

Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security

NEIL D. HAMILTON*

INTRODUCTION AND OVERVIEW

This essay is based on three premises:

First, the issue of farmland preservation will continue to be a key challenge for the U.S. and American cities in the upcoming decades.¹ Support for farmland preservation will likely be based on a variety of justifications including: agricultural production needs, open space and recreation, environmental protection, and the economic costs to cities of providing services to scattered development. The main challenge will be in developing workable, politically acceptable, and affordable approaches to farmland protection which leave in place an actual working agricultural landscape for those on the land and the adjacent communities.

Second, the changing nature of production systems within the agricultural sector, such as large-scale integrated swine operations, and structural changes in farm organization, e.g. industrialization and contract production,² raise important challenges as to the actual expression or shape of agriculture as it is seen or felt by society. A critical issue within agriculture is the nature of the demographic shifts, long underway, such as the declining farm numbers especially among younger age groups, which raise important issues about who will be the farmers of the future. A key political and social challenge concerns creating opportunities for beginning farmers—the next generation of agriculture—who will be making decisions concerning the use of farmland resources. State and federal programs designed to assist

* Ellis and Nelle Levitt Distinguished Professor of Law and Director, Agricultural Law Center, Drake University.

1. See, e.g., Jennifer Preston, *Battling Sprawl, States Buy Land for Open Space*, N.Y. TIMES, June 8, 1998, at 1A.

2. See, e.g., my article written for the 1994 Northern Illinois University College of Law Land Use Conference, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613-57 (1994).

beginning farmers, primarily through financing acquisition of land, are the most notable example of societal efforts to address this issue.³

Third, important changes are helping evolve society's relation to food and agriculture—both in terms of our expectations for the performance of agriculture and the food system and in our attitudes toward farming practices and food quality. These changes are experienced in relation to market demands for high quality or clean food—as reflected in the growing demand for organic food, the use of eco-labels, and the growing interest in eating locally produced food. These changes are also seen in the expansion of various forms of direct marketing, such as farmers' markets and "community supported agriculture" (CSA), in which the consumer has direct contact with the producer.⁴ These developments are creating new opportunities for consumers, producers, and even communities to communicate and connect around food issues. The growing awareness of the value of using a "food system" approach to agriculture creates opportunities to make connections between the various segments of society and to build community around food and agricultural needs.⁵ The challenge is how these developments and the interest of consumers and the public in agriculture can be translated into policy support for efforts which attempt to address the issues of preserving farmland and creating opportunities for a new generation of farmers.

These three premises are the foundation upon which the policy ideas and programmatic examples discussed in this paper are examined. The paper will consider a range of legal and policy questions including:

- What are the premises upon which existing beginning farm loan programs and efforts to protect farmland are based and how might there be built into these programs institutional biases which work against the emergence of the new agriculture and a community food system approach?
- Are there models of unique state, local or private efforts within these topics which illustrate the

3. For an example of such a program, see IOWA CODE, Ch. 175 which authorizes the Iowa Agricultural Development Authority to conduct a program of selling tax exempt bonds and using the proceeds to provide financing to beginning farmers.

4. For a discussion of many of the legal issues associated with the unique forms of direct marketing, see NEIL D. HAMILTON, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* (1999).

5. Many of these topics are addressed in my articles, *Greening Our Garden: Public Policies to Support the New Agriculture*, 2 *DRAKE J. AGRIC. L.* 357 (1997) and *Tending the Seeds: The Emergence of a New Agriculture in the U.S.*, 1 *DRAKE J. AGRIC. L.* 7 (1996).

opportunities which might be associated with a more comprehensive view of food security?

- What policy challenges or alternatives must be considered if these various goals are to be integrated successfully?
- How can the public institutions involved in agriculture and land use planning, and the private institutions, such as the land trust movement, which are also interested in these issues, be motivated to adopt more integrated approaches to farmland protection and farmer assistance to capitalize on the synergy between the topics?

I. POLICY OPPORTUNITIES AND IDEAS TO CONSIDER

From the starting point of the three issues identified above, the main purpose of this presentation is to consider how the goals and values involved in each of these areas might overlap thereby creating opportunities to explore integrating the laws and programs being developed to promote these objectives. In that regard, the following are issues which deserve particular consideration.

A. INTEGRATING FARMLAND PROTECTION AND FINANCING BEGINNING FARMERS

While the public has been willing to spend money on farmland protection and financing beginning farmers, at the federal, state, and local level, there is little evidence of any attempt to integrate the two programs.⁶ The opportunities for integration are significant because of the complimentary nature of the programs. Farmland preservation is based on the need to have someone interested and available to farm the land into the foreseeable future. Likewise, beginning farmer programs are designed to help establish the next generation of farmland owners. One of the major challenges for new and young farmers is the capital cost of land acquisition. And, one of the major costs of farmland preservation programs is in the acquisition of developments and compensation of landowners. These conditions create the basis to explore

6. See, e.g., 'Aggie bonds' unknown to farmland preservation states, FARMLAND PRESERVATION REPORTER, June 1996, at 1.

efforts to match new and beginning farmers with farmlands which have already been placed in preservation programs—and which as a result should be priced at use rather than market value.

There are a number of methods in which these two programmatic goals could be integrated. Consider the following ideas:

- steering beginning farmers to protected lands and providing public financing for them to acquire lands already participating in preservation programs;
- creating incentives for landowners who want to sell conservation easements to farmland preservation programs to receive priority consideration if they can demonstrate some form of commitment or arrangement with qualified “beginning” farmers;
- creating links between protected farmland and beginning farmers. This could be enhanced if as part of the “protection” arrangement the public considered acquiring a right of first-refusal to the land for use in connection with beginning farmer efforts.

B. ADJUSTING TRADITIONAL LAND USE TOOLS TO ACCOMMODATE FARMING AND FOOD SYSTEMS

If efforts in either preserving farmland or creating new farmers are to succeed then the legal and political environments in which these programs are developed and implemented will need to be sensitive to the unique requirements of each program. The same is true if efforts to integrate local food systems into the social and political economy of a community are to succeed. In this regard, traditional land use tools such as zoning and subdivision platting will need to be re-examined to determine whether they provide sufficient flexibility to achieve these goals. One example of this tension can be seen in the relation between local zoning, such as for agricultural and commercial uses, and the impact this may have on the operation of direct farm marketing ventures such as roadside stands or farmstands. Are these a commercial or agricultural activity? Does the farmer have a right to sell what is produced on the farm, from the farm, or is this an illegal “retail” activity in an agricultural zone? A number of states, for example Massachusetts, have adopted state laws designed to protect such on-farm marketing, but even in these states difficult issues of interpretation

remain.⁷ In addition, the very nature of “agricultural” activity is evolving as many farmers—especially those located near to cities—consider adding farm-based agri-tourism ventures, such as corn field mazes and petting zoos, to expand their economic opportunities. Courts have already had to consider such ventures and decide whether they retain enough of the agricultural character to be classified as such under existing land-use regimes.⁸

The consideration of how traditional land use tools might apply to an evolving form of agriculture—one based on local food production, also raises the issue of how land use tools developed to assist traditional agriculture might need to be reconsidered as some forms of food production continue to evolve in the other direction, toward more industrial forms. Perhaps the most important example of this issue is the debate over “right to farm” laws which protect agriculture from nuisance suits.⁹ I have written extensively on the operation of these “right to farm” laws, now in place in all fifty states. But the continued industrialization of agriculture, in particular livestock production, when combined with the possible legislative “mis-use” of “right to farm” protections, raises serious questions about how well these laws can perform, especially as a form of farmland preservation law. The recent Iowa Supreme Court case which struck down one of the state’s three “right to farm” laws on

7. The Massachusetts law, MASS. ANN. LAWS Ch. 40A, § 3, (“subjects which zoning may not regulate”) provides protection for farmstands from some forms of local zoning. But even the existence of this law has not prevented a series of cases involving questions about when something is a farm and when local zoning can restrict marketing activities. *See, e.g.*, *Prime v. Zongin Bd. Of Appeals*, 680 N.E.2d 118 (Mass. App. Ct. 1997); *Town of Eastham v. Clancy*, 686 N.E.2d 1093 (Mass. App. Ct. 1997); *Modern Continental Construction Co., Inc., v. Building Inspector*, 674 N.E.2d 247 (Mass. App. Ct. 1997); *Henry v. Board of Appeals*, 641 N.E.2d 1334 (Mass. 1994); *Building Inspector v. Northeast Nursery, Inc.*, 636 N.E.2d 269 (Mass. 1994); and *Miczek v. Commonwealth*, 586 N.E.2d 1004 (Mass. App. Ct. 1992). In New York the courts have had to consider whether a local zoning ordinance which authorizes “truck gardens” also includes the right of the farmer to sell what is raised in the garden on the site. *See, e.g.*, *Ecker v. Dayton*, 651 N.Y.S.2d 207 (N.Y. App. Div. 1996). For other cases involving disputes over what is agriculture and the legality of on farm sales, *see Demarest v. Mayor and Council of Borough of Hillsdale*, 386 A.2d 875 (N.J. 1978); *Buacom’s Nursery Co., v. Mecklenburg County, North Carolina*, 303 S.E.2d 236 (N.C. Ct. App. 1983) and *Buacom’s Nursery Co., v. Mecklenburg County, North Carolina*, 366 S.E.2d 559 (N.C. Ct. App. 1988).

8. In the Ohio case of *Columbia Township Bd. Zoning App. v. Otis*, 663 N.E.2d 377 (Ohio Ct. App. 1995) the issues were whether a “haunted hayride” operation was agricultural and thus lawful under the current zoning. The court held that while the operation, conducted at a horse stable, may have originally been agricultural in nature at some point it had lost this status. *See also* ORE. REV. STAT. §§ 215.253 and 215.283, concerning zoning regulation and farming.

9. I have written extensively about these laws over the years, most recently in *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts To Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998).

a property rights-taking theory, has placed the conceptual basis for all of these laws into question.¹⁰

C. OPPORTUNITIES FOR PUBLIC ACQUISITION OF INTERESTS IN FARMLAND

As efforts to preserve farmland increase across the nation, much attention is focused on the public acquisition of some form of non-possessory property interest usually in the form of a negative conservation easement, with the right to control the future use of the property. While there is little tradition of actual public ownership of fee interests or use rights to farmland in the U.S., there are many examples of such actual "public" ownership. Churches own significant amounts of land in many states. Educational institutions, especially colleges, actively solicit alumni and friends to donate farmland to help fund educational programs. Many of the private land trusts in operation in the U.S. have acquired interests in farmland, sometimes full possession, either by gift or outright purchase. In all of these examples opportunities exist for considering how to integrate the goals of farmland protection, farm creation, and community food systems. Consider an example of a land trust in Iowa. The Iowa Natural Heritage Foundation (INHF) has acquired ownership of a number of farms across the state, usually as gifts from the estates of interested supporters. The INHF must decide how to manage these farms, both as to the identity of who farms them and the type of farming practices allowed. This spring the INHF entered into a lease with a young market gardener for a small piece of prime farmland property not far from Des Moines. The farm will be the site of CSA and will focus on market gardening for the Des Moines farmers' market, as opposed to a more conventional scale and style of agriculture common in the area.

II. MODELS TO BE CONSIDERED WHICH ILLUSTRATE OPPORTUNITIES TO INTEGRATE THE GOALS OF FARMLAND PROTECTION, FARM CREATION, AND LOCAL FOOD SYSTEMS

In considering whether there exist opportunities to integrate the three issues identified in this paper, one of the best starting points is to identify programs which are already actively involved in these efforts, to consider how they might serve as models for further development. The following discussion considers a variety of projects and institutions which are involved with one or more of these goals.

10. See *Bormann v. Board of Supervisors, Kossuth County*, 584 N.W.2d 309 (Iowa 1998) and *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts To Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998).

A. WISCONSIN FARMLAND CONSERVANCY (WFC)

This land trust is perhaps the one most actively involved in preserving farmland while at the same time trying to create opportunities for new farmers and for more community involvement in agriculture.¹¹ The Wisconsin Farmland Conservancy (WFC) has been involved in the acquisition of farmland which has then been used on a community basis—such as for a “community supported agriculture” (CSA) subscription farm. It has also worked with local communities which have received gifts of farmland to use the farmland to help establish new farming operations rather than simply see the land as an economic asset to be sold or managed for the highest short term return. In one notable example the fair board of the town of Shell Lake, Wisconsin was given a farm. The first idea was to sell it and use the proceeds to support the fair. But then, with the help of WFC, the officials asked what they needed more, money or a young family on that land farming it. They decided instead to rent the land to a young family. The Conservancy has worked with the fair board to develop a lease and conservation easement to protect the land and help the farm family build equity.

B. THE AMERICAN FARMLAND TRUST (AFT)

This national land trust and conservation organization is the accepted leader in helping bring national attention to concerns about farmland preservation and the related effects on local communities and the national economy. The AFT has historically emphasized “market driven” approaches such as using tax incentives and other forms of compensation programs to work with interested landowners. In recent years, the AFT has given more attention to considering issues of farmland preservation in a holistic or systems approach.

These are identified in two main ways. First the need to consider the long term viability of the local agricultural infrastructure and economy which will be necessary to support an actual working farming system on the land being preserved. If this “context” for the existence of agricultural land is not considered—or not in place—there is a danger in how farmland preservation will be perceived. Without an opportunity for the land to remain in farming, the protected land may essentially become, from a public viewpoint (if public

11. The Conservancy has prepared a number of information sheets on these issues, such as *LINKING LAND TRUSTS AND CSA, THE NEXT GENERATION PROGRAM - USING TAX PLANNING AND CHARITABLE TRUSTS TO LINK RETIRING AND BEGINNING FARMERS*, and *BEGINNING FARMERS - A SHARED EQUITY MORTGAGE*.

funds were involved in the protection), high-priced open-space used mainly for horse farms for the upper class. The second way AFT's activities have evolved are in the attention being given to local marketing efforts, such as through farmers' markets and direct marketing. The best example of this is seen in AFT's involvement in the creation and management of the DuPont Circle Farmers' Market in Washington D.C.¹²

C. PRAIRIE CROSSING, GRAYSLAKE, ILLINOIS

One challenge to protecting farmland on the edge of rapidly expanding urban areas such as Chicago and Minneapolis, is how to integrate agriculture and housing demand. One of the more unique approaches to this effort is found at Prairie Crossing, a 660 acre development located in Grayslake, Illinois.¹³ This development includes 300 houses and integrates a 150 acre working farm protected with a permanent conservation easement, and another 150 acre system of prairies, lakes, and trails within the development. The houses are clustered on the edges of preserved open space land. The design of the houses and the development is reminiscent of a Midwestern town of the late 1800s. One challenge faced by the developers—in addition to the market, which has not been as difficult as one might assume—was the willingness of local land use officials to be flexible in zoning and platting requirements, such as road width, so that the rural feel of the development could be maintained. The development includes garden space access for residents and also involves the operation of a CSA for use by residents.

D. THE FRENCH SYSTEM FOR FARMLAND TRANSFER

In France, a private financing institution, authorized under national law, has a right of first refusal to consider the acquisition of any piece of farmland which comes up for sale. The institution, Les sociétés d'aménagement foncier et d'établissement rural,¹⁴ known by the acronym SAFER, is one of the most significant and emblematic expressions of the French national commitment to agriculture, food, and the rural way of life.¹⁵ SAFER was created in the early 1960s and was given the right of pre-emption, meaning

12. See, e.g., Anne Harvey Yonkers, *Selling Direct*, AMERICAN FARMLAND, Spring 1998, at 20.

13. For a general discussion of the creation of Prairie Crossing, see Neil D. Hamilton, *Preserving Farmland Among the Houses*, DES MOINES REGISTER, Sept. 30, 1996, at 7A.

14. Translated roughly as the society for rural planning and resettlement.

15. For a general discussion of the operation of the SAFER system, see Neil D. Hamilton, *How France Puts New Farmers On the Land*, DES MOINES REGISTER, July 21, 1997, at 7A.

that for most sales of farmland in France, SAFER has an exclusive two month period to decide whether to buy the land from the seller—at the market price. Once SAFER has obtained the land its purpose is to finance the resale of the land to qualified farmers. Its first priority is to resettle new farmers on the land, and its second priority is to help neighboring farms expand to a size determined viable for the region. Certain sales of farmland are excluded from SAFER's involvement, including transfers within farm families or acquisitions by tenants or farmworkers, who under French law are given their own rights of priority to buy the land on which they work. While SAFER has a right of priority the majority of sales in which it is involved are voluntary offers made to it by landowners. Since its creation, SAFER, which operates through regional and local branches, has been involved in the sale of about two percent of the farmland in the country.

E. RURAL DEVELOPMENT CENTER (RDC), SALINAS, CALIFORNIA

A major challenge for many people interested in becoming farmers, is obtaining the experience needed to successfully operate a farm. This is especially true for people who did not grow up on a farm or who have not had the opportunity for direct experience. One group of people with experience in agriculture but who face particular challenges in accessing the resources necessary to buy farmland, are migrant and seasonal farm workers. The RDC operates a unique and innovative program in which former farm workers participate in a three-year education training program designed to give them the experience and knowledge necessary to become independent farmers.¹⁶ The RDC is located on a 112 acre farm which is used by over thirty families each year. Participating families are required to attend classes and receive training in intensive crop production. The first year they have access to half an acre, the second year two acres, and the third year up to five acres. At the end of three years the families graduate and must find their own land. In the first twelve years of operation over 240 families passed through the training program and more than seventy percent have established farming operations of their own, somewhere in the Southwest or in Mexico.

F. FARMLAND MATCHING PROGRAM AG-CONNECT, LENOX, IOWA

Many states with farming populations have in recent years begun to operate programs designed to address concerns about the declining number of

16. For a general discussion of the activities of the RDC, see Neil D. Hamilton, *Program helps workers farm their own land*, DES MOINES REGISTER, May 12, 1997, at 11A.

farms, in particular farms operated by young individuals. One type of program which has gained much acceptance is the "land-link" or matching type program which tries to help make the transition between one generation of farmland owners and the next, especially in situations involving non-related individuals. The programs, patterned after an idea first developed by the Center for Rural Affairs in Nebraska, create networks in which older or retiring landowners who want to see their farming operations continued as existing enterprises (rather than sold at auction or merged with another farm) and people interested in becoming farmers, can list their interests and receive information about possible "matches." The ability of any of the interested parties to develop an actual exchange is for the most part left to them, with education and advice from the program, many of which are operated by the state cooperative extension programs. One unique variation on the matching program is AG-Connect, a non-profit organization headquartered in Lenox, Iowa a small farming town in southwestern Iowa. AG-Connect, which has received significant funding from several major foundations, takes a more active role in identifying candidates for matches and in helping make the matches work. AG-Connect staffers, work out of four regional offices in the state and try to work closely with both parties to identify a match, both before and after the business arrangement is developed. The organization helps parties identify problems and develop working long-term relations which will facilitate the transition of ownership of the farming enterprise. Finally, AG-Connect is directly involved in helping identify the incentives which will lead farmland owners to participate and in locating the sources of funding, which might be available for the new farmer making the acquisition.

G. COMMUNITY FOOD SYSTEMS

In recent years, a network of community activists, nutritionists, and educators have adopted the concept of "community food security" to examine how local food systems operate. Their efforts have triggered a surge in local initiatives to improve the availability of fresh food and create opportunities in agriculture. The central premise of the movement, as described by the Community Food Security Coalition, is to insure that "all persons can obtain a nutritionally adequate diet through local non-emergency sources."¹⁷ One of the most successful programs is the Hartford Food System, established in 1978, "to plan, develop, and operate local solutions

17. This definition comes from the CFCS materials, *see, e.g.*, COMMUNITY FOOD SECURITY NEWS, Summer 1999, at 2.

to the city of Hartford's food problems."¹⁸ Actions have included establishing a successful farmers' market, so Connecticut farmers can bring fresh food into the city. The project has supported urban agriculture initiatives including community gardens and greenhouses, and a community supported farm. It has worked to improve options for food marketing and distribution in the inner city. In 1997, the Hartford Food System expanded the concept of food security when the Connecticut legislature created a task force to examine the state's food system.¹⁹ Moreover, in California, the Los Angeles City Council has adopted a "Food Security and Hunger Policy" to address problems of hunger and food insecurity.²⁰

The community security movement received a major boost when Congress included funding for "community food projects" in the 1996 farm bill.²¹ The action by Congress is an excellent example of how public policy can support new agricultural efforts. The farm bill authorized \$1 million for use in 1996 and \$2.5 million each of the next six years. The funds, which must be matched with local money, are to support projects which "meet the food needs of low-income people, increase the self-reliance of communities in providing for their own food needs, and promote comprehensive responses to local food, farm, and nutrition issues."²² Each year, the Cooperative Research, Education and Extension Service (CREES), issues rules for funding with requests, and in 1999 it received over 100 grant applications.²³

18. For a discussion of the Hartford Food Project and other similar efforts, see Neil D. Hamilton, *Greening our Garden: Public Policies to Support the New Agriculture*, 2 DRAKE J. AGRIC. L. 357, 365-66 (1997).

19. In 1998 the Connecticut Food Policy council published a book, *Making Room at the Table: A Guide to Community Food Security in Connecticut*, which details the range of innovative activities underway in the state to promote food security and protect farms and farmland.

20. See *LAFSHP Sets Sail in L.A. to Address Food Insecurity*, NUTRITION WEEK, Aug. 2, 1996, at 6.

21. See, e.g., 1996 Farm Bill, Title IV, Nutrition Assistance § 25 *Assistance for Community Food Projects*, CONG. REC., H2753, Mar. 25, 1996.

22. *Id.*

23. See, e.g., USDA, Cooperative State Research, Education, and Extension Service (CREES), Community Food Projects Program, 62 Fed. Reg. 38524, Wed. July 24, 1996, request for proposals.

**CONCLUSION: LEGAL ISSUES TO BE EXAMINED IN INTEGRATING THE
GOALS OF PROMOTING FARMLAND PRESERVATION, FARM CREATION,
AND COMMUNITY FOOD SYSTEMS**

From a legal perspective one of the most exciting aspects of considering the opportunities to integrate the three issues examined in this paper, is the range of unique legal solutions which could be developed. Clearly, there are reasons why these three objectives have been pursued using somewhat separate and unilateral approaches. The institutions or interest groups involved in the issues do not have the same identity. The goals of farmers and the goals of communities might not always correspond. However, the excitement in part comes from considering the many ways in which these three goals might overlap. As a result, this consideration provides the opportunity to examine a range of challenging legal questions, including the following:

- Should state and local farmland preservation efforts, either public or private, which are based on acquiring conservation easements, write into their easements some ability for the public, such as the land trusts acquiring the interests, to have a right of first refusal in directing the subsequent ownership and operation of the farm?
- Should states which operate both beginning farmer loan programs and farmland preservation programs, consider how the two programs can be developed in unison so that limited public funds to start new farmers are directed to lands on which the public has already spent money to acquire protected status?
- Should land trusts, charitable organizations, and educational institutions (such as land grant colleges) which have an interest in the future of agriculture or which are interested in farmland preservation, try to operate their own programs to assist beginning farmers? For example, should the Iowa State University Foundation develop a program so that the farms it acquires as gifts to the University's endowment are first offered to young farmers and recent graduates of the University?

- Should local land use controls such as zoning be adjusted so they are more sensitive to the need to create opportunities for local food production? For example, how do efforts to protect farmland from conversion, which are based on using large lot requirements to establish the “minimum farm size” present obstacles to small scale market gardeners or garden farmers?
- Would it be possible for a state to develop legislation to create an entity like SAFER in the context of the American property market? Could American farm tenancy law be altered to create for farm tenants a “right of first refusal” at market prices, if the land being farmed is placed on the market?

These and other related issues present a series of difficult legal and policy questions to be addressed. Lawyers and scholars who care about the goals of land use planning, preserving agricultural opportunity, and promoting local food security can make important contributions by engaging in this work. By developing the legal mechanism to integrate these three issues, the legal community can help create a more sustainable future for all who care about agriculture, food and the land.

