it only requires that if property is taken by the state the owner must receive just compensation for his loss. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 314-15 (1987).

45. R. Boyer, *supra* note 18, at 626. *See also* Black's Law Dictionary 470 (5th ed. 1979).

46. *See* United States v. Clark, 445 U.S. 253 (1980) (distinguishing a traditional condemnation under eminent domain from an inverse condemnation).

47. R. Boyer, *supra* note 18, at 257. *See generally* Malone, *The Future of Transferable Development Rights in the Supreme Court*, 73 Ky. L.J. 759, 773 n.71 (1985) (inverse because the land owner brings the action for just compensation against the government).

48. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), *reh'g denied*, 439 U.S. 883 (1978).

49. *Id.*

50. 260 U.S. 393 (1922).

property as they wished, their right was taken away by the Kohler Act.[51] The Act prohibited the mining of coal in such a way that would cause subsidence of any structure used for human habitation.[52] In effect, the statute voided the company's existing rights under the deed. The Court held that regardless of the danger, the law could not be sustained as an exercise of the police power when the right to mine coal was reserved by deed or contract.[53] Justice Holmes stated the general rule "that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."[54] If the Act was passed on the basis of the need to protect public safety, such an exigency would justify the exercise of eminent domain.[55]

Forty-five years later, in *Keystone Bituminous Coal Association v. De Benedictis*,[56] the Court came to the opposite conclusion on very similar facts and found no taking. In *Keystone*, the coal company made a facial challenge to the Pennsylvania Subsidence Act which required that 50 percent of the coal beneath certain structures had to be left to provide support for the surface.[57] The company claimed that the Act violated the fifth amendment prohibition on taking property without just compensation.[58] The Supreme Court specifically held that *Pennsylvania Coal* did not control *Keystone*.[59]

The Court distinguished this case from *Pennsylvania Coal* by finding that the Kohler Act only protected private landowners against damage to their homes.[60] The Subsidence Act, on the other hand, protected "the public interest in health, the environment, and the fiscal integrity of the area."[61] When the amount of coal (less than two percent) that had to be left was viewed in the context of Keystone's investment-backed expectation, the coal company did not meet its burden of proving it was denied the economically viable use of its property.[62] The coal could be mined

51. *Id.* at 412. (The deed to the property, which was executed by the coal company, conveyed the surface rights but expressly reserved the right to remove all the coal under the ground. The deed further provided that the owners took the property with the risk and waived all claims to damages that might arise from mining the coal.)
52. *Id.* at 412-13.
53. *Id.* at 414.
54. *Id.* at 415.
55. *Id.* at 416.
56. 480 U.S. 470 (1987).
57. *Id.* at 478-79.
58. *Id.* at 479.
59. *Id.* at 474.
60. *Id.* at 487.
61. *Id.* at 488.
62. *Id.* at 499.

profitably even if some of it had to be left for surface support.[63] Therefore, the Act did not effect a taking because the company still had the right to mine almost all of the coal, and the amount required to be left for the support estate was minimal.[64]

Limitations on the use of property which are intended to be permanent are not the only restrictions that lead to litigation. Even a temporary regulation may be a taking that requires compensation. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, the church sought to recover for inverse condemnation for the time that an "Interim Ordinance" forbid any construction, reconstruction, or enlargement of any building in a flood protection area in which a church camp was located.[65] The Supreme Court held that where a government regulation temporarily denies an owner of all use of his property for a period of time, the fifth amendment requires just compensation for the duration that the property was affected.[66] Relying on *Pennsylvania Coal v. Mahon*, the Court reiterated the general rule that while property may be regulated, if a regulation goes too far it will be considered a taking.[67] The lower court's decision was reversed and the case was remanded.

In *Nollan v. California Coastal Commission*, the Supreme Court held that a condition required for a building permit was not sufficiently related to the purpose the State claimed it was trying to protect; therefore, the condition was tantamount to the exaction of an easement without just compensation.[68] The Nollans owned beachfront property in California and sought a permit to rebuild a house on the land. The California Coastal Commission approved the permit on the condition that the owners grant public access across their land to the beach.[69] The Nollans claimed the requirement constituted a taking. The Court examined the relationship between the Commission's professed interest in preserving sightlines to the beach and the easement. The Court found no nexus between the Commission's professed interest and the exaction of the easement.[70] Without such a nexus, the Court concluded that requiring an easement in this situation constituted a taking. Although obtaining an

63. *Id.*

64. *Id.* at 499-500. (Pennsylvania property law recognizes a support estate as an estate in land that can be conveyed separately from the surface and mineral rights. The support estate consists of the coal which must be left for surface support.)

65. 482 U.S. 304, 307-08 (1987).

66. *Id.* at 322.

67. *Id.* at 316 (quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)).

68. 483 U.S. 825, 837 (1987).

69. *Id.* at 828.

70. *Id.* at 837.

easement was a valid government purpose, the court held that if the state wanted one it would have to pay for it.[71]

The rule derived from *Nollan* is that any condition linked to obtaining a building permit must be related to furthering the purpose the government claims it is protecting by imposing the condition. If the provision does not bear a sufficient relationship to the proffered purpose, it may be unenforceable if there is no legitimate government interest. If there is a legitimate concern, but no correlation between the stipulation and the purpose, the government may be required to pay for the exaction.

The Supreme Court, in *Kaiser Aetna v. United States*, determined that the imposition of a navigational servitude on petitioner's lagoon would result in a physical invasion of private property that constituted a taking.[72] The United States claimed that by connecting what was previously a private pond to navigable water, the owners lost the right to exclude others.[73] The Court disagreed, saying that the right to exclude was a right the government could not take without compensation; if the United States wanted the marina to be a public aquatic park, it would have to use its eminent domain powers and pay just compensation to the owners.[74]

A. Guidelines for Legislators

The following guidelines can be extrapolated from the preceding cases. A regulation of property that goes too far in interfering with the economic return an owner can reap from his land will be recognized by the courts as a taking. In the protection of a public interest, however, a regulation may limit an owner's investment-backed expectation as long as he is left with economically viable use of his land. Even a temporary regulation that prohibits all use of property can amount to a taking requiring compensation for the time the property's use was restricted. Also, building permits which require conditions not sufficiently related to their stated purpose may be considered exactions requiring compensation even if there is a permissible reason for the imposition. In addition, although the owner maintains ownership, a government sanctioned invasion of private property by the public requires the use of eminent domain to procure the right.

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71. *Id.* at 841-42.

72. 444 U.S. 164, 180 (1979). For a definition of navigational servitude, *see* BLACK'S LAW DICTIONARY 927 (5th ed. 1979) (a navigational servitude is the "public right of navigation for the use of the people at large").

73. 444 U.S. at 170.

74. *Id.* at 179-80.

B. Ripeness as a Bar to a Taking Claim

Ripeness is often an issue in inverse condemnations and can be raised by the opposing party or by the court. Once the ripeness issue is raised it must be decided before the merits of the taking claim can be considered at all. A ripeness problem arises when a case is brought to court too early for adjudication and is considered not "ripe" for a final decision.[75] The Supreme Court has said that a hypothetical threat is not enough for the courts to use their power to decide the constitutionality of a law; the power arises "only when the interests of the litigants require the use of this judicial authority for their protection against actual [government] interference."[76] Thus, an essential element in a regulatory taking challenge is a final determination by a zoning appeal board regarding the type and extent of the development permitted.[77]

In *Williamson County Planning Commission v. Hamilton Bank* the bank sued the planning commission, alleging that the application of certain zoning laws amounted to a taking of the bank's property.[78] The Supreme Court held that the claim was not ripe for decision because the bank did not seek a variance; thus, there had been no final decision regarding the application of the zoning ordinance.[79] In addition, the bank did not exhaust the procedures that the state had provided for seeking compensation under a taking claim.[80] Until the bank used Tennessee's inverse condemnation procedure, or demonstrated that the procedure was unavailable or inadequate, the taking claim was premature.[81] In *Agins v. City of Tiburon*, the Court found that there was not concrete controversy regarding the application of the challenged zoning ordinance because the owner had not submitted a plan for the development of the property.[82] The only question that was ready for consideration was a facial challenge regarding whether the mere enactment of a zoning ordinance constituted a taking.[83] Finally, in *Pace Resources, Inc. v. Shrewsbury Township*,[84] the Third Circuit Court of Appeals found that a taking claim was not yet ripe for decision because there had been no final determination by the town-

75. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.12(d), at 66 (3d ed. 1986).

76. United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1947).

77. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351-53 (1986).

78. 473 U.S. 172, 175 (1985).

79. *Id.* at 190-91.

80. *Id.* at 194.

81. *Id.* at 196-97.

82. 447 U.S. 255, 260 (1980).

83. *Id.*

84. 808 F.2d 1023 (3d Cir. 1987), *cert denied*, 482 U.S. 906, *reh'g denied*, 483 U.S. 1040 (1987).

ship regarding the use of the land. Denial of a permit to develop the property was not a taking because the township's decision only held that one proposed means of development was not acceptable; Pace was free to propose other plans.[85] Regarding the taking issue, the court only examined whether the zoning ordinances on their face effected a taking and held that they did not.[86]

A general rule for ripeness evolves from the preceding cases. In inverse condemnation claims, the injured party must have suffered actual economic injury as a result of a final administrative decision regarding the application of a zoning regulation to have a taking claim decided by a court. Also, all administrative procedures that have been established must be exhausted. Otherwise, only a facial challenge can be made.

C. *Determining the Taking Issue*

While no set formula determines when government action goes too far and effects a taking, courts use a number of factors in deciding if a significant interference with property rights has occurred that will sustain an inverse condemnation. In ascertaining the magnitude of a regulation, a court will examine the character and extent of the interference with an owner's investment-backed expectations in the property as a whole.[87] Diminution in value is another factor that is used to determine if an ordinance denied an owner the economically feasible use of his land. Also, legitimate state interests must be advanced for a statute to be considered valid. These factors are illustrated in the following cases.

The issue before the United States Supreme Court in *Agins v. City of Tiburon* was whether a municipal zoning ordinance effected a taking without just compensation of a developer's property.[88] The developer(s) acquired land for residential development, but after the purchase, the city adopted two ordinances which restricted building to no more than five single-family units on the five acre plot.[89] The crux of the appellants' argument was that the city's action constituted inverse condemnation and the ordinance was also facially unconstitutional.[90] They argued that the city completely destroyed the value of the property for any purpose by permanently preventing its development for residential use.[91] The Su-

85. *Id.* at 1029.
86. *Id.*
87. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978), *reh'g denied*, 439 U.S. 883 (1978).
88. 447 U.S. 255, 258 (1980).
89. *Id.* at 257.
90. *Id.* at 258.
91. *Id.*

preme Court held that the ordinance on its face did not take the property without just compensation and that the taking claim itself was not ripe for consideration.[92] The Court began its analysis by stating that there was no rule to determine when a taking occurs.[93] The determination is based on a weighing of public and private interests.[94] A taking occurs when an ordinance does not substantially advance legitimate state interests, or the zoning denies the economically viable use of land.[95] The Court held that the ordinance substantially advanced a legitimate state interest in discouraging the "premature and unnecessary conversion of open-space land to urban uses" by using local open-space plans.[96] The exercise of the city's police powers extended to protecting citizens from the undesirable effects of urbanization.[97] In addition, while the ordinance limited development, it did not prevent the best use of the land.[98] Regarding the character and extent of the interference, the Court found that the developers could build five homes on their five acres and pursue their reasonable investment-backed expectations by submitting a plan for development.[99] Thus, the owners were not denied the "justice and fairness" guaranteed by the fifth and fourteenth amendments.[100]

In *MacLeod v. Santa Clara County*, the Court of Appeals for the Ninth Circuit concluded that there was no taking even though the owner's right to use his property was restricted by a zoning regulation.[101] MacLeod's ranch was located in an area zoned for residential and agricultural use. He applied for a permit to harvest timber from the land and the permit was denied. Although the court agreed that administration of a zoning ordinance could result in a taking, it did not agree that denial of the permit constituted one in this case.[102] The court pointed out that application of a statute to a particular tract will violate the fifth amendment if the law denies an owner economically feasible use of his land.[103] However, if the ordinance is a valid application of the police power, it does not effect a taking if some economic use of the property remains.[104]

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92. *Id.* at 259-60.
93. *Id.* at 260-61.
94. *Id.* at 261.
95. *Id.* at 260.
96. *Id.* at 261.
97. *Id.*
98. *Id.* at 262.
99. *Id.*
100. *Id.* at 262-63.
101. 749 F.2d 541 (9th Cir. 1984).
102. *Id.* at 545.
103. *Id. Accord* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
104. 749 F.2d at 545.

The court then examined the character and extent of the interference with the ranch and found that it was still being used for its two primary purposes, cattle raising and leased grazing lands, and it could still be held as an investment.[105] Consequently, denial of the permit did not interfere with MacLeod's investment-backed expectation regarding the use of his property.[106] MacLeod also argued that the denial of the permit kept him from pursuing the highest and best use of the property, but the Court held that a mere diminution in value cannot establish a taking.[107] Further, McLeod's contentions failed because owners may not prove a taking by a mere showing that the ability to exploit a property interest previously believed to be available was denied.[108]

IV. Due Process Challenges

When enacting zoning that is intended to preserve agricultural land, some guidelines should be followed in drafting and implementing the legislation. Although there can be some reduction in value or restriction on the use of the area, municipalities should be careful not to destroy the worth of the real estate being affected. Zoning ordinances must substantially advance legitimate state interests without denying all economically feasible use of the land.[109] Even if the owner's investment-backed expectation is diminished, any reasonable return that is left will vitiate a taking claim. The justice and fairness afforded by the fifth amendment does not guarantee the highest and best use of the property.

A. The Due Process Problem

Even if a zoning ordinance withstands a fifth amendment taking claim, it may not survive a fourteenth amendment due process challenge. An ordinance violates due process if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or

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105. *Id.* at 547.

106. *Id.*

107. *Id.* at 548.

108. *Id.*

109. Some legitimate state interests are: the preservation of farmland (Boundary Drive Assoc. v. Shrewsbury Township Bd. of Supervisors, 507 Pa. 481, 491 A.2d 86 (1985)); development of local open-space plans to discourage the premature and unnecessary conversion of open-space land to urban uses (Agins v. City of Tiburon, 447 U.S. 255 (1980)); the promotion of "family values, youth values, and the blessings of quiet seclusion" (Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)); and promoting the health, safety, morals, or general welfare of the community (Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

general welfare."[110] The test is "whether the law is rationally related to a legitimate state interest."[111] In a federal court the plaintiff has the burden of proving that a regulation is arbitrary and irrational.[112] Also, a court will not interfere with a zoning ordinance unless there is a finding that the government body could have had no legitimate reason for its decision.[113] The next two cases exemplify the preceding rules.

B. *Applying The Due Process Test*

In one of the latest farmland preservation cases, the Third Circuit Court of Appeals held that an agricultural zoning plan did not violate substantive due process. In *Pace Resources, Inc. v. Shrewsbury Township*, Pace Resources challenged a township zoning ordinance which rezoned acreage it owned to agricultural use eleven years after the property was purchased.[114] The court of appeals stated that the test for determining if there was a due process violation is whether the law was rationally related to a legitimate state interest.[115] In a federal court, a plaintiff has the burden of proving that the regulation is arbitrary and irrational.[116] Also, the court was compelled to defer to the legislature unless there was a finding that the government body could have had no legitimate reason for its decision.[117] In *Pace Resources*, plaintiff failed to make any factual allegations to prove irrationality.[118] The complaint stated that the township acted to restrain industrial development, and the court found that there was a rational connection between the action and this legitimate purpose.[119] Therefore, Pace did not establish a substantive due process claim upon which relief could be granted.[120]

A zoning ordinance was found to be constitutional under a due process challenge in *Steel Hill Development, Inc. v. Town of Sanbornton*.[121] The owners claimed that the three and six acre minimum lot requirements imposed by a zoning ordinance violated the due process clause of

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110. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). *Accord* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928).

111. Pace Resources, Inc. v. Shrewsbury Township Bd. of Supervisors, 808 F.2d 1023, 1034 (3d Cir. 1987) (citing Rogin v. Bensalem Township, 616 F.2d 680, 689 (3d Cir. 1980).

112. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

113. Nectow v. City of Cambridge. 277 U.S. 183, 187-88 (1928).

114. 808 F.2d at 1025.

115. *Id.* at 1034.

116. *Id.* at 1035.

117. *Id.* at 1034 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)).

118. 808 F.2d at 1035.

119. *Id.*

120. *Id.* at 1036.

121. 469 F.2d 956 (1st Cir. 1972).

the fourteenth amendment because the limitations had no rational relationship to legitimate government objectives.[122] The Court of Appeals for the First Circuit held that local zoning ordinances enacted under state enabling legislation will not be declared unconstitutional unless they are clearly arbitrary and unreasonable and have no substantial relationship to the public health, safety, morals, or general welfare.[123] The court of appeals said that stopping the expansion of population into the community was not a legitimate extension of the zoning power, but even so, held that the severe development restriction could stand temporarily as a "stop-gap measure" until there was more time to study the town's future needs.[124] Uncontrolled development would be detrimental to the community and putting a halt to development until a comprehensive plan could be made was a legitimate and permissible interest.[125] The court cautioned that the three and six acre zoning would not be permitted to stand indefinitely, unless the municipality was able to present better reasons for its decision after having adequate time to complete a study.[126]

C. *Avoiding Due Process Violations*

If lawmakers follow some basic guidelines when enacting and applying agricultural zoning laws, ordinances will withstand due process challenges. Legislators should consider the test for a due process violation under the fourteenth amendment when drafting the statute. The test is whether the law is rationally related to a legitimate government interest. When applying the rule, if the reviewing court can find a rational and legitimate basis for the zoning, then it will defer to the legislature and the law will be upheld. Agricultural zoning should be related to the preservation of farmland to maintain the food supply or to curb development; both purposes have been found to constitute legitimate state interests. The presumption of constitutionality which applies to zoning is hard to overcome in a due process challenge, but if an ordinance is applied arbitrarily or unreasonably, it will not be considered a valid exercise of the police power. Therefore, zoning must be implemented carefully or run the risk of being declared in violation of due process as a result of capricious administration.

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122. *Id.* at 959.

123. *Id.* at 960. *Accord* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

124. 469 F.2d at 962.

125. *Id.*

126. *Id.*

IV. TRANSFERABLE DEVELOPMENT RIGHTS

While the Farmer holds title to the land, actually, it belongs to all the people because civilization itself rests on the soil.
—Thomas Jefferson

Transferable development rights are a mechanism for compensating owners for development restrictions placed on their land by agricultural zoning.[127] The concept behind TDRs is that land value is divided into two elements: the existing use value and the development potential value.[128] Development potential value can be translated into development rights, separated from the underlying property, and used somewhere else to increase population densities where development is desirable.[129] TDRs help preserve farmland by leaving owners with only the farm use of their property; the development rights must be used outside the agricultural preservation area.[130] The major advantage of this system is that the cost of preserving farmland is shifted from the government to private developers.[131] The major problem with TDRs is that their value is often speculative; their worth will not be equal to the value of the development rights lost if there is no place to transfer them or no market for them.[132] If transferable development rights do not provide just compensation for the owner's loss of his investment-backed expectation, the preservation plan is likely to be challenged on taking and due process grounds and found to be unconstitutional.

A. *Transferable Development Rights Systems*

There are two basic forms of TDR programs. Under one scheme, preservation and development districts are delineated, a procedure for assigning development rights is established, and TDRs are allotted to owners of land in the preservation district in a systematic manner.[133] Residential development rights can be measured in dwelling units while

127. Rose, *supra* note 9, at 619.
128. Note, *Making TDR Work*, 56 N.C.L. REV. 77, 81 (1978).
129. *Id.*
130. *Id.*
131. R. COUGHLIN, *supra* note 14, at 26-27. *See generally* R. COUGHLIN, *supra* note 14, at 24-26. Another method of using development rights to preserve farmland requires that the government purchase development rights from the farm owner. The rights then belong to the government; they are not resold and transferred to another area. Although purchase of development rights plans are the most permanent method of preventing development, they are often the most expensive.
132. Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1110-12 (1975).
133. R. COUGHLIN, *supra* note 14, at 26.

commercial development rights could be assessed on square footage, or one unit of measure could be used for both.[134] Owners in a preservation district are prohibited from developing their property but can transfer the TDRs to land they own in the development district thereby increasing the building floor area beyond what is normally allowed in that zone. They may also sell the TDRs to a developer who will use them in the same manner.

Another plan creates a development rights bank.[135] Here the government uses its eminent domain power and condemns the excess development potential of a farm, paying the owner just compensation. Then the government "banks" (holds) the development rights to sell to someone who will apply them to the designated transfer area.[136]

B. The Taking And Due Process Challenges to TDRs

There has been no Supreme Court decision on the constitutionality of TDRs in agricultural preservation programs. In another context, however, the Court held that the application of zoning ordinances using TDRs did not violate the taking clause of the Constitution. The leading case, *Penn Central Transportation Co. v. City of New York*,[137] involved a challenge to New York City's Landmarks Preservation Law. As a result of legislation, appellant's property, Grand Central Terminal, was designated an historic landmark which resulted in restrictions on its use.[138] Subsequently, Penn Central applied for a permit to construct an office building over the site, and all attempts at having a design approved which was suitable for preserving the character and facade of the building were rejected.[139] The statute provided that owners who could not develop their property in the same manner as existing zoning because of the landmark designation could, with some restrictions, transfer the lost development rights to other parcels in delineated areas.[140]

Appellant claimed that the character and extent of the interference effected a taking because the application of the law significantly diminished the value of the location.[141] The Court disagreed, finding that the property could still be used in a gainful fashion. The Landmarks Preservation Law only prohibited anyone from using the airspace above the

134. Note, *supra* note 128, at 100-01.
135. Note, *supra* note 132, at 1102.
136. *Id.*
137. 438 U.S. 104 (1978).
138. *Id.* at 110-12.
139. *Id.* at 116-18.
140. *Id.* at 113-14.
141. *Id.* at 131.

structure.[142] Further, the company was not denied all use of existing air-rights because the rights were not abrogated; they were transferable to at least eight other sites in the vicinity of the depot.[143] Although the Court conceded that the TDRs might not be enough to constitute just compensation if there was a taking, it noted that the TDRs did mitigate the financial burden imposed by the Landmarks Preservation Law in this case and said that mitigation should be considered in evaluating the impact of the regulation.[144] The Court concluded by finding that the restrictions imposed were substantially related to the promotion of the general welfare and permitted a reasonable beneficial use of the property. Therefore, there was no taking, and the issue of whether the TDRs were just compensation did not have to be addressed.[145]

A state case involving both taking and due process challenges to a zoning resolution incorporating TDRs was brought before the Court of Appeals of New York in *Fred F. French Investing Co. v. City of New York*.[146] In this case, a 1972 amendment to the New York City zoning resolution created a "Special Park District" which rezoned appellant's two private parks, opening them to the public.[147] The resolution permitted the transfer of development rights from rezoned, privately owned lots to "receiving lots."[148] Owners could use the TDRs to increase the maximum floor area in a building on a receiving lot by 10 percent and up to 20 percent with special approval. However, before any rights could be transferred, the city had to approve a plan for the continuing maintenance of the park at the owners expense.[149] Opening the parks to the public was not dependent on utilization of the TDRs.[150]

Plaintiff, the purchase money mortgagee of the property, claimed the rezoning was an inverse condemnation which required compensation.[151] The New York court held that the amendment was unconstitutional because it deprived the owner of all use of his land without due process of law.[152] The court found that the statute rendered the park unsuitable for any reasonable income-producing purpose, destroying its economic

142. *Id.* at 135.
143. *Id.* at 136-37.
144. *Id.* at 137.
145. *Id.* at 138.
146. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).
147. *Id.* at 592, 350 N.E.2d at 384, 385 N.Y.S.2d at 7-8.
148. *Id.*
149. *Id.* at 592-93, 350 N.E.2d at 384, 385 N.Y.S.2d at 8.
150. *Id.*
151. *Id.* at 590, 350 N.E.2d at 382, 385 N.Y.S.2d at 6.
152. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

value.[153] In arriving at its decision, the court examined the value of the TDRs because they were an essential component of the value of the property, constituting some of the economic uses of the land. Therefore, the court reasoned, they must be considered in determining whether the ordinance destroyed all economic use of the parks.[154] Here, the court found that the TDRs were totally useless and had no real pecuniary value until they could be attached to some suitable property.[155] However, unless the owner owned or purchased another approved transfer site, or found a buyer for the TDRs, they had no worth to him.[156] Thus, both the underlying property and the TDRs were worthless to the owner. Consequently, the mortgagee was deprived of the security for its security interest.[157]

In *City of Hollywood v. Hollywood, Inc.*, a Florida District Court of Appeals held that a zoning ordinance that utilized TDRs was a valid extension of the police power.[158] The city passed a zoning ordinance which reduced the density of multi-family units permitted on the western part of the tract of beachfront land and established a separate single-family classification on the eastern part of the tract. A developer would have the option of not building in the east in return for transferable development rights which could be used to increase the density of multi-family units in the west.[159] The developer challenged the plan, claiming it was arbitrary and unreasonable and asserting that the TDR provision was not supportable in fact or law.[160] The court first held that the government action was proper and reasonably related to a valid public purpose, preserving open space.[161] It then examined the economic impact of the TDRs, finding that the transfer involved the gain of 368 multi-family units compared to the loss of 79 single-family units. The court could not find the exchange unreasonable and found no merit to the claim that the TDRs were unsupported in fact or law.[162]

C. *Outline for Constitutional TDR Plans*

When designing and executing TDR schemes, legislators should first be careful that the zoning ordinance itself is constitutional. In addition, provisions should be made for the utilization of the development rights.

153. *Id.*
154. *Id.*
155. *Id.* at 597-98, 350 N.E.2d at 388, 385 N.Y.S.2d at 11.
156. *Id.*
157. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.
158. 432 So. 2d 1332 (Fla. Dist. Ct. App. 1983).
159. *Id.* at 1333.
160. *Id.* at 1336.
161. *Id.* at 1338.
162. *Id.* at 1337-38.

TDRs preclude taking claims because the land owner cannot successfully assert that the zoning restriction deprived him of the economic use of his property if the TDRs supply compensation.[163] Transferable development rights must, therefore, provide some value to the owner of restricted property. If a property is rendered useless by the regulation, and the TDRs are also useless, a court will probably find that the preservation plan effects a taking and violates due process as well. One way to avoid the speculative nature of TDRs is to ensure that they have a market value. By carefully choosing the transfer districts and by restricting development in those districts, a demand for the TDRs can be created.[164] Another way to avoid the problem of the uncertainty of TDR values is for the municipality or state to create a development rights bank which will purchase the TDRs, thus giving them value even if there is no ready market.[165]

V. CONCLUSION

> *"Some day," old Jamie had said, "there will come a reckoning and the country will discover that farmers are more necessary than traveling salesmen, that no nation can exist or have any solidity which ignores the land."*
>
> —Louis Broomfield

There are many factors in our society that are competing for America's agricultural land. The most obvious are housing and industrial developers. The less obvious, but nonetheless formidable competitors are energy producers. About one-quarter of the coal reserves suitable for strip mining are located under prime agricultural land in several states east of the Mississippi and in the west under river valleys which are often favorable for farming.[166] Hydroelectric reservoirs may impound between 1,000 and 20,000 acres. Even power plants and transmission lines need considerable acreage.[167]

In addition to the amount of land taken by energy suppliers, the secondary effects of development will also have an impact on the need for agricultural land. Air pollution is affecting crop and forest production. Although the amount of damage pollutants are causing is not known with

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163. Malone, *supra* note 47, at 760.
164. Note, *supra* note 132, at 1112.
165. *Id.* at 1113.
166. W. FLETCHER, FARM LAND AND ENERGY: CONFLICTS IN THE MAKING 20 (1980).
167. *Id.*

certainty, if crop yields are measurably reduced, it will eventually take more land to produce the same amount of crops that we do now.[168]

There are numerous benefits to retaining farmland. Farming is a valuable industry, producing income for farmers, their employees, and farm-related businesses. Cheaper local produce helps keep down the cost of imported farm products. Open land provides the needed porous surface for groundwater recharge. In addition there is the aesthetic beauty of undeveloped land.[169] But our farmland is being irrevocably converted at a heretofore unknown rate. If the National Agricultural Lands Study prediction is correct, by the year 2000 all of the country's cropland will probably be in cultivation.[170] It is imperative to plan now for America's future needs before it is too late and we permanently lose the land base needed for producing our own food supply. Wise land use planning incorporating zoning, TDRs, and other methods of controlling growth that will not contravene the Constitution will help conserve agricultural lands. It is time we discovered that farmers are more important than developers.

Anthony R. Arcaro

168. *Id.* at 24-25. *See generally* Rose, *supra* note 9, at 593. (Crop yields fell during the 1970's as compared to the 1960's. The volume of production nationwide will have to increase seventy-five percent by the year 2,000 to meet expected domestic and export demands.)

169. F. STEINER & J. THEILACKER, *supra* note 6, at 83.

170. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 5, at 8.